Chapter 8: Constitutional Aspects of the Forms of Cooperation

Introduction: the forms of cooperation

8-1 Three forms of cooperation are written into the Treaty on European Union:
- police and judicial cooperation in criminal matters[1];
- closer cooperation between Member States in this field[2]; and
- general cooperation between Member States in other fields.[3]

These forms of cooperation jointly constitute one of the foundations of the European Union.[4]

8-2 Like the common foreign and security policy, police and judicial cooperation in criminal matters is peculiar to the Treaty on European Union and largely outside the scope of the Treaty establishing the European Community.[5] Three of the institutions of the European Communities - the European Parliament, the Council and the Commission, - and a new body entitled the Coordinating Committee[6], have a role in implementing the provisions on police and judicial cooperation in criminal matters. The Court of Justice of the European Communities has some jurisdiction over the relevant provisions; in this respect, the constitutional position is different from the position under the common foreign and security policy.[7]

8-3 Again, like the common foreign and security policy, the forms of cooperation may be regarded as a first stage in what may ultimately prove to be an important constitutional development within the European Union. At present the very nature of the arrangements indicate the use of politically cooperative, rather than legally mandatory, instruments for achieving their objectives. On the other hand, given the Member States' traditional objections to allowing the European Union any jurisdiction in criminal matters, the provisions in question represent a significant change in their position.

Objective of police and judicial cooperation in criminal matters

8-4 There is a single, clear objective of police and judicial cooperation in criminal matters: it is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.[8]

8-5 It is intended that the foregoing objective should be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud[9], through:
- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol)[10],
- closer cooperation between judicial and other competent authorities of the Member States[11]
- approximation, where necessary, of rules on criminal matters in the Member States.[12]

Common action in the field of police cooperation

8-6 Common action (which is a general term and not a specific instrument[13]) in the field of police cooperation includes:

- operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
- the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;
- cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;
- the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.[14]

8-7 Europol is an important factor in the provisions of the Treaty: the Council is required to promote cooperation through Europol and, in particular, by 1 May 2004, to:

- enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;
- adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;
- promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol; and
- establish a research, documentation and statistical network on cross-border crime.[15]

Common action on judicial cooperation in criminal matters

8-8 Common action on judicial cooperation in criminal matters includes:

- facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
- facilitating extradition between Member States;
- ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
- preventing conflicts of jurisdiction between Member States; and
- 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.[16]

Machinery for implementing cooperation

8-9 Constitutionally, the machinery for implementing police and judicial cooperation in criminal matters comprises the following elements:

- the duties imposed on the Member States,
- the powers and duties of the Council,
- the tasks of the Coordinating Committee,
- the rights of the European Parliament and
- the rights and duties of the Commission.

The jurisdiction of the Court of Justice in police and judicial cooperation in criminal matters is discussed separately below.

8-10 Two duties are imposed on the Member States: namely, to

- inform and consult one another within the Council with a view to coordinating their action and to establish collaboration between the relevant departments of their administration[17] and,
- within international organisations and international conferences in which they take part, to defend the common positions adopted in the areas of police and judicial cooperation in criminal matters.[18]

8-11 Eight powers are conferred and duties imposed on the Council[19]; namely, to

- adopt common positions defining the approach of the Union to a particular matter[20];
- adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States[21];
- adopt decisions for any other purpose consistent with the objectives of police and judicial cooperation in criminal matters, excluding any harmonisation of the laws and regulations of the Member States[22];
- establish conventions which it recommends to the Member States for adoption in accordance with their respective constitutional requirements[23];
- to conclude agreements with one or more states or international organisations in the fields covered by these provisions[24];
- lay down the conditions and limitations under which the competent authorities concerned may operate in the territory of another Member State[25];
- authorise Member States which intend to establish closer cooperation between themselves to make use of the Institutions, procedures and mechanisms laid down by the Treaties[26]; and
- to take appropriate budgetary decisions.[27]

8-12 Three tasks are imposed on a Coordinating Committee of senior officials; namely, those of:

- coordination,
- giving opinions for the attention of the Council, either at the Council's request or on its own initiative and
- contributing[28] to the preparation of the Council's discussions on police and judicial cooperation in criminal matters.[29]

