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REPORT

on the draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (9636/1999 – C5-0091/1999 and SN 5060/1999 – C5-0331/1999 – 1999/0809(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Antonio Di Pietro

<i>Symbols for procedures</i>	<i>Abbreviations for committees</i>
* Consultation procedure <i>majority of the votes cast</i>	I. AFET Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy
**I Cooperation procedure (first reading) <i>majority of the votes cast</i>	II. BUDG Committee on Budgets
**II Cooperation procedure (second reading) <i>majority of the votes cast, to approve the common position majority of Parliament's component Members, to reject or amend the common position</i>	III. CONT Committee on Budgetary Control
*** Assent procedure <i>majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty</i>	IV. LIBE Committee on Citizens' Freedoms and Rights, Justice and Home Affairs
***I Codecision procedure (first reading) <i>majority of the votes cast</i>	V. ECON Committee on Economic and Monetary Affairs
***II Codecision procedure (second reading) <i>majority of the votes cast, to approve the common position majority of Parliament's component Members, to reject or amend the common position</i>	VI. JURI Committee on Legal Affairs and the Internal Market
***III Codecision procedure (third reading) <i>majority of the votes cast, to approve the joint text</i>	VII. INDU Committee on Industry, External Trade, Research and Energy
(The type of procedure depends on the legal basis proposed by the Commission)	VIII. EMPL Committee on Employment and Social Affairs
	IX. ENVI Committee on the Environment, Public Health and Consumer Policy
	X. AGRI Committee on Agriculture and Rural Development
	XI. PECH Committee on Fisheries
	XII. REGI Committee on Regional Policy, Transport and Tourism
	XIII. CULT Committee on Culture, Youth, Education, the Media and Sport
	XIV. DEVE Committee on Development and Cooperation
	XV. AFCO Committee on Constitutional Affairs
	XVI. FEMM Committee on Women's Rights and Equal Opportunities
	XVII. PETI Committee on Petitions

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Procedural page

By letter of 3 August 1999 the President of the Council of the European Union consulted Parliament pursuant to Article 39(1) of the EU Treaty on the draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (9636/1999 – 1999/0809(CNS)).

By letter of 3 December 1999 the Director-General of the Directorate-General for Justice and Home Affairs of the Council of the European Union forwarded the revised draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (SN 5060/1999 – 1999/0809 (CNS)).

At the sittings of 13 September 1999 and 17 December 1999, the President of Parliament announced that she had referred the proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and to the Committee on Legal Affairs and the Internal Market for its opinion (C5-0091/1999 and C5-0331/1999).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Mr Di Pietro rapporteur at its meeting of 29 July 1999.

The committee examined the draft Council act and the draft report at its meetings of 28 September 1999, 19 October 1999, 8 November 1999, 6 December 1999 and 26 January 2000.

At the last meeting it adopted the motion for a resolution by a majority.

The following were present for the vote: Watson, chairman; Ferri and Evans, vice-chairmen; Di Pietro, rapporteur; Andersson (for Duhamel), Banotti, von Bötticher, Cappato, Cashman, Cederschiöld, Ceyhun, Coelho, Cornillet, Deprez, Di Lello Finuoli, Fiori (pursuant to Rule 153(2)), Ford (for Schmid), Frahm, Hannan, Gebhardt (for Vattimo), Hernandez Mollar, Karamanou, Kessler, Kirkhope, Klamt, Lambert (for Sörensen), Lehne (for Buttiglione), Ludford, Manisco (for Sylla), Nassauer, Paciotti, Palacio Vallelersundi (for Posselt), Pirker, Roure (for Sousa Pinto), Scapagnini ((pursuant to Rule 153(2))), Schulz, Swiebel, Terron I Cusi and Turco (for Vanhecke).

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 31 January 2000.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (9636/1999 – C5-0091/1999 and SN 5060/1999 – C5-0331/1999– 1999/0809(CNS)).

Draft Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on mutual assistance in criminal matters between the Member States of the European Union

The proposal is amended as follows:

Text proposed by the Council¹

Amendments by Parliament

(Amendment 1)

Preamble to the draft Convention

Recital 3

DESIRING to improve judicial cooperation in criminal matters between the Member States of the Union,

RESOLVED to improve judicial cooperation in criminal matters between the Member States of the Union,

Justification:

The amendment strengthens the Council text by expressing the Member States' determination rather than simply their desire to improve judicial cooperation.

(Amendment 2)

Preamble to the draft Convention

Recital 3

POINTING OUT that the Member States have a common interest in ensuring that mutual assistance between the Member States is provided in a fast and efficient manner compatible with the basic principles of their national law, including the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950,

POINTING OUT the Member States' common interest in ensuring mutual assistance compatible with the basic principles of their national law, which is rapid and effective and complies with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950,

¹ OJ C 251, 2.9.1999, p. 1
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Justification:

The amendment makes it clearer that the Member States have a common interest in ensuring mutual assistance in judicial matters but that such assistance must never be in breach of fundamental principles or individual rights.

(Amendment 3)
Recital 3a (new)

3a. Bearing in mind in particular that the rights of the defendant and the right to a fair trial are basic principles which must be protected at European level through specific and binding instruments,

Justification:

The present Convention makes no reference whatsoever to the rights of the defendant, which are basic principles of the European legal tradition and are protected by the Member States' legal systems. However, mutual legal assistance at European level creates an area of European judicial enquiry and process which is not subject to the jurisdiction of individual Member States and represents a challenge when it comes to protecting the rights of the defendant. These rights must therefore be protected under the present Convention or by means of a specific and binding legal instrument.

(Amendment 4)
Preamble, paragraph 4

EXPRESSING their confidence in the structure and functioning of their legal systems and in the ability of all Member States to guarantee a fair trial,

CONSIDERING that there are great differences between the legal systems of the Member States and the way in which general legal principles are actually applied and that there is a need to approximate those legal systems so that the judicial system as a whole is more effective and ensures greater compliance with human rights,

(Amendment 5)
Recital 4a (new)

4a. Calling on the Member States constantly to improve their respective legal orders and legal systems so as to eliminate factors causing delays, inefficiencies and violations of the European Convention on Human Rights, so as to ensure respect for human rights and fundamental freedoms and in particular the rights of the defendant and the right to a fair trial,

Justification

There are still countless failings in the administration of justice in the Member States which result in serious and persistent violations of human rights and fundamental freedoms, a fact which the European Court of Human Rights in Strasbourg constantly highlights. The Member States need to take urgent action to eliminate the factors causing this situation.

(Amendment 6)
Preamble to draft Convention
Recital 5

TAKING INTO ACCOUNT the importance of concluding a Convention between the Member States of the European Union to supplement the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and other Conventions in force in this area,

RESOLVED to conclude a Convention between the Member States of the European Union that will supplement the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and other Conventions in force in this area,

Justification:

This part of the preamble seeks to highlight Parliament's determination to supplement (and not to repeal or replace) the 1959 European Convention.

(Amendment 7)
Preamble to the draft Convention
Recital 6

CONSIDERING that the provisions of those Conventions remain applicable for all matters not covered by this Convention,

NOTING that the provisions of those Conventions remain applicable for all matters not covered by this Convention,

Justification:

This amendment stipulates that all parts of the 1959 Convention not governed by this Convention remain in force.

(Amendment 8)
Preamble to the draft Convention
Recital 7

CONSIDERING that the Member States attach importance to strengthening judicial cooperation, while continuing to apply the principle of proportionality,

CONSIDERING the interests of the Member States and the need to ensure that, also within the context of mutual assistance in judicial matters, the means used to combat an offence that has been committed are in proportion to the offence itself,

Justification:

The amendment restates the need to avoid measures that are disproportionate to the ends pursued.

(Amendment 9)
Article 1(1)

Justification:

This amendment does not apply to the English version. The choice of the word 'integrare' (supplement) in Italian is to highlight the fact that the provisions on mutual assistance in criminal matters still have to be developed further and hopefully codified in a single text.

(Amendment 10)
Article 1, paragraph 2a (new)

The Council shall adopt the measures required to implement this Convention in accordance with the procedures set out in Article 34(2)(c) of the EU Treaty and the objective referred to in Article 29 of the EU Treaty and the timetable established in the Council and Commission action plan to establish an area of freedom, security and justice.

Justification:

This amendment outlines the possible framework and timetable for action by the institutions in the phase following conclusion of the Convention.

(Amendment 11)
Article 2, paragraph –1 (new)

-1. Mutual assistance under this Convention shall be afforded in proceedings in respect of criminal offences brought by the judicial authorities of the requesting Member State.

Justification:

The amendment seeks to make it clear that mutual assistance is first of all provided for criminal proceedings brought by judicial authorities and that the subsequent paragraphs are complementary and additional.

(Amendment 12)
Article 2(1)

1. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of offences which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

1. Mutual assistance shall also be afforded in proceedings brought by the competent authorities in respect of offences which are punishable under the national law of the requesting and the requested Member State, or both, by virtue of being infringements of the rules of law, where the decision may give rise to criminal proceedings before a court having jurisdiction in particular in criminal matters.

There is a lack of definition of the criminal offences covered by the Convention. The scope of the Convention must be restricted to serious organised crime.

(Amendment 13)
Article 2(2)

2. Mutual assistance shall also be afforded in connection with criminal proceedings and procedures as referred to in paragraph 1 which relate to offences or infringements for which a legal person may be held liable in the requesting Member State.

2. Deleted.

Justification:

The Convention's field of application should be restricted to criminal matters.

(Amendment 14)
Article 2(2a) (new)

2a (new) This Convention shall not restrict the scope of application of the Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and subsequent amendments and additions.

Justification:

The new paragraph 3a is a provision enacting recitals 5 and 6 of the Preamble.

(Amendment 15)
Article 2(2)b (new)

2a. The measures applied by the participating Member States under the mutual assistance procedure must comply with the principle of proportionality.

(Amendment 16)
Article 4, paragraphs 1 and 2

1. Where mutual assistance is afforded and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State, the Member States shall undertake to comply, unless otherwise provided in this Convention, for the purposes of executing letters rogatory, with formalities and procedures expressly indicated by the requesting Member State. The requested Member State shall execute the request for assistance as soon as possible and shall take as full account as possible of any deadlines set by the requesting Member State. The requesting Member State shall explain the reasons for the deadline.

2. Where the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting Member State, the authorities of the requested Member State shall promptly

1. Where mutual assistance is afforded and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State, the Member States shall undertake to comply, unless otherwise provided in this Convention, for the purposes of executing letters rogatory, with formalities and procedures expressly indicated by the requesting Member State. The requested Member State shall execute the request for assistance as soon as possible and taking as full account as possible of the procedural deadlines and any deadlines set by the requesting Member State. The requesting Member State shall explain the reasons for the deadline.

2. Where the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting Member State, the authorities of the requested Member State shall promptly

inform the authorities of the requesting Member State and indicate the conditions under which it might be possible to execute the request. The authorities of the requesting and the requested Member State may subsequently agree on further action to be taken concerning the request, where necessary making such action subject to the fulfilment of those conditions.

inform the authorities of the requesting Member State and indicate the time required and the conditions under which it might be possible to execute the request. The authorities of the requesting and the requested Member State may subsequently agree on further action to be taken concerning the request, where necessary making such action subject to the fulfilment of the conditions set.

