

**European Constitution:  
what is new in the area of judicial  
co-operation in criminal matters  
and police co-operation**

***Dr. Simone White***  
***European Commission Anti-Fraud Office***

*email@address*

***April 2004***



© Simone White, 2004

Published in Great Britain by The Federal Trust for Education and Research, 7 Graphite Square,  
Vauxhall Walk, London SE11 5EE Tel. +44 (0) 20 7735 4000  
[http://www.fedtrust.co.uk/eu\\_constitution](http://www.fedtrust.co.uk/eu_constitution)

The Federal Trust for Education and Research is an independent think tank which aims to enlighten  
public debate on issues arising from the interaction of national, European and global levels of  
government.

Charity (Registration No. 272241)

# European Constitution: what is new in the area of judicial co-operation in criminal matters and police co-operation

Simone White<sup>1</sup>

The draft Constitutional Treaty<sup>2</sup> does away with the distinction between the treaty establishing the European Community (first pillar) and the Treaty on European Union (third pillar) and should therefore put an end to “pillars” debates.<sup>3</sup> It is a single treaty, divided in three parts: part I deals with the objectives and competence of the Union, part II contains the Charter of Fundamental Rights and part III contains the policies and functioning of the Union. It would be difficult to criticise such a simplification. Although the treaties are fused, this does not mean that decision making procedures will be uniform throughout. In fact, some distinctions persist in the areas we are concerned with here. So perhaps we may find that, in the future, it may well be *good bye* to “pillars” debates, but *hello* to subsidiarity disputes.

Chapter IV of Part III contains matters relating to the area of freedom, security and justice. It covers policies on border checks, asylum and immigration, judicial co-operation in civil matters. Section 4 deals with judicial co-operation in criminal matters and Section 5 deals with Police co-operation. Our focus here is on Sections 4 and 5, judicial co-operation in criminal matters and police co-operation. These two areas represent Title VI of the Treaty of Nice, known as the “third pillar”. They are now sections 4 and 5, Chapter IV, Title III of the draft Constitutional Treaty. This paper does not deal with crime prevention, covered in Article III-173, which calls for discrete treatment.

The draft Treaty *constitutionalises* some of the principles found in the conclusions reached by the Presidency of the Tampere European Council in October 1999 and in particular the principles of mutual recognition,<sup>4</sup> operational co-operation<sup>5</sup> and approximation of legislation.<sup>6</sup> It is well known that the Presidency considered mutual recognition of judicial decisions in particular to be “the cornerstone of judicial co-operation”.<sup>7</sup> The view that mutual recognition has a crucial role to play in the making of the European Judicial Space is held by many commentators, whether they agree with other aspects of integration or not. However progress in this area since 1999 seems to have been faster in the commercial and civil sphere than in criminal matters.<sup>8</sup>

The European Council meeting in Laeken in December 2001 saw the European Arrest Warrant<sup>9</sup> as a “decisive step forward”. It also saw the common definition of terrorist crimes, the drawing up of lists of terrorists and terrorist organisations, groups and bodies, the co-operation between specialist services and the provisions concerning the freezing of assets as constituting “practical steps responses in the campaign against terrorism”.<sup>10</sup> The Convention Working Group on Freedom, Security and Justice considered mutual recognition and the approximation of substantive and procedural criminal laws by qualified majority to be closely linked. It also recommended the strengthening of operational collaboration by *inter alia* merging several operational committees at Council-level. There is therefore a strong sense of continuity in this field, which does not however inhibit innovation, as we shall see. The treaty introduces important changes in the areas of judicial co-operation in criminal matters and police co-operation, ranging from substantive proposals to changes in law-making procedure. Generally, this raises

two issues: how the European Judicial Space might evolve as a result of the Constitution and secondly what impact the new legal framework is likely to have.

## 1. The evolution of the European judicial space

Sections 4 and 5 propose to extend the powers of Eurojust and of Europol. In parallel, it would be possible to adopt legislative acts to harmonise criminal procedure, as well as substantive criminal law. It also makes it possible to create a European Public Prosecutor (EPP). Bearing this in mind, a number of scenarios seem possible for the evolution of the European Judicial Space; these will be discussed in section 1.3 below.

### 1.1. Judicial co-operation in criminal matters

There are two particularly significant additions to the provisions contained in the Treaty on European Union in terms of judicial co-operation in criminal matters.