8-13 Three rights are conferred on the European Parliament; namely, to

- be consulted by the Council before the Council adopts framework decisions and other

decisions or establishes conventions[30];
- be regularly informed by the Presidency and the Commission of discussions in the areas of police and judicial cooperation in criminal matters[31],
- ask questions of the Council or make recommendations to it.[32]

8-14 Four rights are conferred and duties imposed on the Commission; namely, to
- be "fully associated" with the work in the the areas of police and judicial cooperation in criminal matters[33];
- to take action before the Court of Justice for the review of the legality of certain Council measures[34];
- give opinions on proposed authorisations (in connection with the procedure for ensuring "closer cooperation")[35] and
- propose that action in areas of police and judicial cooperation should fall under the Treaty establishing the European Community.[36]

8-15 In exercising its powers to take measures and promote cooperation, the Council is subject to certain constraints. Thus it may act only on the basis of a unanimous decision[37] and only on the initiative of a Member State or of the Commission.[38] It must consult the European Parliament before adopting measures, other than common positions.[39] It is subject to the conditional jurisdiction of the Court of Justice.[40] It must not interfere with the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.[41]

Jurisdiction of the Court of Justice

8-16 Subject to two important conditions, the Court of Justice of the European Communities has jurisdiction to give preliminary rulings[42] on the validity and interpretation of framework decisions and other decisions, on the interpretation of conventions established under the provisions governing police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them.[43] The first condition is that Member States each make a declaration that it can accept the jurisdiction of the Court of Justice to give preliminary rulings in this field.[44] (Any Member State, whether or not it has made a declaration, is entitled to submit statements of case or written observations to the Court in cases which arise under these provisions.[45]) The second condition is that the Court of Justice has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.[46]

8-17 If the conditions are met, the Court of Justice has jurisdiction
- to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. These proceedings must be instituted within two months of the publication of the measure[47];

- to rule on any dispute between Member States regarding the interpretation or the application of common positions, framework decisions and other decisions, whenever the dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members[48]; and
- to rule on any dispute between Member States and the Commission regarding the interpretation or the application of the relevant conventions.[49]

8-18 Redefinition of the jurisdiction of the Court, with effect from 1 May, 1999, may well have been prompted, at least in part, by the Court's views on the relationship between the provisions on cooperation and the provisions of the Treaty establishing the European Community. The case may well be largely superseded as a result of the amendments introduced by the Treaty amending the Treaty on European Union; but it is a salutary reminder that, even where the Court's jurisdiction appears to have been restricted, the Court may find a way to pass judgment.[50]

Closer Cooperation in Criminal Matters

8-19 Member States which intend to establish closer cooperation between themselves may be authorised, on certain conditions[51], to make use of the institutions, procedures and mechanisms laid down by the Treaties, provided that the cooperation proposed respects the powers of the European Community and the objectives of police and judicial cooperation in criminal matters and has the aim of enabling the European Union to develop more rapidly into an area of freedom, security and justice.[52] The authorisation is granted by the Council, acting by a qualified majority, at the request of the Member States concerned and after inviting the Commission to present its opinion; the request also has to be forwarded to the European Parliament.[53] If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorisation by qualified majority, a vote is not taken; but the Council may, acting by a qualified majority[54], request that the matter be referred to the European Council for decision by unanimity.[55] The procedure for establishing closer cooperation is elaborated in the relevant provisions of the Treaty.[56] The provisions on closer cooperation are subject to the jurisdiction of the Court of Justice[57] and are without prejudice to the provisions of the Protocol integrating the "Schengen acquis" into the framework of the European Union.[58]

Transfer from one Treaty to another

8-20 One of the peculiar features of the Treaty on European Union, from a constitutional point of view, is a provision under which the Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas involving police and judicial cooperation in criminal matters should fall under the Treaty establishing the European Community, and at the same time determine the relevant voting conditions relating to it. The Council may recommend that the Member States adopt that decision in accordance with their respective constitutional requirements.[59]

Closer Cooperation in other Areas

8-21 Since the Title of the Treaty concerned with police and judicial cooperation in criminal matters contains provisions allowing Member States to make use of the institutions, procedures and mechanisms laid down by the Treaties[60], it is logical for a similar principle to apply to cooperation in other areas; and a new Title, recently introduced, provides for just such an arrangement.[61] Much of the wording is the same; and the same observations may be about certain constitutional aspects of the procedure. Cooperation, even through common institutions, falls short of mandatory law. If some Member States choose to make use of the special cooperation procedures, and others do not, the European Union runs the risk of becoming constitutionally lop-sided. At the same time, if the procedures are a success, they may provide the basis at some stage in the future for legislation having mandatory and uniform effects throughout the European Union.