Justification:

The changes are designed to highlight the need for the Member State requested to take account of the procedural deadlines of the requesting Member State.

(Amendment 17)
Article 4(3)

3. If it is foreseeable that the deadline set for execution of the request cannot be complied with, and if the reasons referred to in paragraph 1, third sentence, indicate in a concrete way that this will lead to substantial impairment of the proceedings being conducted in the requesting Member State, the authorities of the requested Member State shall promptly indicate the estimated time needed for execution of the request. The authorities of the requesting Member State shall promptly indicate whether the request is to be upheld nonetheless. The authorities of the requesting and requested Member States may subsequently agree on further action to be taken concerning the request.

Deleted

Justification:

It is proposed to delete this paragraph because its provisions have already been incorporated into the text of the previous paragraphs.

(Amendment 18)
Article 5
Paragraph 1

Sending and service of procedural documents

1. Each Member State shall send procedural documents intended for persons who are in

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Sending and service of procedural documents

1. The requested Member State shall arrange for service or notification of the document,

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the territory of another Member State to them directly by post.

either in accordance with the law of the requested Member State or in the specific form desired by the requesting Member State, provided that this is compatible with the law of the requested Member State.

(Amendment 19)
Article 5(2)

2. Procedural documents may be sent via the competent authorities of the requested Member State only if:

- the address of the person for whom the document is intended is unknown or uncertain, or
- the relevant procedural law of the requesting Member State requires proof other than proof that can be obtained by post of the service of the document on the addressee, or

- it has not been possible to serve the document by post, or

- the requesting Member State has justified reasons for considering that despatch by post will be ineffective or is inappropriate.

2. Procedural documents may be sent via the competent authorities of the requested Member State where

- it has not been possible to serve the document by post because the address of the person for whom the document is intended is unknown or uncertain or because the requesting Member State has indicated the reasons why dispatch by post may be ineffective or inappropriate

- the relevant procedural law of the requesting Member State requires proof of the service of the document on the addressee, other than the proof that can be obtained by post.

Justification:

The proposed changes seek to spell out more clearly that there are two circumstances in which documents may be transmitted between the competent authorities other than by post, namely uncertainty as to the address or proof of service required by procedural law. The requesting Member State should not only have reasons to doubt the effectiveness and appropriateness of dispatch by post, but should also be required to state those reasons.

(Amendment 20)
Article 5(3)

3. Where there is reason to believe that the addressee does not understand the language in which the document is drafted, the document – or at least the important passages thereof – must be translated into (one of) the language(s) of the Member State

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3. (20 words deleted) The document (seven words deleted) must be translated into (one of) the language(s) of the Member State in the territory of which the addressee is staying. If the authority by which the procedural document was issued knows that

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in the territory of which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document – or at least the important passages thereof – must be translated into that other language.

the addressee understands only some other language, the document – or at least the important passages thereof – must be translated into that other language.

Justification:

All procedural documents must automatically be translated into the language of the addressee, without leaving any scope for discretion, since this may subsequently generate problems.

Or. it

(Amendment 21)

Article 6, paragraph 2a (new)

2a (new) If the authority to which a request for judicial assistance is sent is not competent to act on the request, it shall, where the request has been transmitted directly, officially forward the request to the competent authority in that Member State and shall inform the requesting authority thereof by the same means.

Justification:

New paragraph 2a supplements the provisions enabling the judicial authorities to interact and inserts provisions modelled on those in the 1959 Convention to avoid bureaucratic delays.

(Amendment 22)

Article 6 (4)

4. Any request as referred to in paragraph 1 may, for the sake of speed, be made via the International Criminal Police Organisation (Interpol) or any body competent under provisions introduced pursuant to the Treaty on European Union.

4. Any request for mutual assistance (six words deleted) may, for the sake of speed, be made via the International Criminal Police Organisation (Interpol) or any body competent under provisions introduced pursuant to the Treaty on European Union.

Justification:

These changes bring the text into line with the amendments proposed earlier.

(Amendment 23)
Article 6(6) and (7)

6. Where, in respect of requests for assistance in relation to proceedings as envisaged in Article 2(1) the competent authority is a judicial authority or a central authority in one Member State and an administrative authority in the other Member State, requests may be made and answered directly between these authorities.

7. Any Member State may declare, when giving the notification provided for in Article 23(2), that it is not bound by the first sentence of paragraph 5 and/or by paragraph 6 or that it will only apply those paragraphs under certain conditions which it shall specify. Such a declaration may be withdrawn or amended at any time.

6. Where, in respect of requests for assistance in relation to proceedings as envisaged in Article 2 (one word deleted) the competent authority is a judicial authority or a central authority in one Member State and an administrative authority in the other Member State, requests may be made and answered directly between these authorities.

7. Any Member State may declare, when giving the notification provided for in Article 22, that it is not bound by the first sentence of paragraph 5 and/or by paragraph 6 or that it will only apply those paragraphs under certain conditions which it shall specify. Such a declaration may be withdrawn or amended at any time.

Justification:

The changes to paragraphs 6 and 7 are formal amendments arising from earlier changes.

(Amendment 24)
Article 7

1. The competent authorities of the Member States may, within the limits of their national law and without a request to that effect, exchange information relating to criminal offences as well as the infringements of the rules of law referred to in Article 2(1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided.

2. The providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority.

3. The receiving authority shall be bound by those conditions.

1. The competent authorities of the Member States may, within the limits of their national law and without a request to that effect, provide information relating to criminal offences as well as the infringements of the rules of law referred to in Article 2(2), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided.

2. The providing authority may, before the information is released, notify the receiving authority of the conditions for the use of such information pursuant to its national law.

3. The receiving authority may opt not to receive information subject to such

conditions. Where it accepts, it shall be bound by those conditions.

Justification:

The proposed changes seek to clarify the purpose of mutual assistance – the ‘exchange of information’ implies that two or more Member States provide each other with information, whereas this particular case involves specific information provided by one Member State to another.

The changes to paragraphs 2 and 3 are proposed to enable the Member State receiving the information to decide whether or not to accept any conditions imposed on its use.

(Amendment 25)
Article 7(3a) (new)

3a. At all events, the procedures governing exchanges of information, the authorities which requested and provided it and the content of the information should all be documented. The document recording this information should be included in the file for the relevant case and made available to the defence.

Justification:

It is necessary to ensure the right of the defence to have at its disposal in the case file all the details necessary to ascertain the origin and nature of any information gathered.

(Amendment 26)
Article 8(1)

1. At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

1. At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles which are the product or proceeds of crime at the disposal of the requesting State with a view to their return to their rightful owners.

Justification:

The word ‘obtained’ is not an appropriate legal term. It is preferable to speak of articles which are the product or proceeds of crime.

(Amendment 27)
Article 8(2) and (3)

2. In applying Articles 3 and 6 of the European Mutual Assistance Convention and Articles 24(2) and 29 of the Benelux Treaty, the requested Member State may waive the return of articles supplied to the requesting Member State if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.

3. In the event of any such waiver as referred to in paragraph 2, the requested Member State shall exercise no security right or other right of recourse under tax or customs legislation in respect of surrendered articles, other than those owned by the rightful owner.

2. In applying Articles 3 and 6 of the European Mutual Assistance Convention and Articles 24(2) and 29 of the Benelux Treaty, the requested Member State may effect restitution of such articles directly to the rightful owner. The rights of bona fide third parties shall not be affected.

3. In the event of direct restitution of such articles to the rightful owner, the requested Member State shall exercise no security right or other right of recourse under tax or customs legislation in respect of surrendered articles, other than those owned by the rightful owner.

Justification:

The amendments to paragraphs 2 and 3 clarify the original wording.

(Amendment 28)
Article 9(1) and (1a)

1. Where there is agreement between the competent authorities of the Member States concerned, a Member State which has requested an investigation for which the presence of a person held in custody on its own territory is required may temporarily transfer that person to the territory of the Member State in which the investigation is to take place.

1. The Member State which requests or has requested another Member State to conduct a criminal investigation for which the presence of a person held in custody on its own territory is required may, in order to carry out investigations as quickly as possible, temporarily transfer that person to the territory of the Member State in which the investigation is to take place.

1a.(new) Likewise, the Member State which considers that the presence on its own territory of a person held in custody on the territory of another Member State is required to conduct a criminal investigation may request the temporary transfer of that person to its territory.

Justification:

The changes in paragraph 1 make it clear that what is involved is the exchange of letters rogatory other than under existing agreements (otherwise the provisions would be redundant). Paragraph 1a, however, allows the possibility of also requesting assistance through letters rogatory in situations that are the reverse of that described in paragraph 1.

(Amendment 29)
Article 9, paragraph 1a (new)

The transfer shall be made in such a way that it does not infringe the rights of the accused. The person being held in custody who is to be transferred temporarily shall have the right to the assistance of defence counsel.

(Amendment 30)
Article 9(2)

2. The agreement shall cover the arrangements for the temporary transfer of the person and the date by which he must be returned to the territory of the requesting Member State.

2. The Member States concerned shall agree on a case by case basis the specific arrangements for the temporary transfer of the person without prejudice to the rights of the defence and the date by which he must be returned to the territory of the Member State where he was initially held in custody.

Justification:

The amendment seeks to clarify the text and reaffirm that it is essential not to prejudice the rights of the defence.

(Amendment 31)

Article 9(3)

3. Where consent to the transfer is required from the person concerned, a statement of consent or a copy thereof shall be provided promptly to the requested Member State.

3. Where consent to the transfer is required from the person concerned, the Member State in which the person is held in custody shall ask that person in advance for a statement of consent and shall forward a copy thereof to the requesting Member State.

Justification:

The amendment seeks to clarify the text and reaffirm that it is essential not to prejudice the rights of the defence.

(Amendment 32)

Article 9, paragraph 3a (new)

3a. If the person held in custody refuses consent, he may not be transferred.

Justification:

The transfer of a person held in custody from a prison in one Member State to a prison in another Member State runs counter to the principle of rehabilitation and re-integration into society. Lack of knowledge of the foreign language concerned, distance from family and other considerations which may be grounds for the prisoner's refusal of consent should be taken seriously into account.

(Amendment 33)

Article 9(4)

4. The period of custody in the territory of the requested Member State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the requesting Member State.

4. The period of custody in the territory of the Member State to which the person has been transferred shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the Member State in which he was originally held.

Justification:

The amendment seeks to clarify the text and reaffirm that it is essential not to prejudice the rights of the defence.

(Amendment 34)
Article 9, paragraph 4a (new)

4a (new) The State in which the person concerned was originally held in custody shall notify the State to which the person is transferred of the date on which the period of detention ends.

Where the date of expiry of a person's detention falls during the period of transfer, the person concerned shall be transferred immediately to the State from which he was being transferred in order to complete the legal formalities for his release.

Justification:

Provision must be made for the situation in which the date for the release of the person concerned falls during the period of transfer. The person concerned should be released in the State in which he served his sentence.

(Amendment 35)
Article 9(5)

5. Articles 11(2) and (3), 12 and 20 of the European Mutual Assistance Convention and Articles 33, 35 and 46 of the Benelux Treaty shall apply.