The first addition concerns the possibility of adopting legislative acts concerning criminal procedure, such as rules to ensure the recognition of judgements and decisions, to ensure the mutual admissibility of evidence between Member States, to protect the rights of individuals in criminal procedure and the rights of victims of crime, to cover any other specific aspects of criminal procedure identified by the Council in a Decision and to prevent and settle conflicts of jurisdiction between Member States. This would bring the harmonisation of criminal procedure to the level already reached in the fields of civil and commercial law.

Secondly, a European Public Prosecutor could also be established within Eurojust, given unanimous approval in Council.

Both these additions proved to be controversial during the IGC discussions and a minority of Member States have held strong views against their integration into the Constitutional Treaty. Comparative table 1 (in Annex) indicates some correspondences between the draft treaty and those preceding.

#### *Eurojust (not the EPP, well not quite)*

In Article III-174 of the draft Constitutional Treaty, the competence of Eurojust is spelled out, its scope is widened, it acquires the power to initiate criminal procedure and a bridge is envisaged from it to a restricted version of the proposed European Public Prosecutor (EPP).

It is useful to remember that the establishment of Eurojust followed a recommendation made at Tampere in 1999,<sup>11</sup> an opinion of the European Parliament and initiatives taken in 2000 and put to the Council by various Member States. The treaty of Nice<sup>12</sup> provides that closer co-operation between judicial and other competent authorities of the Member States, including co-operation through Eurojust must take place in accordance with the provisions in its Articles 31 and 32.<sup>13</sup> Under the Treaty of Nice Eurojust has competence<sup>14</sup> 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.<sup>15</sup>

In the draft Constitution, the role of Eurojust<sup>16</sup> is to support and strengthen co-ordination and co-operation between national prosecution authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on a common bases,

on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. European Laws would subsequently be adopted to determine Eurojust's structure, scope of action and tasks. The tasks might include the initiation as well as the co-ordination of criminal prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union and the strengthening of judicial co-operation, including the resolution of conflicts of jurisdiction and close co-operation with the European Judicial Network. However, formal acts of judicial procedure would continue to be carried out by competent national officials.

It is not clear however at this stage how Eurojust might "initiate" proceedings in the Member States. The process might involve either requesting a Member State to open a case through a non-binding but formal request; or by virtue of special powers (yet to be determined). The latter would take Eurojust closer to the more extensive version of a European Public Prosecutor as proposed under Article III-175, discussed next.

#### *The more extensive proposal for a European Public Prosecutor*

A proposal for the establishment of a European Public Prosecutor was mooted during the Nice Inter Governmental Conference, but without success. The proposal was then the subject of a Green Paper.<sup>17</sup> This Green Paper explored not only what the minimum needed would be in order for the EPP to function in relation to substantive criminal law and procedure, but also the issues surrounding the relations that the EPP would need with other agencies in order to function.<sup>18</sup>

Apart from the initiation and the co-ordination of prosecutions conducted by competent authorities, the possibility of establishing a European Public Prosecutor on the basis of Eurojust is mooted in Article III-175. This would be done unanimously, after obtaining the consent of the European Parliament. The EPP would be responsible for investigating, prosecuting and bringing to judgement, where appropriate and in liaison with Europol, the perpetrators and accomplices of serious crimes affecting more than one Member State and of offences against the European Union's financial interests. It would exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

Alternatively the EPP could, as a last resort, be established under Article I-43, to reinforce co-operation. This would mean that at least nine Member States would have to agree to go forward with this project. National Parliaments would be kept informed (see 2 below). Under the system advocated in the Constitutional Treaty, other Member States could join whenever they felt ready.

### **1.2. Police co-operation**

Article III-176 deals with police co-operation in general.

The role of Europol<sup>19</sup> is outlined in Article III-177 of the draft Constitutional Treaty. Europol is responsible for supporting the Member States in combating serious organised crime by collating and analysing intelligence provided by national authorities. It supports and strengthens action by the Member States' police authorities and other law enforcement services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

It is envisaged that European Laws will determine Europol's structure, operation, and field of action and tasks. These tasks may

include the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the Member States or third countries or bodies. They might also include the co-ordination, organisation, and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams<sup>20</sup>, where appropriate in liaison with Eurojust.