5. Articles 11(1), (2) and (3), 12 and 20 of the European Mutual Assistance Convention and Articles 33, 35 and 46 of the Benelux Treaty shall apply.

Justification:

The reasons laid down in the European Council's European Convention on Human Rights as grounds for refusing the transfer of a prisoner (if the person in custody does not consent, if his presence is necessary at criminal proceedings pending in the territory of the requested party, if the transfer is liable to prolong his detention, or if there are other overriding grounds for not transferring him) should be maintained to provide a minimum level of protection of the rights of persons held in custody.

(Amendment 36)
Article 9(6)

6. Each Member State may declare when giving the notification provided for in Article 23(2) that, before reaching an agreement under paragraph 1 of this Article, the consent referred to in paragraph 3 of this Article will be required

6. Each Member State may declare when giving the notification provided for in Article 23(2) that, before agreeing to the request under paragraphs 1 and 1a of this Article, the consent referred to in paragraph 3 (three words deleted) will be

or will be required under certain conditions indicated in the declaration.

required or will be required in certain circumstances indicated in the declaration.

The amendment seeks to clarify the text and reaffirm that it is essential not to prejudice the rights of the defence.

(Amendment 37)
Article 10(1) and (1a) (new)

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference, as provided for in paragraphs 7 to 8.

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, (20 words deleted) request that the hearing take place, in accordance with the provisions on the rights of the defendant, by video conference or teleconference, as provided for in the following paragraphs.

1a. The witness or expert may request that the hearing take place by video conference or teleconference where it is not desirable or possible for him to appear in the territory of the requesting State in person.

Justification:

Paragraph 1 now incorporates the provisions that originally appeared in Articles 10 and 11 since they deal with similar procedures for hearings with substantially the same arrangements (as can be seen from the following text of Article 11 which has just been copied from the previous article). The amendment is designed to ensure that the rights of the defendant are respected.

The new paragraph 1a seeks to allow those persons invited to give evidence to choose between giving evidence by video or telephone link or in person in the requesting Member State.

(Amendment 38)
Article 10(1)a (new)

1a. If the witness is a minor, the hearing must be held by video conference. The minor must be assisted by a person whom he or she trusts or by an uninvolved expert.

Justification:

For minors, a hearing is a traumatic experience. Giving evidence by video conference is one way of avoiding the need for a minor to be heard repeatedly. The minor has the right to be assisted by a person whom he or she trusts: normally this should be one or both parents. In some

situations – where the minor’s trust in either or both parents has been violated – there must be provision for an expert to assist the minor.

(Amendment 39)
Article 10(1)b (new), 2, 3 and 4

2. The requested Member State shall agree to the hearing by video conference provided that the use of the video conference is not contrary to its fundamental principles of law and on condition that it has the technical means to permit the hearing. If the requested Member State has no access to the technical means for video conferencing, such means may be made available to it by the requesting Member State by agreement between them.

3. Applications for a hearing by video conference shall contain, in addition to the data referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend, the name of the judicial authority and of the persons who will be conducting the hearing.

4. The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its legislation.

1b An expert or witness asked to give evidence at a hearing by video conference or teleconference may ask to be heard directly by the requesting authority in the territory of the State that has requested the hearing.

2. The requested Member State shall agree to hearings using such techniques provided that the use thereof is not contrary to its fundamental principles of law and on condition that it has the technical means required. If the authority in the requested Member State has no access to the technical means required for video conferencing, such means may be made available to it by the requesting Member State.

3. Applications for a hearing by video conference or teleconference shall contain, in addition to the data referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, (16 words deleted), the name of the judicial authority that will be conducting the hearing and the names of any other persons who will attend.

4. The judicial authority of the requested Member State shall invite the expert or witness to attend the hearing in accordance with the forms laid down by its legislation and shall inform him of his right to refuse a hearing by video or teleconference (and his right to be heard directly by the judicial authority of the requesting State on its territory.

Justification:

The new paragraph 1b seeks to allow those persons invited to give evidence to choose between giving evidence by video or telephone link or in person in the requesting Member State.

Paragraphs 2 to 4 have been amended to take account of the fact that the provisions of the original Articles 10 and 11 have been incorporated into this article. The amendment to paragraph 4 is intended to clarify the rights of the person to be heard.

(Amendment 40)
Article 10(5)(a)

5. With reference to hearing by video conference, the following rules shall apply:

- (a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State judges that during the hearing the fundamental principles of the law of the requested Member State are infringed, it shall immediately take the necessary measures for the continuation of the hearing in accordance with the said principles;

5. With reference to hearing by video conference, the following rules shall apply:

- (a) a judicial authority of the requested Member State shall be present during the hearing (two words deleted), assisted by an interpreter if he does not know the language concerned, and shall also be responsible for ensuring both identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State judges that during the hearing the fundamental principles of the law of the requested Member State are infringed, it shall immediately take the necessary measures for the continuation of the hearing in accordance with the said principles;

Justification:

Questions relating to translation and interpretation are of paramount importance in securing proper judicial cooperation.

(Amendment 41)
Article 10(5)b

- (b) measures extending to the protection of the person to be heard may be agreed between the competent authorities of the requesting and the requested Member States;

- (b) measures extending to the protection of the person to be heard shall be agreed, where necessary, between the competent authorities of the requesting and the requested Member States;

(Amendment 42)

Article 10(5)d

(d) at the request of the requesting Member State the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if necessary;

(d) at the request of the requesting Member State or the person to be heard the requested Member State shall ensure that the person to be heard is assisted by an interpreter, if he does not know the language concerned;

Justification:

Questions relating to translation and interpretation are of paramount importance in securing proper judicial cooperation.

(Amendment 43)

Article 10(5)e

(e) the person to be heard may claim the right not to testify which would accrue to him or her under the law of either the requested or the requesting Member State;

(e) the person to be heard may claim the right not to testify in cases where and insofar as this right would accrue to him or her under the law of either the requested or the requesting Member State;

(Amendment 44)

Article 10(5)(f) (new)

The person to be heard may be assisted during the video conference by defence counsel whom he trusts.

(Amendment 45)

Article 10(7)

7. The cost of establishing the video link, costs related to the servicing of the video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses.

7. The cost of providing the telephone or video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses.

(Amendment 46)
Article 10(9)

9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving an accused person. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention on Human Rights. Any Member State may, when giving its notification pursuant to Article 23(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time. Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.

Deleted.

Justification:

The original text of paragraph 9 has been made into a separate article following Article 11 as it refers to the hearing of persons other than witnesses and experts whose rights as defendants require greater safeguards because of their position (under investigation, accused persons or co-defendants)).

(Amendment 47)
Article 10, paragraph 9a (new)

9a. The rights of the defence counsel of persons under investigation in respect of whom evidence obtained by means of a video conference may be used shall always be guaranteed.

Justification:

This amendment is designed to ensure that the rights of the defendant are fully observed when video conferences are used.

(Amendment 48)

Article 11

1. If a person is in one Member State's territory and has to be heard as a witness or expert by a judicial authority of another Member State the latter may, where its national law so provides, request assistance of the former Member State to enable the hearing to take place by telephone conference, as provided for in paragraphs 2 to 5. Deleted.
2. A hearing may be conducted by telephone conference only if the witness or expert agrees that the hearing take place by that method.
3. The requested Member State shall agree to the hearing by telephone conference where this is not contrary to its fundamental principles of law.
4. An application for a hearing by telephone conference shall contain, in addition to the data referred to in Article 14 of the European Convention on Mutual Assistance and Article 37 of the Benelux Treaty, the name of the judicial authority and of the persons who will be conducting the hearing and an indication that the witness or expert is willing to take part in a hearing by telephone conference.
5. The practical arrangements regarding the hearing shall be agreed between the Member States concerned. When agreeing such arrangements, the requested Member State shall undertake to:
- notify the witness or expert concerned of the time and the venue of the hearing;
 - ensure the identification of the witness or expert;
 - verify that the witness or expert agrees to the hearing by telephone conference.

The requested Member State may make its agreement subject, fully or in part, to the relevant provisions of Article 10(5) and (8). Unless otherwise agreed, the provisions of Article 10(7) shall apply mutatis mutandis.

Justification:

For the reasons outlined above, the text of the original Article 11 has been incorporated into Article 10 since they involve basically similar types of hearing subject to the same procedure (video conferences or teleconferences).

(Amendment 49)
Article 11 (new)

Former Article 10(9)

9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving an accused person. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention on Human Rights.

Any Member State may, when giving its notification pursuant to Article 23(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time.

Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.

1. The provisions of Article 10 concerning the use of video conferencing may be applied by the Member States at their discretion - where appropriate and with the agreement of their competent judicial authorities - to hearings involving an accused person, co-defendant, or a person under investigation alone or with others. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention on Human Rights.

Any Member State may, when giving its notification pursuant to Article 23(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time.

Such hearings shall only be carried out with the consent of the persons to be questioned and with the safeguards for the rights of the defence provided by the fundamental principles of national law. This article shall enter into force when the Council has adopted such rules as may prove to be necessary with a view to the

protection of the rights of accused persons
in a legally binding instrument.

Justification:

This amendment creates a specific article for the provisions contained in the last part of the original Article 10 and, for the purposes of safeguarding the rights of the defence, puts persons under investigation, co-defendants or persons under investigation alone or with others on the same footing as accused persons, spelling out their right to be questioned the presence of their defence counsel and with all the rights of the defence.

(Amendment 50)
Article 12(3)

3. Controlled deliveries shall take place in accordance with the procedures of the requested Member State. Competence to act and to direct operations shall lie with the competent authorities of that Member State.

3. Controlled deliveries shall take place in accordance with the procedures of the requested Member State. Competence to act and to direct operations shall lie with the competent authorities of that Member State, which shall keep the requesting Member State informed of developments and coordinate with it.

Justification:

The amendment seeks to ensure that the Member States keep each other informed even in the case of controlled deliveries.

(Amendment 51)
Article 13(3)(b)a(new)

(b)a the team cannot include members of the judiciary acting as judges in the Member States concerned.

Justification:

A clear distinction should be drawn between the duties of investigators and judges.

(Amendment 52)
Article 13(9)(c) and (d)

(c) for preventing an immediate and serious threat to public security, and without

Deleted

prejudice to subparagraph (b) if subsequently a criminal investigation is opened;

(d) for other purposes to the extent that this is agreed between Member States setting up the team

Deleted

Justification:

With regard to guarantees, it is unacceptable to use such highly general and imprecise terms as 'other purposes' and 'immediate and serious threat to public security', to describe cases in which the information obtained may be used. All the above stipulations would be superfluous and the investigating teams could, while apparently pursuing a specific objective, use the information obtained for other purposes.

Amendment 53)
Article 14(1)

1. The requesting and the requested Member State may agree to assist one another for the operation of investigations into crime by officers acting under covert or false identity (covert investigations).

1. A Member State may request assistance from the other Member States in conducting investigations into crime by officers acting under covert or false identity (covert investigations).

Justification:

The purpose of this amendment is to make it clear that in the case of covert operations it is also necessary to request assistance in advance.

(Amendment 54)
Article 15

For the purpose of the application of the provisions of Articles 16, 17 and 18, "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in this area, an equivalent competent authority, specified pursuant to Article 21(1)(e) and acting in the framework of a criminal investigation.

Deleted.

Justification:

The text of Article 15 has been moved to Article 3(2) so that all the definitions in the text appear

in a single article (Article 3).

(Amendment 55)
Article 15a (new)

The application of Articles 16, 17 and 18 shall respect Article 8(2) of the European Convention on Human Rights and Fundamental Freedoms, Article 8 of Directive 95/46 and Article 14 of Directive 97/66.

(Amendment 56)
Article 16(1)

1. For the purpose of a criminal investigation, a competent authority in any Member State (the requesting Member State) may, in accordance with the requirements of its domestic law, make a request to a competent authority in another Member State (the requested Member State) for:

(a) the interception and immediate transmission to the requesting Member State of telecommunications; or

(b) the interception, recording and subsequent transmission to the requesting Member State of the recording of telecommunications.

1. For the purpose of a criminal investigation, a competent authority in any Member State (the requesting Member State) may, in accordance with the requirements of its domestic law, request assistance from a competent authority in another Member State (the requested Member State) for:

(a) the interception and immediate transmission to the requesting Member State of telephone conversations or communications and any other forms of telecommunications;

(b) the interception, recording and subsequent transmission to the requesting Member State of the recording of such conversations and telecommunications.

Justification:

The proposed amendments arise from the new form of the text but also serve to enhance the concept of 'the request for assistance' which not only involves transmission but is also a means of actively involving the competent authorities of the Member State requested. The changes in subparagraphs (a) and (b) define more clearly what communications may be intercepted.

(Amendment 57)
Article 16(2)

2. Requests under paragraph 1 may be made in relation to the use of means of telecommunications by the subject of the interception, if this subject is present:

2. Requests under paragraph 1 may be made in relation to the use of means of telecommunications by the subject of the interception, if the latter is present or his telephone or telematics subscription is:

- (a) in the requesting Member State, and where the requesting Member State needs the technical assistance of the requested Member State to intercept his communications;
- (b) in the requested Member State, and where his communications can be intercepted in that Member State;
- (c) in a third Member State, which has been informed pursuant to Article 18(1)(a), and where the requesting Member State needs the technical assistance of the requested Member State to intercept his communications.

- (a) in the requesting Member State, and where the requesting Member State needs the technical assistance of the requested Member State to intercept his communications;
- (b) in the requested Member State, and where his communications can be intercepted in that Member State;
- (c) in a third Member State, to which a similar request for assistance has been made before the interception, and where the requesting Member State needs the technical assistance of the requested Member State to intercept his communications.

Justification:

To avoid misinterpretations, the amendment makes it clear that telephone communications may be intercepted even in the absence of the person concerned. The change to subparagraph (c) is required as a result of the deletion of Article 18 for reasons that will become apparent.

(Amendment 58)

Article 16, paragraphs 3, 4, 5 and 6

3. By way of derogation from Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, requests under this Article shall include the following:

- (a) an indication of the authority making the request;
- (b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;
- (c) information for the purpose of identifying the subject of the interception;
- (d) an indication of the criminal conduct under investigation;
- (e) the desired duration of the interception; and

3. In order to define and supplement the provisions of Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, requests under this Article shall include the following:

- (a) an indication of the authority making the request;
- (b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;
- (c) information for the purpose of identifying the subject of the interception;
- (d) an indication of the criminal conduct under investigation and a brief statement of the facts;
- (e) the (one word deleted) duration of the interception, which may not, however, exceed the statutory maximum period in the requesting Member State and the Member State requested;

(f) if possible, the provision of sufficient technical data to ensure that the request can be met (in particular the relevant network connection number).

4. In the case of a request pursuant to paragraph 2(b), a request shall also include a summary of the facts. The requested Member State may require any further information necessary to enable the requested Member State to decide whether the request would be granted if it had been made by a national authority of that Member State.

5. The requested Member State undertakes to comply with requests under paragraph 1(a):

(a) in the case of a request pursuant to paragraph 2(a) and 2(c), on being provided with the information in paragraph 3. The requested Member State may allow the interception to proceed without further formality;

(b) in the case of a request pursuant to paragraph 2(b), on being provided with the information in paragraphs 3 and 4 and where the request would be granted if it had been made by a national authority of that Member State. The requested Member State may make its consent subject to any conditions which it would impose had the request been made by one of its own national authorities.

6. Where immediate transmission is not possible, the requested Member State undertakes to comply with requests under paragraph 1(b) on being provided with the information in paragraphs 3 and 4 and where the request would be granted if it had been made by a national authority of that Member State. The requested Member

(f) as far as possible, the provision of any technical data available to ensure that the request can be met (seven words deleted).

4. The requested Member State may require any further information necessary to decide whether the request satisfies its national law.

5. The requested Member State undertakes to comply with requests for interceptions from the requesting State (56 words deleted) where the request would be granted if it had been made by a national authority of that Member State. The requested Member State may make its consent subject to any conditions which it would impose had the request been made by one of its own national authorities.

Deleted.

State may make its consent subject to any condition which it would impose had the request been made by one of its own national authorities.

Justification:

The amendments seek to link and harmonise the provisions in the Convention concerning requests for judicial assistance with those of Article 14 of the 1959 European Convention and Article 37 of the Benelux Treaty. With regard to paragraphs 3(e) and (f), the duration of the interception must be specified in advance. The uncertainty introduced by the term 'desired' could allow abuses and violations of fundamental rights. The provision of all data which the requesting state has at its disposal would prevent any further request for data and any unnecessary delays in executing the request for assistance.

(Amendment 59)
Article 16(7), (8) and (9)

7. Any Member State may declare when giving the notification provided for in Article 23(2) that it is bound by paragraph 6 only when it is unable to provide immediate transmission. In this case the other Member States may apply the principle of reciprocity.

8. When making a request under paragraph 1(b), the requesting Member State may, where it has a particular reason to do so, also request a transcription of the recording. The requested Member State shall consider such requests in accordance with its national law and procedures.

9. The Member State receiving the information provided under paragraphs 3 and 4 shall keep that information confidential in accordance with its national law.

7. Any Member State may declare when giving the notification provided for in Article 22(2) that it is bound by paragraph 5 only when it is unable to provide immediate transmission of the telecommunications. In this case the other Member States may apply the principle of reciprocity.

8. When making a request under paragraph 1(b), the requesting Member State may (ten words deleted) also request a transcription of the recording. The requested Member State shall comply with the request in accordance with its national law and procedures.

9. The Member State receiving the information referred to in paragraph 3 shall comply with the rules on confidentiality laid down in its national law.

Justification:

The changes in paragraph 7 arise from the new numbering; the amendment to paragraph 8 seeks to clarify the text (Italian text uses the word 'esigere' (require) which is inconsistent with the following verb 'consider', which infers that the assessment may be negative - this does not apply to the English version which reads 'request' not require). Finally, the change in paragraph 9 is for greater clarity.

(Amendment 60)
(Article 16, paragraph 9a (new))

9a. The interception shall in all cases by ordered by a court.

Justification:

The ‘infringement’ of a fundamental right – even if grounds are given – may be ordered only by a court.

Or. it

(Amendment 61)
Article 18

1a. Without prejudice to the general principles of international law as well as to the provisions of Article 16(2)(c), the obligations under this Article apply to interception orders authorised by the competent authority of one Member State in the course of criminal investigations which present the following characteristics: An investigation following the commission of a specific criminal offence, including attempts in so far as they are criminalised under national law, in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.

Deleted

1. Where for the purpose of a criminal investigation, the interception of telecommunications is authorised by the competent authority of one Member State (the intercepting Member State) and the telecommunication address of the subject specified in the interception order is being used on the territory of another Member State (the notified Member State) from which no technical assistance is needed to carry out the interception, the first mentioned Member State shall inform the other Member State on the interception:
(a) prior to the interception in cases where it knows when ordering the interception that the subject is on the territory of that Member State;
(b) immediately after it knows that the subject of the interception is on the

territory of that Member State in other cases.

2. The information to be provided by the intercepting Member State includes:

(a) an indication of the authority ordering the interception;

(b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation;

(c) information for the purpose of identifying the subject of the interception;

(d) an indication of the criminal conduct under investigation; and

(e) the expected duration of the interception.

3. The following shall apply where a Member State is notified pursuant to paragraphs 1 and 2:

(a) Upon receipt of the information provided under paragraph 2 the competent authority of the notified Member State shall, without delay, reply to the intercepting Member State, with a view to:

1. allowing the interception to be carried out or to be continued. The notified Member State may make its consent subject to any conditions which it would impose in a domestic case;

2. requiring the interception not to be carried out or to be terminated where the interception would not be permissible pursuant to the national law of the notified Member State, or for the reasons specified in Article 2 of the European Mutual Assistance Convention. Where the notified Member State imposes such a requirement, it shall give reasons for its decision in writing;

3. in cases referred to in subparagraph (a)2 requiring that any material intercepted while the subject was known by the intercepting Member State to have been on the territory of the notified Member State not be used as evidence in criminal proceedings.

(b) If, exceptionally, the notified Member State fails to reply within 96 hours from the time it was informed by the

intercepting Member State, this shall constitute a decision to prohibit the interception and the use of the intercepted material pursuant to subparagraphs a)2) and a)3). The notified Member State shall without delay give a written statement of reasons for that decision.

(c) The notified Member State may request a summary of the facts of the case and any further information, necessary to enable the notified Member State to decide whether interception would be granted in a domestic case. Such a request does not affect the application of subparagraph b), unless otherwise agreed between the notified Member State and the intercepting Member State.

(d) The Member States shall take the necessary measures to ensure that a reply can be given within the 96 hour period. To this end they shall designate contact points (to be on duty twenty four hours a day) under Article 21(e).

4. The Member State receiving the information provided under paragraph 2 shall keep that information confidential in accordance with its national law.

5. Where the intercepting Member State is of the opinion that the information disclosed by paragraph 2 is of a particularly sensitive nature, it may be transmitted to the competent authority through a specific authority where that has been agreed on a bilateral basis between the Member States concerned.

6. Any Member State may declare, when giving its notification under Article 23(2), or at any time thereafter, that it will not be necessary to provide it with the information on interceptions as envisaged in this Article.

Justification:

It is proposed that this highly controversial article be deleted, firstly since it could restrict intelligence activities designed to safeguard the security and integrity of a Member State and secondly it might allow the investigative bodies of one Member State to carry out interception

activities in another Member State without the latter's backing and authorisation. Essentially this is an area which needs to be looked at in greater depth before it becomes the subject of a Convention.

(Amendment 62)
Article 19

Costs which are incurred by telecommunications operators or service providers in executing requests pursuant to Article 16 shall be borne by the requesting Member State.

Save where otherwise agreed between the parties, costs which are incurred by telecommunications operators or service providers in intercepting telecommunications shall be borne by the requesting Member State.

(Amendment 63)
Article 21(1)(b)

(b) one or more central authorities for the purposes of applying Article 6 as well as the authorities competent to deal with the requests referred to in Article 6(8)(b),

(b) one or more central authorities for the purposes of applying Article 6 as well as the authorities competent to deal with the requests referred to in Article 6(8)(a) and (b)).