The competence of Europol is limited to operational action carried out in liaison with and in agreement with the authorities of the Member States whose territory is concerned. The application of coercive measures would remain the exclusive responsibility of the competent national authorities.

At present, Europol does not have a major operational role. In a recent report, the Select Committee of the European Union of the House of Lords opined that "Europol should focus on providing an outstanding service of support of Member States' law enforcement agencies, rather than looking to take on new responsibilities."<sup>21</sup> The possibility of its role changing is discussed below.

The role of Europol as outlined in Article III-177 of the draft Constitutional Treaty would be to support and strengthens action by the Member States' police authorities and other law enforcement services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy. It is envisaged that European Laws will determine Europol's structure, operation, and field of action and tasks. These tasks may include the collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the Member States or third countries or bodies. They might also include the co-ordination, organisation, and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.

### **1.3. Possible scenarios for Europol and Eurojust working together**

The issue of knowing how the various institutional actors should interact and work together has preoccupied commentators awhile. Beyond the need to avoid duplication and to ensure good value for the tax payer, there is a need to face up to the challenge of 'joining up' the services provided at supra national level<sup>22</sup> whilst ensuring a strict application of subsidiarity.

#### *(i) The minimum synergy scenario*

At present, Europol has limited operational powers, in the sense that it cannot investigate in the Member States, although it can assist the Member States with intelligence. Furthermore a possibility exists for Europol to take part in Joint Investigation Teams including Member States' law enforcement bodies.

The European Anti-Fraud Office, OLAF, can also take part in joint investigations.<sup>23</sup> It has some powers of investigation, albeit in the limited field of the fight against fraud affecting the European budget, and in particular it has a role in relation to irregularities and frauds committed by European institutions and bodies.<sup>24</sup> In a recent report, the Select Committee of the European Union of the House of Lords opined that "Europol should focus on providing an outstanding service of support of Member States' law enforcement agencies, rather than looking to take on new responsibilities."<sup>25</sup> However, should Europol and OLAF merge, as has recently been mooted by its own Supervisory Committee, this would no doubt

produce economies of scale. If indeed "pragmatic" police co-operation always manifests itself early,<sup>26</sup> as it has been repeatedly suggested, this might be one such occasion.

The possibility of Eurojust supervising Europol was mooted by the Working Group, but not retained in the final text. The relationship between Europol and Eurojust might therefore remain unclear under this particular scenario. This is perhaps the first scenario that one could envisage for the evolution of the judicial space as far as these two bodies are concerned: Europol acquiring more operational capacity. It would liaise with Eurojust whenever needed. We could call this a 'minimum synergy scenario'. It would begin to address what needs to be done before either of the two more advanced scenarios below could become operational.<sup>27</sup>

### *(ii) The '174' scenario*

A second scenario could include a gradual setting up of the European Public Prosecutor through Article III-174, with both Europol and OLAF liaising with Eurojust as well as with national authorities.

In this scenario, Eurojust would take on a full role as initiator of prosecutions, but the onus would remain on the Member States to investigate and prosecute. In order to be effective in initiating prosecutions, Eurojust may need to rely on the "reinforced" Europol described above. As a result, the relationship between the two would have to be clarified *de jure*.

With this type of centralisation, the establishment of a specialised chamber attached to the European Court of Justice would become important, and is provided for in Article I-28.

### *(iii) The '175' scenario: a seamless European Judicial Space?*

According to Article III-175 of the draft Treaty, the EPP would be responsible for investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators and accomplices of serious crimes affecting more than one Member State and of offences against the European Union's financial interests. It would exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

The EPP could also be established as a last resort, under Article I-43, in order to reinforce co-operation in at least a quarter of the Member States.

In this scenario, the relationship between Europol and Eurojust would need to be clarified. Two possibilities must be differentiated. A European Public Prosecutor system in nine or more Member States only would, of course, not ensure an even space throughout the European Union and could only be seen as an intermediary step. However, it would allow for the centralised system described in Article 175 to be set up and tested, which might have the effect of convincing the more reluctant Member States that centralised responsibility for investigation and prosecution of certain offences is desirable.

These three scenarios are not mutually exclusive and can be seen as progressive steps in the integration of the European Judicial Space. Decision making mechanisms also have a decisive role to play in this.