(Amendment 64)
Article 23(1a) (new)

1a. When adopting the instruments necessary for the application of this Convention, the Member States shall ensure that respect for the fundamental rights deriving from the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and from the national law of the Member State is guaranteed, and in particular:
- the right not to be deprived of personal liberty except in the cases explicitly laid down in Article 5 of the Convention
- the right of the individual to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him, to be brought promptly before a judge and to be tried within a reasonable time,
- the rights of the defence and in particular

equality of prosecution and defence,
- the neutrality and impartiality of the judge,
- the presumption of innocence until proved
guilty.

Justification:

These rights, which are formally enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, are not fully respected in some Member States.

(Amendment 65)
Article 23(2)

This amendment does not apply to the English text.

DRAFT LEGISLATIVE PROPOSAL

Legislative resolution of the European Parliament on the draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (9636/99 – C5-0091/1999 and SN 5060/1999 – C5-0331/1999 – 1999/0809(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the draft Council act and revised draft act (9636/1999 and SN 5060/1999),
 - having been consulted by the Council pursuant to Article 39(1) of the EU Treaty (C5-0091/1999 and C5-0331/1999),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0019/2000),
1. Approves the draft Council act as amended;
 2. Calls on the Council to alter its draft accordingly;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Asks to be consulted again if the Council intends to amend the draft act substantially;
 5. Instructs its President to forward its position to the Council and Commission.

B. EXPLANATORY STATEMENT

I. INTRODUCTION

I.1 Timetable

The Council wrote to the European Parliament on 3 August 1999, pursuant to Article 39 of the Treaty on the European Union, requesting its opinion on a draft convention to ensure improved mutual assistance in criminal matters between the Member States. The draft convention was later revised, and the revised draft was forwarded to the European Parliament by letter of 3 December 1999.

The Council has been attempting to provide the Member States with a new instrument for judicial cooperation in criminal matters for several years (with the first draft dating from the Italian presidency in the first half of 1996), and the last Parliament was asked to deliver an opinion on the Council's first draft convention, which was eventually shelved due to difficulties in reaching agreement between the Member States (5202/98 – C4-0062/98 – 98/0902 CNS). However, the action plan to combat organised crime approved by the European Council in Amsterdam (in June 1997) envisaged the new convention on mutual assistance in criminal matters being signed by the end of 1997 or the middle of 1998 (political guideline 4 and recommendation 16). Meanwhile, in the years 1997 to 1999, Parliament adopted a legislative resolution on a European judicial network² and two resolutions on judicial cooperation in criminal matters in the European Union³ and criminal procedures and the European public prosecutor⁴, in addition to a number of legislative resolutions concerning the implementation of the action plan to combat organised crime. In other words, the need to take action in this area has been recognised for several years, but the many doubts on the part of and divisions between the Member States have delayed any agreement up to now.

Now, once again, the European Parliament has been asked to deliver its opinion. But, yet again, this has been done with no regard for Parliament's prerogatives. First of all, the short time allowed has considerably reduced our prospects of carefully assessing the draft document by thoroughly discussing it within Parliament and seeking the advice of outside experts. The three months allotted are nothing compared to the four years or so for which the Council has been mulling over the proposal, and moreover no allowance has been made for Parliament's summer recess, the time needed to conduct hearings of the new Commissioners, and the fact that there has been a change of Parliament in the intervening period.

Above all, we must take issue once again (as Parliament did on the last occasion, to no apparent avail) with regard to the Council's anomalous – one might almost say, cavalier - interpretation of the provisions of Article 39(1) of the Treaty on European Union. This specifies that '*the Council shall consult the European Parliament before adopting any measure referred to in Article 34(2)(b), (c) and (d). The European Parliament shall deliver its opinion within a time-limit which the Council may lay down, which shall not be less than three months. In the absence of an opinion within that time-limit, the Council may act*'. It should be obvious to any impartial observer that the three-month period allowed to the European Parliament should be regarded as a minimum and not a maximum, particularly where there are practical difficulties such as those

² OJ C 371 of 8.12.1997, p.201

³ OJ C 104 of 6.4.1998, p. 267

⁴ OJ C 219 of 30.7.1999, p. 106

referred to above (and which are not of Parliament's making) in drawing up an opinion to such a short deadline. The approach adopted, as everyone recognises, is an insult to the spirit of cooperation which ought to be the hallmark of relations between the institutions of the Union.

Nevertheless, the European Parliament cannot stay on the sidelines, particularly in view of the fact that it is essential to propose to the Council a series of 'minimum' amendments with a view to remedying various very major omissions which would have the effect of doing more harm than good to international judicial cooperation in criminal matters. Parliament is fully aware of (and stresses) that further and stronger action needs to be taken in terms of concerted efforts to combat crime (for example, it is necessary to harmonise this whole area as soon as possible and to establish minimum standards for collaboration).

I.2. - The problem of judicial cooperation in criminal matters

International judicial cooperation is necessary both to tackle cross-border crime and to enlist the assistance of other Member States in identifying those responsible for crimes committed in a country, impound the proceeds or obtain evidence.

However, there are such considerable differences between the Member States' respective legal systems, both with regard to substantive law and procedure, that it has been difficult up to now to attempt to codify all the possible methods of judicial cooperation in a single, legally binding instrument (or a 'single code'). The draft convention submitted by the Council reflects the Member States' indecisiveness and falls short of a number of ambitious objectives while its failure to provide solutions weakens and undermines the actions of the Member States' judiciaries and limits the effectiveness of letters rogatory: consider, for example, the problematic requirement of 'dual criminal liability' as a prerequisite for the granting of Member States' requests for judicial assistance, despite the fact that all parties continue to express 'their confidence in the structure and functioning of their legal systems and in the ability of all Member States to guarantee a fair trial' (to quote from the preamble of the draft convention). Another problem which has not been addressed is the need to set well-defined deadlines for the execution of letters rogatory, as it often happens that, by the time these are executed, the alleged offences have been time-barred or the trial has been concluded. There is no reference to the possibility of, procedures for or limits on using the various Member States' 'judicial data banks' or to the setting up such data banks at European Union level for shared use. Similarly, there is no attempt to address the problem of the excessive number of 'reservations' which the Member States are accustomed to enter when ratifying international conventions on criminal matters, with the result that the aim of such conventions is thwarted and their spirit betrayed. Nor does the draft convention tackle the question of harmonising at European level various aspects of criminal law (particularly with regard to financial and tax matters and company law). Yet even now, actions may be regarded as offences in one country and not in another, not to mention the innumerable offences which are regarded differently from one Member State to another. For example, we can see by comparing the Member States' legislation that a person who attempts to bribe a state employee with his or her (sometimes tacit) encouragement may be regarded as either culprit or victim, depending on the country.

To sum up, after four years' labour, the mountain has brought forth a mouse. But, despite the many shortcomings of this text, all the provisions to improve the existing situation should be endorsed, albeit in an amended form, because, however flawed, it is better than nothing and, one step at a time, it will be possible to beat the problem of international organised crime.

So the need to ensure that the citizens of the Union can really live in an area of freedom, security and justice compels us to do all we can to encourage the achievement of all means necessary – no matter how modest – to take a firm stand against both large-scale and small-scale crime, by cooperating at European level where necessary. This draft convention is definitely a useful instrument.

1.3. Constitutional framework

Article 29 of the Treaty on the European Union states that the Union's objective shall be to provide citizens with a 'high level of safety' within an area of freedom, security and justice by, inter alia, developing 'common action' among the Member States in the fields of police and judicial cooperation in criminal matters.

To achieve this objective, all the Member States will have to take action to prevent crime, and in particular organised crime (terrorism, trafficking in persons, drugs and arms, corruption and fraud) by means of increased cooperation between their judicial authorities and by bringing the ground rules of their criminal law into alignment.

Article 31 specifies the objectives of common action on judicial cooperation in criminal matters: facilitating and accelerating cooperation between competent ministries and judicial authorities of the Member States in relation to proceedings and the enforcement of decisions; facilitating extradition; ensuring compatibility between the applicable rules; preventing conflicts of jurisdiction; progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

The acts that can be adopted by the Council, unanimously and on the initiative of a Member State or the Commission, are: common positions; framework decisions, which are not unlike directives; decisions and conventions (Article 34), with conventions being able to enter into force – an important step forward – after they have been ratified by at least half of the signatory states.

With regard to the question of the possible implications of judicial cooperation in criminal matters for the institutions' political and legislative activities, attention should be drawn in particular to the new provisions concerning the role of the Court of Justice (Article 35), obligatory consultation of the European Parliament (Article 39) and 'closer cooperation' (Article 40).

So the substance of the draft convention should be assessed on the one hand in the light of the new rules relating to the area of freedom, security and justice in the European Union and, on the other, by reference to its main objectives: to 'supplement' (Article 1), at the level of the Member States of the EU, existing agreements established in other contexts (Council of Europe, Benelux Union, Schengen) to improve judicial cooperation in criminal matters by ensuring that mutual assistance is provided in a fast and efficient manner compatible with the basic principles of the Member States' national law and the European Convention for the Protection of Human Rights. This objective should be pursued in a spirit of mutual confidence in the Member States' respective legal systems and in their ability to guarantee fair trial (second, third and fourth recitals of the preamble).

The amendments briefly summarised below have been put forward bearing in mind the foregoing points and with a view to implementing the legal instruments referred to in the draft convention in a more coordinated and effective manner.

II. CRITICAL ANALYSIS OF THE COUNCIL PROPOSAL: PROPOSED AMENDMENTS

The points made in the Buffetaut report (A4-0122/98) on the first draft convention presented by the Council during the previous Parliament are still topical and valid, particularly the argument that the contents of the draft convention should be assessed in the light of its objectives, which are to incorporate (not replace) earlier agreements set up in other legal contexts (listed in Article 1 of the draft convention) *‘to improve judicial cooperation in criminal matters by ensuring that mutual assistance is provided in a fast and efficient manner compatible with the basic principles of the Member States’ national law, including the principles of the European Convention for the Protection of Human Rights’*.

The draft agreement consists of four titles, of which the first three deal with substantive matters while the last contains final provisions relating to notification, ratification and entry into force. The first section (Title I) begins by laying down provisions to standardise the procedures and formalities for executing letters rogatory (with the Member States being required to comply with the formalities and procedures indicated by the requesting Member State, providing they are not contrary to the fundamental principles of law in the requested Member States – Article 4). The text also provides for procedural documents to be sent to and served on persons who are in the territory of another Member State to be sent by post as a general rule (Article 5). It also contains a very important and significant provision requiring the transmission of requests for mutual assistance to be made *‘directly between judicial authorities with territorial competence’* as a rule, rather than through diplomatic and ministerial channels as before (Article 6). It also provides for the possibility of the competent authorities of the Member States spontaneously exchanging information relating to criminal offences without having to obtain authorisation from, or being vetted by, various authorities.

The second section (Title II) lists a series of requests for specific forms of mutual assistance and sets out the formalities and procedures to be followed. In particular, the Member States would be able to return goods on their territory that had been obtained by criminal means in other Member States either to the requesting Member State or directly to their rightful owners, regardless of the nationality of the latter (Article 8). The text also provides for the transfer of persons held in custody from one state to another for purposes of investigation (Article 9). There is also provision for accused persons to be interrogated and for witnesses in countries other than those in which evidence is being taken to be heard by means of video or telephone conferences (Articles 10 and 11).

Also with a view to stepping up the fight against organised crime, the text lays down provisions to regulate and make possible so-called *‘controlled deliveries’* of goods connected with criminal activities (such as consignments of drugs) on Community territory with a view to facilitating investigations (Article 12). Finally, the text provides for the setting up of *‘joint investigation teams’* composed of members of the authorities of the Member States responsible for criminal investigations (Article 13) and the presence in Member States of *‘officers acting under covert or false identity’* with a view to infiltrating certain areas of the criminal community and breaking the conspiracy of silence protecting them (Article 14).

Articles 14a and 14b cover the criminal and civil liability of officials of one Member State operating on the territory of another Member State as part of ‘controlled deliveries’, ‘joint investigation teams’ or ‘covert investigations’.

The third section (Title 3) addresses the delicate matter of the interception of telecommunications, and provides for the possibility of using this means of pursuing a criminal investigation in accordance with the procedures, and subject to the limits laid down by, Articles 16 et seq. of the draft convention. In practice, it makes it possible to request mutual assistance to intercept a communication when the person in communication is on the territory of the requesting Member State if the technical assistance of the requested state is necessary in order to intercept the communications of the person in question, or if the person is in the territory of the requested Member State, if the communication can be intercepted by the requested Member State (Article 16), or to intercept telecommunications operated via a gateway through the intermediary of a service provider in a third Member State (e.g. when the operation of satellite stations is involved – Article 17). It also provides for the much-discussed – and, as we shall see, controversial – possibility of intercepting telecommunications of persons on the territory of another Member State without the technical assistance of the latter (Article 18).

Despite its apparent consistency, on closer reading it appears that the text submitted by the Council suffers from various contradictions and inconsistencies in relation to its original purpose. It is plain to anyone reading this draft convention that it has been put together by many hands over the years, seeks to incorporate proposals from various quarters, and is the outcome of four years' horse-trading in the Council in an effort to reach a compromise between the reservations expressed by the various national delegations.

We have therefore proposed various amendments, not to raise new issues in an area which, as we have said, has generated so many unresolved problems, but simply to attempt to reorganise the Council proposal on a more systematic basis by proposing a series of technical changes to make the text more harmonious and consistent.

These may be summed up as seeking to: (a) place greater emphasis on the fundamental rights of the defence; (b) introduce various technical modifications required to make a series of obscure or contradictory passages more readily comprehensible; (c) delete Article 18 concerning the interception of telecommunications of persons on the territory of a Member State without the technical assistance of the latter.

These amendments, within the limits imposed by the fact that, as we have said, they are the outcome of a partial and non-definitive exercise, may however help to achieve the new draft convention's original objective: to provide the judicial authorities with a flexible, pragmatic and effective instrument to combat organised international crime by means of judicial cooperation, in particular by simplifying the process of acquiring evidence of certain criminal acts (either in the event of such acts being committed in more than one state, or in the event of acts being committed in one Member State but it being impossible to obtain evidence thereof without the help of other Member States). So let us briefly examine these amendments:

(a) Rights of the defence

Neither the preamble nor the body of the text, the contents of which is likely to have an impact on fundamental freedoms, takes sufficient account of a basic principle which should govern international mutual assistance in criminal matters: the need to take account, in addition to the general principles of the various Member States' domestic law, fundamental individual rights (Amendments 2, 3, 4 and 5).

In addition to stressing the need for compliance with the principles of the European Convention on Human Rights and Fundamental Freedoms, it is also essential to harmonise the existing discrepancies between the 15 Member States' respective legal systems with a view, for example, to initiating a process of bringing all the Member States' legal systems into line with those offering the strongest safeguards in respect of the rights of the defence. This process of 'upward harmonisation' will not only avoid creating disparities in the treatment accorded to nationals and residents of the European Union, but will also mark a step forward in the development of the Union's judicial culture.

Bearing in mind this question of the rights of the defence, we have also sought to amend Articles 10 and 11 (amendments 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49), which deal with the possibility of hearing witnesses and experts by video conference or telephone conference. The procedure laid down is the same, but Article 10(9) of the draft Council act refers also to accused persons. It is obvious that the different rules cannot be applied on the basis of the technical means used (there is no great difference between turning on a tape recorder and a video recorder), but on the basis of the different degree of protection accorded to the rights of the person heard depending on whether he is a witness or an accused person (or potential suspect). So we have taken the step of providing a single text to cover the hearing of witnesses and experts, while establishing a separate article to cover the hearing of accused persons, who should always be assured of special safeguards (the right to be accompanied at all times by one's defence counsel, to understand the language, to be able to decline to reply and so on).

We have also submitted an amendment to Article 9 (amendment 34) providing for the immediate release of persons held in custody who had been transferred to another state for purposes of investigation in the event of the period for which they had been remanded in custody coming to an end while they were being held in the country to which they had been transferred.

Amendments have also been put forward to make significant changes to the provisions on the interception of communications, with a view to limiting its use and improving the protection of the fundamental rights of individuals, including the right to privacy. This is why we have proposed the deletion of Article 18 (amendment 61), a limit on the maximum time to which persons may be subject to such interception and compliance with the relevant rules applied both in the requesting and in the requested State (amendment 57).

(b) Scope and definitions

Establishing the limits within which a given activity may or may not be authorised is a question of primary importance, particularly in this area. It is no coincidence that the question of the convention's proposed scope was one of the points that caused the greatest problems in the Council. Article 2 provides a rather vague definition of the procedures in connection with which assistance is to be accorded: such assistance is to be accorded 'also' in proceedings brought by

the administrative authorities in respect of offences punishable under the national law and ‘also’ in connection with criminal proceedings and procedures brought against a legal person⁵. To what does ‘also’ refer? What is missing is an initial, essential section clearly establishing that mutual assistance is to be accorded above all – and systematically – in proceedings in respect of criminal offences brought by judicial authorities (amendment 14).

A series of ‘tidying up’ amendments have been tabled with a view to reorganising the proposal on a more rational basis. For example, the definition of ‘competent authority’ appears only in Article 15 of the draft convention, although that term is used several times before that article in the text. The rapporteur had proposed that all the definitions employed should be grouped together in a single article at the beginning of the text (Article 3, amendment 12 in the draft report) but the committee rejected this proposal.

The aim of amendments 19 and 20 relating to Article 5, which concerns the possibility of sending procedural documents by post, is to reword a text which, as it stands, is legal nonsense by avoiding such vague terms as ‘ineffective’ and ‘inappropriate’ and clearly specifying the cases in which it may be impossible to send such documents by post, i.e. when the procedural rules of a Member State do not allow documents to be served by post or when the address of the person for whom the document is intended is unknown.

Amendment 24 seeks to replace, in Article 7(1), the word ‘exchange’ by the word ‘provide’, as this does not technically refer to an ‘exchange’ (which implies that each side gives information to the other in the course of the same investigation) but to an authority in one Member State offering information to an authority in another Member State. The amendment also seeks to insert clauses to prevent the use of such information being conditional on, or indeed precluded by, vague restrictions. The article has been reworded to provide for the possibility of refusing to receive such information if its receipt could turn out to impede rather than facilitate the investigation as a result of the conditions imposed by the State offering such information.

With regard to Article 9 on the temporary transfer of persons in detention, amendment 28 seeks to include, in addition to cases of spontaneous agreement between the authorities of the states concerned (in which event there would be no need for letters rogatory), the possibility of submitting an official request for the transfer of a person in custody for the purposes of a criminal investigation, while also laying down rules concerning the immediate release of persons in custody if the period for which they have been remanded comes to an end during the period of transfer.

Amendment 50 (Article 12) relates to information on the progress of operations involving ‘controlled deliveries’. The aim is to amend the text to ensure that the state which is asking for permission to carry out controlled deliveries is informed promptly of activities carried out in the requested State, and take the necessary steps to pursue its own investigative activities.

To improve transparency, amendment 53 seeks to amend the provisions of Article 14 relating to covert operations. We do not consider it efficient for such delicate operations to be set up by simple agreement between the States; on the contrary, provision should be made for formal

⁵ Amendments 12 and 13 tabled by other members of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs sought to remove the possibility of providing judicial assistance in proceedings relating to acts punishable as infringements brought by administrative authorities, and in criminal proceedings of other kinds relating to offences or infringements for which a legal person may be held liable.

requests and their subsequent acceptance, to ensure that the whole procedure can be subject to control by the judicial authorities, as otherwise this would simply involve police activities.

(c) Interception of communications

The great unresolved political issue in this draft convention, despite the best intentions of the Finnish Presidency, is contained in Title III on the interception of telecommunications. Firstly, we must define the object of such interceptions, which is not persons, but their communications. Further, what exactly is meant by the term 'telecommunications'? Communications by fixed link, via satellite, via telematic systems, or simply face-to-face conversations? It is essential to specify the terms used (amendment 56), as otherwise there would be an increased risk of legal objections at a later stage, particularly when the question of using the evidence thus obtained arose.

However, the main problem arises from Article 18 (Title III). This provides for the possibility of intercepting 'subjects' on the national territory of another Member State without seeking the technical assistance of the latter. This leads us into a legal minefield in which some Member States wish to maintain the possibility of pursuing completely independent investigations in other Member States to ensure their own national security (by means of secret agents?) and dispensing with the time-consuming business of obtaining permission from the other countries' judicial authorities; while other States wish, in order to be able to monitor investigations of that kind, to ensure that they require prior official authorisation. This would involve recognising the possibility of resorting to the technical device of intercepting telephone calls on a 'preventive' basis, not just after offences have been committed and once sufficient evidence has been obtained against a person who might be involved in the criminal activities in question.

That is why we have to acknowledge that the time is not yet right to include this problematic area in Community legislation: it is a very delicate matter which needs to be considered further, and careful consideration of the relevant provisions leads to the conclusion that it would be unwise to pass legislation at European level at this stage. It would be better, therefore, to delete Article 18 and to continue to allow the prosecution of those responsible for illegal activity whenever similar operations are uncovered. Maintaining the provisions of Article 18 would mean legalising the 'grey' activities of the secret services and, at the same time, would require the Member States to make their own activities in the area of 'preventive security' subject to the involvement of the judicial authorities when the latter, by definition, should only be involved after offences have been committed.

III. FINAL REMARKS

As we have already acknowledged, there are still some differences within the Council in relation to the draft convention, despite the fact that the General Affairs Council of 2 December 1999 agreed to complete the establishment of the convention in March 2000.

Parliament's opinion, which is obligatory but not binding, will be provided, as your rapporteur noted at the outset, at very short notice, to comply with the deadlines set by the Council, and with a strong sense of Parliament's responsibility to submit concrete proposals for possible solutions or improvements before the final decision is taken in Council.