## **2. New decision making procedures**

### **2.1. A new legal framework**

Some well known criticisms of the "third pillar" have been addressed in the proposed legal framework. Conventions, in particular have

taken too long to be ratified and implemented in the Member States.<sup>28</sup> Doubts have often existed about the correctness of the legal basis for some third pillar acts. It was often necessary to adopt two instruments addressing the same problem to obtain the required effect.<sup>29</sup> The new legal framework addresses these criticisms to a large extent. New legal acts are introduced, together with an increase of co-decision and qualified majority voting. An extension of the jurisdiction of the European Court of Justice is proposed.

The draft Constitution simplifies things considerably, since it provides only for two types of legislative acts in the fields of co-operation in criminal matters and police co-operation,<sup>30</sup> namely European Laws and European Framework Laws. Purely declaratory, non binding acts are dispensed with.

A European Law is a legislative act of general application, binding in its entirety and directly applicable in all Member States. A European Framework Law is a legislative act binding as to the results to be achieved on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result.<sup>31</sup> Table 3 (in Annex) gives an idea of correspondence with instruments actually in force.

### **The scope of European laws and Framework Laws**

#### *Police co-operation*

In the field of police co-operation, European Laws or Framework Laws could be used to establish rules concerning

- the collection, storage, processing, analysis and exchange of relevant information
- support for the training of staff, and co-operation on the exchange of staff, on equipment and on research into crime detection
- common investigative techniques in relation to the detection of serious forms of organised crime.

#### *Judicial co-operation in criminal matters*

In the field of judicial co-operation in criminal matters, European laws or Framework Laws will set up rules to ensure the recognition of judgements and decisions. Minimum rules could be adapted to ensure the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and to cover any other specific aspects of criminal procedure identified by the Council in a Decision and to prevent and settle conflicts of jurisdiction between Member States

- encouraging the training of the judiciary and judicial staff
- facilitating co-operation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

In addition, European Framework Laws can also be used to establish minimum rules concerning the definition of criminal offences and sanctions in two instances. The first instance concerns particularly serious crime with a cross border dimension.<sup>32</sup> Included in the list of serious crimes are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Secondly, if the approximation of criminal legislation proves essential to ensure the effective implementation of a Union Policy in an area that has been subject to harmonisation measures, European Framework Laws could also be used to establish minimum rules with

regard to the definition of criminal offences in the area concerned.<sup>33</sup>

### Qualified Majority

The adoption of European Laws and Framework Decisions will be adopted by co-decision and by qualified majority voting (the "ordinary procedure"). There are a few exceptions to this rule in the field that concerns us here.

- For legislation concerning specific aspects of criminal procedure identified by the Council in a European Decision, the Council will act unanimously after obtaining the consent by the European Parliament. A European Public Prosecutor<sup>34</sup> might be adopted by the Council acting unanimously after obtaining the consent of the European Parliament.

- In the field of police co-operation involving Member States' competent authorities<sup>35</sup> European Laws or Framework Laws will be adopted by unanimity by the Council after consulting the European Parliament.<sup>36</sup>

Unanimity therefore would persist for aspects of criminal procedure and for operational co-operation. As stated in Article III-175, the European Public Prosecutor would also require an unanimous vote.

The Working Group was aware that the maintenance of unanimity after enlargement could lead to deadlock, so these areas have been kept to a minimum in relation to "certain aspects of co-operation in criminal matters concerning core functions of the Member States and deeply rooted in their various legal traditions".

### Enhanced co-operation and New "passerelle"

There is scope for the Council to adopt, on its own initiative and by unanimity, after a period of consideration of six months, a Decision allowing for the adoption of such European Laws or Framework Laws according to the ordinary legislative procedure, that is to say by qualified majority.

In such a case, the Council acts only after consulting the European Parliament and informing national Parliaments.<sup>37</sup> This possibility has been coined a 'passerelle' or an 'escalator'.

Acts adopted within the framework of enhanced co-operation only bind participating states. They do not form part of the *acquis communautaire*.<sup>38</sup> However, such co-operation can be extended to all Member States at any time.<sup>39</sup> Enhanced co-operation only applies to areas of joint competence, such as judicial co-operation in criminal matters and police co-operation.

Authorisation for enhanced co-operation must be granted by the Council, on condition that it is a "last resort", when it has been established within the Council that the objectives of such co-operation cannot be attained within a reasonable period by the Union as a whole and provided that it brings together at least one third of the Member States.

In this context, qualified majority means a majority of the votes representing at least three fifths of the population of those states for a Commission proposal and otherwise qualified majority represents two thirds of the votes representing at least three fifths of the population of those states.<sup>40</sup>

### Judicial co-operation in criminal matters

In the field of judicial co-operation in criminal matters, European laws or Framework Laws will set up rules to ensure the recognition of judgements and decisions. Minimum rules could be adapted to

ensure the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and to cover any other specific aspects of criminal procedure identified by the Council in a Decision and to prevent and settle conflicts of jurisdiction between Member States concerning encouragement of training of the judiciary and judicial staff, or facilitation of co-operation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

In addition, European Framework Laws can also be used to establish minimum rules concerning the definition of criminal offences and sanctions in two instances. The first instance concerns particularly serious crime with a cross border dimension.<sup>41</sup> Included in the list of serious crimes are: terrorism, trafficking in human beings and sexual exploitation of women and children; illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

If the approximation of criminal legislation proves essential to ensure the effective implementation of a Union Policy in an area that has been subject to harmonisation measures, European Framework Laws could also be used to establish minimum rules with regard to the definition criminal offences in the area concerned.<sup>42</sup>

Thirdly, Article III-174 also provides for legislative acts concerning the functioning of Eurojust to be adopted by qualified majority.

### Extension of the jurisdiction of the European Court of Justice

As we have seen, the European Court of Justice is to have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act.

In the field of judicial co-operation in criminal matters and police co-operation, the European Court of Justice, including its specialised courts would rule on actions brought by a Member State, a European Institution or a natural or legal person, give preliminary rulings on the interpretation of the Constitution or the validity and interpretation of acts of the Institutions of the Union,<sup>43</sup> at the request of Member State courts, on the interpretation of Union law or the validity of acts adopted by the institutions and would also rule on the other cases provided for in the Constitution.<sup>44</sup> It would rule in any dispute between Member States that relates to the subject matter of the Constitution if the dispute is submitted to it under a special agreement between the parties.<sup>45</sup>

However, the Court of Justice would have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or to exercise responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law.<sup>46</sup>

This might bring up two issues. Firstly, if the Court is called to give a ruling on the application of a rule on criminal procedure, for example, the relationship of this jurisprudence with the European Court of Human Rights' established jurisprudence would have to be worked out. Could the European Court actually modify the human rights *acquis* in the European Union? Secondly, if the European Court of Justice is called to rule on matters related to enhanced co-operation, how would the resulting jurisprudence relate to the rest of its jurisprudence and to the jurisprudence of the European Court of Human Rights?

Leaving such questions aside, clearly the proposal in broad terms is an advance on the status quo in the Treaty on European Union,

which gave the European Court of Justice no automatic jurisdiction. It should be noted that Article 28(1) of the draft Treaty provides for specialised chambers, so it is not excluded that a criminal law chamber be constituted at some stage. This would be in line with the development of the European Judicial Space described above. It also differs from the situation in common foreign and security policy, where the European Court of Justice has no jurisdiction.

## 2.2. New role for national Parliaments

The Constitution introduces political monitoring by national Parliaments. Although this can be seen as a consolidation of existing trends, it is clear that it will affect legislative decision making in the fields that concern us here.

The involvement of national Parliaments is not new. National Parliaments already had committees of scrutiny for sensitive subjects. The Italian Parliament, for example, set up in 1998 a committee responsible for supervising the implementation of the Schengen agreements and for the monitoring of the operation of the Italian Europol unit.<sup>47</sup>

This monitoring would take several forms: (i) a check on subsidiarity and (ii) a political monitoring of Europol and Eurojust.

### *Subsidiarity and national Parliaments*

National Parliaments would first of all ensure that proposals and legislative initiatives in the fields of judicial co-operation in criminal matters and police co-operation comply with the principle of subsidiarity.<sup>48</sup>

The Protocol on subsidiarity attached to the Constitutional Treaty provides that, before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimensions of the action envisaged. The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislators. The Commission has to justify its proposal with regard to the principles of subsidiarity and proportionality. Any legislative proposal should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. The Court of Justice would have jurisdiction to hear actions brought by member states on behalf of the national Parliaments on grounds of infringement of the principle of subsidiarity by a legislative act.