The underlying aim of the present proposal is to provide not only the judicial authorities, and in particular judges, but also concerned citizens with a valid and effective instrument to assist action to combat crime while providing fundamental safeguards for the rights of the defence and the basic principles of human rights. This is why, despite the text's many shortcomings, the provisions it contains may be approved, provided that they are suitably amended to ensure that they are effective for the purposes of the judicial authorities and acceptable in the eyes of Europe's citizens.

8 November 1999

OPINION
(Rule 162)

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the draft Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (9636/99 – C5-0091/99⁶ (report TO6462) (rapporteur Antonio Di Pietro)

Committee on Legal Affairs and the Internal Market

Draftsman: François Zimeray

PROCEDURE

At its meeting of 23 September 1999 the Committee on Legal Affairs and the Internal Market appointed François Zimeray draftsman.

It considered the draft opinion at its meetings of 11 October and 8 November 1999.

At the latter meeting it adopted the following conclusions with 3 votes against.

The following were present for the vote: Palacio Vallelersundi, chairman; Beysen, Rothley and Wieland, vice-chairmen; Crowley, Dehousse, Ferri, Fourtou, Garaud, Gebhardt, Lord Inglewood, Koukiadis, Lehne, MacCormick, Manders, Marinho, Medina Ortega, Moraes, Uca, Villiers, Wallis, Zappalà and Fiori (pursuant to Rule 153(2)).

I. Introduction

The draft convention supplements the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 May 1959⁷ and is based on Article 34(2)(d) of the Treaty on European Union. Some provisions of the draft convention concern the Schengen *acquis*. Pursuant to Article 39 (1) of the Treaty on European Union, Parliament must be consulted on the convention.

We have to acknowledge the fact that there is still room for improvement as regards judicial cooperation between the Member States and that it is in the common interest of the Member States to equip themselves with the means of improving cooperation between themselves so as to enable more drastic measures to be taken to counteract cross-border crime. Mutual assistance, the adaptation of procedures to new technologies, the use of modern means and the gradual establishment of a European judicial area are praiseworthy objectives recalled by Article 1 of the

⁶ OJ C 251, 2.9.1999, p.1.

⁷ And the Additional Protocol of 17 March 1978 to the European Mutual Assistance Convention which includes fiscal offences in the scope of the convention.

draft convention. However, many examples of woolly drafting have been found which are incompatible with the objective of legal certainty. On many points, the text which has been submitted could be made more precise, leaving aside any considerations of style. This text is intended to govern criminal procedure, and the vagueness of certain passages is not conducive to the protection of citizens' rights

First of all, this draft convention is imprecise with regard to its scope:

2. Definition and scope

We should point out that by its very nature criminal law must be interpreted strictly and that in this field more than in any other there is a need for absolute clarity.

Article 5(1) of the draft convention reads as follows: 'Each Member State shall send procedural documents intended for persons who are in the territory of another Member State to them directly by post'. It would have been preferable to refer more precisely to the identity of the persons to whom the documents are being sent (judicial authorities? administrative authorities, complainants?).

Article 13(1) provides as follows: 'Where necessary, officials of international organisations or bodies may be part of the team'. These are joint investigation teams which may be set up by several Member States. It would have been appropriate to specify which types of international organisations or bodies, which are inordinately wide terms, are permitted to take part in those investigations.

The same applies to the possibility of carrying out 'Investigations under covert or false identity' (Article 14(1)), where it is stated that they can be carried out by 'officers' acting on behalf of the Member States without stipulating a common framework of requirements at European level.

In the same way, the carrying out of criminal investigations 'by officers acting under cover or false identity' is rather a serious measure which would have justified a more precise definition of the circumstances in which such investigations can be conducted. The draft convention does not stipulate any restrictions, any threshold of seriousness or any special rules for the use of these investigative powers.

In Title III, Interception of Telecommunications, we should point out that under Article 8(2) of the European Convention on Human Rights and Fundamental Freedoms, interference by a public authority is subject to strict conditions: it must be 'in accordance with the law' and 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'⁸.

⁸ The term 'competent authority' is defined in Article 15 of the draft convention as far as the interception of telecommunications is concerned but is not systematically incorporated in Articles 16, 17 and 18 of the draft convention which refer to interception by the 'Member State'. See Article 6 of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, p.1.

But above all, the scope of the draft convention is not laid down precisely with regard to the seriousness of the alleged offences.

The provisions which have been drawn up pursue the very laudable political objective of combating certain serious features of modern crime, but the proposed text is in no way restricted to the most serious crimes and offences (murder and related crimes, Mafia practices, drug trafficking, money laundering etc.). On the contrary, the way in which it is drafted at present makes it possible to use disproportionate international investigation measures against minor offences and might constitute a serious threat to personal freedoms if, because of the vagueness of the Convention, it were to be abused by some ‘**officer**’ of a Member State. This would be all the more serious in view of the fact that the scale of offences is not the same in all countries.

At present, the Convention might provide a basis for using measures which are out of proportion to the end pursued.

3. *The capacity of the public judicial authorities and the protection of personal freedoms.*

Although Article 4(1) makes express reference to compliance with the formalities and procedures expressly indicated by the Member State ‘provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State’, it would have been appropriate to pay greater attention in particular to fundamental rights and personal freedoms.

Several provisions contained in the draft convention might, if not amended, pose serious obstacles to the protection of individual rights.

Thus, the drafting of Article 3 of the draft convention, which defines a criminal investigation may seem to undermine the presumption that a person is innocent until proved guilty. In fact, a criminal investigation is defined as ‘an investigation following the commission of a specific criminal offence in order to identify and arrest, charge, prosecute or deliver judgement on those persons responsible’. The use of the words ‘persons presumed responsible’ would have been more judicious since by virtue of the presumption of innocence, as long as a person has not been tried, he or she cannot be deemed to be guilty or even ‘responsible’.

In addition, it would have been better to define the concept of ‘competent authorities’ within the meaning of Article 7(1). These authorities might be investigators, police officers, or judges or even simply administrative or local authorities or public officials, depending on the national laws. Those authorities can spontaneously exchange information on matters which have not been referred to them within the context of a pending procedure, without the possibility of any judicial review.

Article 9 of the draft convention, which provides for the temporary transfer of persons held in custody for purposes of investigation, is bound to come up against the problem of the differences between the legal systems, different codes of criminal procedure and different practices applicable in the Member States. For example, the average length of procedure differs from one Member State to another and for that reason the measure whereby persons in custody are temporarily transferred will not necessarily reduce excessive periods in custody.

Unfortunately, no efforts at harmonisation have been made in this field, although it is one in which the European Court of Human Rights has ruled against several Member States⁹.

Although the European Convention on Human Rights and Fundamental Freedoms applies, an express reference in this connection to representation by a lawyer would not have been superfluous.

There is a danger of a levelling down to the standards of the less advanced Member States of the Union, in other words a sort of 'judicial dumping'.

Article 10 provides for the hearing of witnesses or experts by video conference. Nevertheless, the possibility of a hearing by video conference could have been extended to accused persons. The distinction made between the accused and witnesses or experts who are the only persons entitled to take advantage of video conferencing, is contrary to the concept of a more modern and speedier system of justice and one more concerned about the presumption of innocence.

Pursuant to the last sentence of Article 10(9), 'Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument'. The application of Article 10 ought therefore to be suspended until that legal instrument has been adopted.

Articles 17 and 18 of the draft convention concern interception of telecommunications.

In themselves, the proposed measures are technically necessary in view of developments in means of communication and especially the introduction of the cordless telephone system (GSM).

However, the application of the draft convention as worded at present is very likely to encourage the infringement of personal freedoms.

The criteria for authorisation of the interception of telecommunications differ from one Member State to another, as do the authorities entitled to order such interception. Here again, it is regrettable that no efforts have been made to harmonise these provisions and that no threshold of seriousness of offences has been established above which such interception would be possible and, conversely, below which it would be prohibited. This would also help to keep in proportion the reactions of the judicial authorities to acts for which a person can be convicted.

⁹ Letellier v France of 26 June 1991, Series A No 207

CONCLUSIONS

The Committee on Legal Affairs and the Internal Market approves in principle the guidelines underpinning the Draft Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Council

Amendments by Parliament

(Amendment 1)

Preamble

Draft Convention

established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.

THE HIGH CONTRACTING PARTIES to this Convention, Member States of the European Union,

REFERRING to the Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,

Proposal for a framework decision of the Council

on Mutual Assistance in Criminal Matters between the Member States of the European Union.

The Council of the European Union,

having regard to the Treaty on European Union, and in particular Article 34(2)(b) thereof,

having regard to the initiative by Finland, as the Member State holding the Presidency of the Council,

having regard to the opinion of the European Parliament,

(The term 'Convention' is to be replaced by the term 'framework decision' throughout the remainder of the text)

(Remainder of preamble unchanged)

(Amendment 2)
Preamble, fifth recital

EXPRESSING their confidence in the structure and functioning of their legal systems and in the ability of all Member States to guarantee a fair trial,

CONSIDERING that there are great differences between the legal systems of the Member States and the way in which general legal principles are actually applied and that there is a need to approximate those legal systems so that the judicial system as a whole is more effective and ensures greater compliance with human rights,

(Amendment 3)
Preamble, recital 5a (new)

CONSIDERING that there is a need to ensure that, within the context of mutual assistance, the means used to combat an offence which has been committed are in proportion to the offence itself,

(Amendment 4)
Article 1(2)a (new)

The Council shall adopt, in accordance with the procedure laid down in Article 34(2)(d) of the TEU, on the basis of the objective referred to in Article 29 of the TEU and within the periods referred to in the action plan of the Council and the Commission on the establishment of an area of freedom, security and justice, the measures necessary to implement this framework decision.

(Amendment 5)
Article 2(2)a (new)

2a. The measures applied by the participating Member States under the mutual assistance procedure must comply with the principle of proportionality.

(Amendment 6)
Article 3
Criminal investigation

For the purposes of Title III of this Convention, a 'criminal investigation' is an investigation following the commission of a specific criminal offence in order to identify and arrest, charge, prosecute or deliver judgment on those persons responsible.

For the purposes of Title III of this Convention, a 'criminal investigation' is an investigation following the commission of a specific criminal offence in order to identify and arrest, investigate, prosecute or deliver judgment on those persons presumed responsible.

(Amendment 7)
Article 5

Sending and service of procedural documents

1. Each Member State shall send procedural documents intended for persons who are in the territory of another Member State to them directly by post.

2. Procedural documents may be sent via the competent authorities of the requested Member State only if:

- the address of the person for whom the document is intended is unknown or uncertain, or

- the relevant procedural law of the requesting Member State requires proof other than proof that can be obtained by post of the service of the document on the addressee, or

- it has not been possible to serve the document by post, or

- the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate.

3. Where there is reason to believe that the addressee does not understand the language in which the document is drafted, the

Sending and service of procedural documents

1. The requested Member State shall arrange for service or notification of the document, either in accordance with the law of the requested Member State or in the specific form desired by the requesting Member State, provided that this is compatible with the law of the requested Member State.

2. Procedural documents must be drafted in the language(s) of the requesting and the requested Member State and in the national language of the addressee. These versions shall be served together.