### *Monitoring of Europol and Eurojust activities*

As we have seen, the draft Constitutional Treaty allocates to national Parliaments a role in monitoring the activities of Europol and Eurojust. European Laws will determine arrangements for involving the European Parliament and Member States' national Parliaments in the evaluation of Eurojust's activities.<sup>49</sup> European Laws will also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with Member States' national Parliaments.<sup>50</sup>

The place of national Parliaments in European inter-institutional dynamics remains to be settled. It is doubtful, for example, that national Parliaments would remain satisfied for very long at 'being informed' that a legislative act is about to move from a requirement of unanimity to qualified majority within the framework of the "passerelle" as envisaged in the draft Constitutional Treaty.

## 3. Conclusion

It is clear that the Constitution heavily 'communitarises' judicial co-operation in criminal matters and police co-operation, through the adoption of binding acts through qualified majority, falling under the competence of the European Court of Justice.

The reality test however will be of whether existing operational bodies, such as Europol, Eurojust, OLAF and their national partners, can adapt to meet the new challenges. In this some pooling of expertise must be expected.

## Endnotes

<sup>1</sup> At the time of writing (January 2004), the author works for OLAF, dealing with political and legal affairs in the Directorate of Investigations. All views expressed in this paper are those of the author and do not necessarily reflect the policy position of the European Commission.

<sup>2</sup> Draft Constitutional Treaty, version of July 2003.

<sup>3</sup> See for example S. White "Beyond pillars and passerelle debates: the European Union's emerging crime prevention space", unpublished paper.

<sup>4</sup> Articles 41, III-161, III-171 of the draft Constitutional Treaty. See also VI, points 33 to 37 of the Tampere European Council Conclusions (full reference).

<sup>5</sup> Articles 41, III-162, III-176 of the draft Constitutional Treaty. See also IX points 43 to 50 of the Tampere conclusions.

<sup>6</sup> Articles 41, III-151, 171 and 172 of the draft Constitutional Treaty. See also X point 55 of the Tampere conclusions calling for approximation of criminal laws and procedures on money laundering, for example.

<sup>7</sup> See VI point 33 of the Tampere conclusions.

<sup>8</sup> See for example new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Minimum rules relating to legal aid and other financial aspects of civil proceedings now exist at EU level.

<sup>9</sup> Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States, L 190, page 1 of 18 July 2002.

<sup>10</sup> See point 17 the Presidency Conclusions of the European Council Meeting in Laeken, 14-15 December 2001.

<sup>11</sup> See point 46 of the Council's conclusions.

<sup>12</sup> See substantive amendments OJ (2001) C 80/6.

<sup>13</sup> Article 29(2), second indent of the Treaty of Nice.

<sup>14</sup> See Article 4 of the Decision setting up Eurojust, xx

<sup>15</sup> Participation in a criminal organisation must be understood within the meaning of Council joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351/1.

<sup>16</sup> Article III 174.

<sup>17</sup> Commission Green Paper on Criminal Law Protection of the financial interests of the Community and the establishment of the European Public Prosecutor COM (2001) 715 final.

<sup>18</sup> See White, S (2002) The European Prosecutor: extension of Eurojust or “prolongation” of the Corpus Juris proposals. In Gilles de Kerchove and Anne Weyembergh (eds.) *L’espace pénal européen: enjeux et perspectives*. pp 47-54

<sup>19</sup> Europol was established by the 1995 Europol Convention, which came into force on 1 October 1998.

<sup>20</sup> See Council framework Decision of 13 June 2002 on joint investigation teams 2002/465/JHA OJ (2002) L 162/1.

<sup>21</sup> See House of Lords session 2002-03, 20<sup>th</sup> report, Select Committee on the European Union, Government responses: review of scrutiny; Europol’s role in fighting crime; and EU Russia relations, page 23.

<sup>22</sup> See Salazar, L. (2002) *Le rôle des nouveaux acteurs dans la définition d’une politique criminelle européenne* pages 55 to 62, also Nillson, HG. (2002) Proliferation or concentration of the actors in the JHA area pp 63-79 in. Gilles de Kerchove and Anne Weyembergh (eds.)(2002).

<sup>23</sup> See in particular ninth preamble of Council framework Decision of 13 June 2002 on joint investigation teams, OJ (2002) L 162/1.