Deleted.

document – or at least the important passages thereof – must be translated into (one of) the language(s) of the Member State in the territory of which the addressee is staying. If the authority by which the procedural document was issued knows that the addressee understands only some other language, the document – or at least the important passages thereof – must be translated into that other language.

4. All procedural documents shall be accompanied by a report stating that the addressee may obtain information from the authority by which the document was issued or from other authorities in that Member State regarding his or her rights and obligations concerning the document. Paragraph 3 shall also apply to that report.

5. Articles 8, 9 and 12 of the European Mutual Assistance Convention and Articles 32, 34 and 35 of the Benelux Treaty shall apply.

3. All procedural documents shall be accompanied by a report stating that the addressee may obtain information from the authority by which the document was issued or from other authorities in that Member State regarding his or her rights and obligations concerning the document.

4. Articles 8, 9 and 12 of the European Mutual Assistance Convention and Articles 32, 34 and 35 of the Benelux Treaty shall apply.

(Amendment 8)
Article 6 (2) and (3)

2. Paragraph 1 shall not prejudice the possibility of requests being sent or returned in specific cases:

(a) between a central authority of a Member State and a central authority of another Member State, or

(b) between a judicial authority of one Member State and a central authority of another Member State.

3. A Member State may declare, in a statement to be sent to the depositary of this Convention, that its judicial authorities do not, or do not in general, have authority to execute requests received directly as envisaged in paragraph 1, or requests received from a central authority as envisaged in paragraph 2(b), and that requests and information must therefore be sent via the central authority or authorities of the Member State to the extent indicated in

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the statement. The Member State may at any time amend its statement by means of a communication to be made to the depositary and any such amendment shall be for the purpose of giving greater effect to paragraph 1.

(Amendment 9)
Article 6(7)

7. Any Member State may declare, when giving the notification provided for in Article 23(2), that it is not bound by the first sentence of paragraph 5 and/or by paragraph 6 or that it will only apply those paragraphs under certain conditions which it shall specify. Such a declaration may be withdrawn or amended at any time.

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(Amendment 10)
Article 7(3)a (new)

Spontaneous exchange of information

3a. At all events, the procedure followed in exchanging the information, the authorities which have requested it, those which have provided it and the content of the information must all be documented. The document recording them must be placed in the file of the proceedings to which they relate and must be made available to the defence.

(Amendment 11)
Article 9(1)a (new)

The transfer shall be made in such a way that it does not infringe the rights of the accused. The person being held in custody who is to be transferred temporarily shall have the right to the assistance of defence counsel.

(Amendment 12)
Article 9(3) and (6)

3. Where consent to the transfer is required from the person concerned, a statement of consent or a copy thereof shall be provided promptly to the requested Member State.

6. Any Member State may declare when giving the notification provided for in Article 23(2) that, before reaching an agreement under paragraph 1 of this Article, the consent referred to in paragraph 3 of this Article will be required or will be required under certain conditions indicated in the declaration.

3. Where consent to the transfer is required from the person concerned, a statement of consent or a copy thereof shall be provided in advance to the requested Member State.

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(Amendment 13)
Article 10(1)

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference, as provided for in paragraphs 2 to 8.

1. If a person is in one Member State's territory and has to be heard as a suspect, witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by video conference, as provided for in paragraphs 2 to 8.

(Amendment 14)
Article 10(5)(e)a (new)

(e)a. the person to be heard may be assisted during the video conference by defence counsel whom he trusts.

(Amendment 15)
Article 10(9), first paragraph

9. Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving an accused person. In this case, the decision to
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9. Member States may also apply the provisions of this Article, through the intermediary of their competent judicial authorities, to hearings by video conference involving an accused person. In this case, the decision to hold the video conference,

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hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention on Human Rights.

and the manner in which the video conference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention on Human Rights.

(Amendment 16)

Article 10(9), third subparagraph

Hearing by video conference

Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.

Hearings shall only be carried out with the consent of the accused person. This article shall come into force when the Council has adopted, in a legally binding instrument, such rules as may prove to be necessary with a view to the protection of the rights of accused persons.

(Amendment 17)

Article 10(9)a (new)

9a. The right of the defence counsel of persons under investigation in respect of whom the evidence obtained by means of a video conference may be used shall always be guaranteed.

(Amendment 18)

Article 10(10) (new)

10. The hearing of the suspect pursuant to paragraph 1 of this article shall be permissible only during the investigation and before the beginning of the actual trial before the court which concludes with a judgment.

Hearing of witnesses and experts by telephone conference

Deleted.

1. If a person is in one Member State's territory and has to be heard as a witness or expert by a judicial authority of another Member State the latter may, where its national law so provides, request assistance of the former Member State to enable the hearing to take place by telephone conference, as provided for in paragraphs 2 to 5.

2. A hearing may be conducted by telephone conference only if the witness or expert agrees that the hearing take place by that method.

3. The requested Member State shall agree to the hearing by telephone conference where this is not contrary to its fundamental principles of law.

4. An application for a hearing by telephone conference shall contain, in addition to the data referred to in Article 14 of the European Convention on Mutual Assistance and Article 37 of the Benelux Treaty, the name of the judicial authority and of the persons who will be conducting the hearing and an indication that the witness or expert is willing to take part in a hearing by telephone conference.

5. The practical arrangements regarding the hearing shall be agreed between the Member States concerned. When agreeing such arrangements, the requested Member State shall undertake to:

- notify the witness or expert concerned of the time and the venue of the hearing;
- ensure the identification of the witness or expert;
- verify that the witness or expert agrees to the hearing by telephone conference.

The requested Member State may make its agreement subject, fully or in part, to the relevant provisions of Article 10(5) and (8).

Unless otherwise agreed, the provisions of Article 10(7) shall apply mutatis mutandis.

(Amendment 20)
Article 13(3)(b)a (new)

(b)a. the team cannot include members of the judiciary acting as judges in the Member States concerned.

(Amendment 21)
Article 13(8)

8. Information lawfully obtained by an official while forming part of a joint investigation team based in another Member State may be used for the purposes of criminal investigations in the seconding Member State under the same conditions as if the information had been obtained by way of mutual assistance.

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(Amendment 22)
Article 15

For the purpose of the application of the provisions of Articles 16, 17 and 18, 'competent authority' shall mean a judicial authority, or, where judicial authorities have no competence in this area, an equivalent competent authority, specified pursuant to Article 21(1)(e) and acting in the framework of a criminal investigation.

For the purpose of the application of the provisions of Articles 16, 17 and 18, 'competent authority' shall mean a judicial authority specified pursuant to Article 21(1)(e) and acting in the framework of an investigation into a serious criminal offence.

(Amendment 23)
Article 15a (new)

The application of Articles 16, 17 and 18 shall respect Article 8(2) of the European Convention on Human Rights and Fundamental Freedoms, Article 8 of Directive 95/46 and Article 14 of Directive 97/66.

(Amendment 24)
Article 16(3)(e)

(e) the desired duration of the interception;
and

(e) the duration of the interception; and

(Amendment 25)
Article 16(9)a (new)

9a. The interception shall always be ordered
by a court.

(Amendment 26)
Article 18(6)

6. Any Member State may declare, when
giving its notification under Article 23(2), or
at any time thereafter, that it will not be
necessary to provide it with the information
on interceptions as envisaged in this Article.

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(Amendment 27)
Article 21(1), first subparagraph

FINAL PROVISIONS

Article 21

Statements

1. When giving the notification referred to in Article 23(2), each Member State shall make a statement naming the authorities which, in addition to those already indicated in the European Mutual Assistance Convention and the Benelux Convention, are competent for the application of this Convention and the application between the Member States of the provisions on mutual assistance in criminal matters of the instruments referred to in Article 1(1), including in particular:

FINAL PROVISIONS

Article 21

Statements

1. When providing the information referred to in Article 23(2), each Member State shall make a statement naming the authorities which, in addition to those already indicated in the European Mutual Assistance Convention and the Benelux Convention, are competent for the application of this Convention and the application between the Member States of the provisions on mutual assistance in criminal matters of the instruments referred to in Article 1(1), including in particular:

(Amendment 28)

Article 22

Reservations

No reservations may be entered in respect of this Convention, other than those for which it makes express provision.

Cooperation between Member States

In accordance with the conventions, bilateral or multilateral agreements or other arrangements applicable, Member States shall assist one another as fully as possible in the procedures to which this framework decision relates.

Entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Convention.

3. This Convention shall enter into force ninety days after the notification referred to in paragraph 2 by the State, Member of the European Union at the time of adoption by the Council of the Act establishing this Convention, which is last to complete that formality.

4. Until this Convention enters into force, any Member State may, when giving the notification referred to in paragraph 2 or at any other time, declare that as far as it is concerned this Convention shall apply to its relations with Member States which have made the same declaration. Such declarations shall take effect ninety days after the date of deposit thereof.

5. This Convention shall apply only to requests for mutual assistance submitted after the date on which it enters into force or is applied as between the requested Member State and the requesting Member State.

Implementation

1. Member States shall bring into force not later than 31 December 2001 the necessary laws, regulations and administrative provisions to comply with this framework decision. They shall immediately inform the Commission thereof and shall communicate to the Commission a copy of the measures implementing this framework decision.

When Member States adopt these provisions, they shall contain a reference to this framework decision or shall be accompanied by such reference on the occasion of their official publication. The method of making such reference shall be laid down by the Member States.

2. The Commission shall report to the Council on the implementation by the Member States of the provisions of this framework decision within two years of its entry into force.

(Amendment 30)
Article 23a (new)

In adopting the instruments necessary for the implementation of this Convention, Member States shall ensure that respect for fundamental rights, particularly the rights of the defence and the principle that everyone shall be presumed innocent, as derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and from the national law of the Member State, is guaranteed.

(Amendment 31)
Article 23(1)a (new)

1a. In adopting the instruments necessary for the implementation of this Convention, Member States shall ensure that respect for fundamental rights derived from the Convention for the Protection of Human Rights and Fundamental Freedoms is guaranteed, particularly:

- that people are deprived of their personal liberty solely in cases unambiguously provided for in Article 5 of that Convention,

- that everyone enjoys the right to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him, to be brought promptly before a judge and to be tried within a reasonable time,

- that the rights of the defence are guaranteed, and particularly that the prosecution and the defence enjoy equal rights,

- that the judge is impartial and free of bias,

- that everyone is presumed innocent until definitively pronounced guilty.

(Amendment 32)

Article 24

Accession of new Member States

1. This Convention shall be open to accession by any State which becomes a member of the European Union.

2. The text of this Convention in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

4. This Convention shall enter into force with respect to any State which accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of this Convention if it has not already entered into force at the time of expiry of the said period of ninety days.

5. Where this Convention is not yet in force at the time of the deposit of their instrument of accession, Article 23(4) shall apply to acceding Member States.

Entry into force

This framework decision shall enter into force on the date of its publication in the Official Journal of the European Communities.

Depositary

Addressees

1. The Secretary-General of the Council of the European Union shall act as depositary of this Convention.

This framework decision is addressed to the Member States.

2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, statements and reservations and also any other notification concerning this Convention.

Done aton in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all texts being equally authentic, such original being deposited in the archives of the General Secretariat of the Council of the European Union.

Done at Brussels on by the Council, the President