<sup>24</sup> Regulation 1073/99 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) OJ (1999) L 136/1.

<sup>25</sup> See House of Lords session 2002-03, 20<sup>th</sup> Report, Select Committee on the European Union, Government responses: review of scrutiny; Europol’s role in fighting crime; and EU Russia relations, p.23.

<sup>26</sup> Schutte, JJE (1996), Administrative co-operation in Mireille Delmas Marty (ed.) *What kind of criminal policy for Europe*, pages 191 to 204, see also Fijnaut, C (1991) Police co-operation within western Europe in Heidensohn F. and Farrell M., (eds.) *Crime in Europe*, pp. 103-120.

<sup>27</sup> See White, S (1999) EC criminal law: Prospects for the *Corpus Juris* in *Journal of Financial Crime*, 5(3): 223- 231.

<sup>28</sup> See for example White, S and Dorn, N. (2001) Freedom, Security and Justice: criminal law co-operation in Miklos Levay (ed.) *The EU in Transnational crime, transnational justice*, Proceedings of criminal justice publication, no 2, Bibor Publishing, see in particular pages 17 and 18 on improved implementation procedures.

<sup>29</sup> See Final Report of Working Group X “Freedom, security and Justice”, European Convention, 2 December 2002, CONV 426/02.

<sup>30</sup> The other, non-legislative acts are as follows: European regulations, acts of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. European decisions are to be binding in their entirety. Recommendations and opinions would be adopted by the Institutions and have no binding force. They are not applicable in the context of judicial co-operation and police co-operation.

<sup>31</sup> Title V, Article 32(1).

<sup>32</sup> Article III-172.

<sup>33</sup> Article III-172(2)

<sup>34</sup> Article III-175.

<sup>35</sup> These authorities are defined in Article III-176 as: all the Member States’ competent authorities, including police, customs

and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

<sup>36</sup> However, customs co-operation also appears under Article III-41, where the Treaty provides that European Laws or framework Laws will establish measures in order to strengthen customs co-operation between Member States and between the latter and the Commission under qualified majority.

<sup>37</sup> Article 24(4) of the draft Constitutional Treaty.

<sup>38</sup> Article III-43(4) of the draft Constitutional Treaty.

<sup>39</sup> Article III-43(1) second paragraph of the draft Constitutional Treaty.

<sup>40</sup> Article III-43(3) of the draft Constitutional Treaty.

<sup>41</sup> Article III-172.

<sup>42</sup> Article III-172(2)

<sup>43</sup> Article III-274.

<sup>44</sup> Article I-28(1) and (3) of the draft Constitutional Treaty.

<sup>45</sup> Article III-280.

<sup>46</sup> Article III-283.

<sup>47</sup> See also “The role of national parliaments in the creation of the European area of freedom, security and justice, an Italian point of view” by Fabio Evangelisti, paper given at King’s College seminar on 19.6. 1998, unpublished.

<sup>48</sup> Article III-160

<sup>49</sup> Article III-174(b) second sub-paragraph.

<sup>50</sup> Article 43(2): “Within the area of freedom, security and justice, national parliaments may participate in the

evaluation mechanisms foreseen in Article III-161, and shall be involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles III-177 and III-174”. See also Article III- 177(2)(b) second sub-paragraph.

## Annex 1

### PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY. DRAFT CONSTITUTIONAL TREATY, JULY 2003 VERSION

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as enshrined in Article I-9 of the Constitution, and to establish a system for monitoring the application of those principles by the Institutions,

HAVE AGREED UPON the following provisions, which shall be annexed to the Constitution:

1. Each Institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article I-9 of the Constitution.

2. Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged.

In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for the decision in its proposal.

3. The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States.

4. The Commission shall justify its proposal with regard to the principles of subsidiarity and proportionality. Any legislative proposal should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.

This statement should contain some assessment of the proposal's financial impact and, in the case of a framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and wherever possible, quantitative indicators. The Commission shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

5. Any national Parliament or any chamber of a national Parliament of a Member State may, within six weeks from the date of transmission of the Commission's legislative proposal, send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

6. The European Parliament, the Council of Ministers and the Commission shall take account of the reasoned opinions issued by Member States' national Parliaments or by a chamber of a national Parliament. The national Parliaments of Member States with unicameral Parliamentary systems shall have two votes, while each of the chambers of a bicameral Parliamentary system shall have one vote.

Where reasoned opinions on a Commission proposal's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the Member States' national Parliaments and their chambers, the Commission shall review its proposal.

This threshold shall be at least a quarter in the case of a Commission proposal or an initiative emanating from a group of Member States under the provisions of Article III-165 of the Constitution on the area of freedom, security and justice.

After such review, the Commission may decide to maintain, amend or withdraw its proposal.

The Commission shall give reasons for its decision.

7. The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-270 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national

Parliament or a chamber of it.

In accordance with the same Article of the Constitution, the Committee of the Regions may also bring such actions as regards legislative acts for the adoption of which the Constitution provides that it be consulted.

8. The Commission shall submit each year to the European Council, the European Parliament, the Council of Ministers and the national Parliaments of the Member States a report on the application of Article I-9 of the Constitution. This annual report shall also be forwarded to the Committee of the Regions and to the Economic and Social Committee.

## Annex 2 - Article 41

Article 41: Specific provisions for implementing the area of freedom, security and justice

1. The Union shall constitute an area of freedom, security and justice:

- by adopting European laws and framework laws intended, where necessary, to approximate national laws in the areas listed in Part III;
- by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions;
- by operational co-operation between the competent authorities of the Member States, including the police, customs and other services specialising in the prevention and detection of criminal offences.

2. Within the area of freedom, security and justice, national parliaments may participate in the evaluation mechanisms foreseen in Article III-161, and shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174.

3. In the field of police and judicial co-operation in criminal matters, Member States shall have a right of initiative in accordance with Article III-160 of the Constitution.

Table 1: Provisions judicial co-operation in criminal matters in the Treaty on European Union and in the draft Constitutional Treaty

<i>Judicial co-operation in criminal matters: topics</i>	<i>Treaty on European Union Consolidated 24 12 2002</i>	<i>Draft Constitutional Treaty Version July 2003</i>
Judicial co-operation in criminal matters	Articles 61(e) 29 and 31(1) TEU	Article III-171
Substantive criminal law	Articles 29 and 31(1)(e) TEU	Article III-172
Criminal procedure	<b>No mention in TEU</b>	Article III-172
Crime prevention	Reference only in Article 31(1)(e)	Article III-173
Eurojust	Article 29 and 31(2)	Article III-174
European Public Prosecutor	<b>No mention in TEU</b>	Article III-175

Comparative Table 2: Police co-operation provisions in the Treaty of Nice and in the draft Constitutional Treaty

<i>Police co-operation</i>	<i>Treaty on European Union Consolidated 24 12 2002</i>	<i>Draft Constitutional Treaty Version July 2003</i>
Co-operation with regard to internal security	Article 30(1) TEU	Article III-176
Europol	Article 30(2) TEU	Article III-177
Operations on the territory of another Member State	Article 32 TEU	Article III-178

Comparative Table 3 - Judicial co-operation in criminal matters and police co-operation - new legal framework, compared with the Treaty on European Union

<i>Draft Constitutional Treaty (July 2003 version)</i>	<i>Treaty establishing the European Community (Nice)</i>	<i>Treaty on European Union Chapter VI (Nice)</i>
Art 32: European Laws and European Framework Laws are the new legislative acts in the fields of judicial co-operation in criminal matters and police co-operation		
European Law Art 32 "A European Law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States"	Regulation Art 249 TEC "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."  <i>Explanation: Regulations do not deal with criminal law, although they can require checks and impose sanctions.</i>	No directly applicable instrument of this type in the TEU under Treaty on European Union.

<p>European Framework Law Art 32 “ A European Framework Law shall be a legislative act binding, as to the results to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result.”</p>	<p>Directive Art 249 TEC:” A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.  <i>Example: Money laundering directive</i></p>	<p>Framework Decision Art 34(2)(b) TEU Framework Decisions are “for the purpose of approximation of the laws and regulations of the Member States. Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.” <i>Example: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L82/1 of 22.3.01; Council Framework Decision on the European Arrest Warrant of June 2002</i></p> <p>Convention Art 34(2)(d) TEU Conventions are recommended “to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time to be set by the Council. <i>Example: Convention on Mutual Legal Assistance in criminal matters of 17 March 1, 2000</i></p>
---	--	---