8-22 Under the provisions in question, Member States which intend to establish closer cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and the Treaty establishing the European Community, provided that the following eight conditions are fulfilled; namely, that the cooperation:

- is aimed at furthering the objectives of the Union and at protecting and serving its interests;
- respects the principles of the said Treaties and the single institutional framework of the Union;
- is used only as a last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein;
- concerns at least a majority of Member States;
- does not affect the "acquis communautaire" and the measures adopted under the other provisions of the said Treaties;
- does not affect the competences, rights, obligations and interests of those Member States which do not participate therein;
- is open to all Member States and allows them to become parties to the cooperation at any time, provided that they comply with the basic decision and with the decisions taken within that framework;
- complies with the specific additional criteria laid down in the Treaty establishing the European Community[62] and in this Treaty[63], depending on the area concerned, and is authorised by the Council in accordance with the procedures laid down therein.[64]

Member States must apply, as far as they are concerned, the acts and decisions adopted for the implementation of the cooperation in which they participate; and Member States not participating in such cooperation must not impede the implementation thereof by the participating Member States.[65]

8-23 For the purposes of the adoption of the acts and decisions necessary for the implementation of the cooperation referred to in the foregoing paragraph, the relevant institutional provisions of this Treaty and of the Treaty establishing the European Community apply. However, while all members of the Council are able to take part in the deliberations, only those representing participating Member States can take part in the adoption of decisions. This means that a qualified majority is normally necessary[66]; unanimity, however, is constituted by only those Council members concerned.[67] Expenditure resulting from implementation of the cooperation, other than administrative costs entailed for the institutions, is borne by the participating Member States, unless the Council, acting unanimously, decides otherwise.[68] The Council and the Commission are under a

duty to inform the European Parliament regularly of the development of closer cooperation established on the basis of this Title.[69]

1. Articles 29 to 42 (formerly K.1 to K.14), EU Treaty.

2. Article 40 (formerly K.12), EU Treaty.

3. Articles 43 to 45 (formerly K.15 to K.17), EU Treaty.

4. Article 1 (formerly A), third paragraph, EU Treaty.

5. But see the reference to "additional criteria" in Paragraph 8-16.

6. Article 36(1) (formerly K.8(1)), EU Treaty.

7. Article 35(5) to (7) (formerly K.7(5) to (7), EU Treaty.

8. Article 29 (formerly K.1), first paragraph, EU Treaty. This is "without prejudice to the powers of the European Community".

9. Article 29 (formerly K.1), second paragraph, EU Treaty.

10. Ibid, indent (a); "in accordance with the provisions of Articles 30 and 32".

11. Ibid, indent (b), "in accordance with the provisions of Articles 31(a) to (d) and 32".

12. Ibid, indent (c); "in accordance with the provisions of Article 31(e)".

13. For the instruments designed to implement common action, see Article 34 (formerly K.36), EU Treaty, which is discussed later in this Chapter.

14. Article 30(1), formerly K.2(1)), indents (a) to (d), EU Treaty.

15. Article 30(2), formerly K.2(2)), indents (a) to (d), EU Treaty. Europol was established by the 1995 Convention, last amended in December, 2000 (OJ C.316/95 and C 358/00).

16. Article 31 (formerly K.3), (a) to (e), EU Treaty. See, for example, JHA/235/1999, Joint Position [*sic*] defined by the Council on the proposed United Nations Convention against organised crime.

17. Article 34 (formerly K.6), EU Treaty.

18. Article 37 (formerly K.9), EU Treaty. Articles 18 and 19 apply as appropriate to matters falling under this Title.

19. Under Articles 32 and 34 (formerly K.4 and K.6), EU Treaty.

20. Article 34(2)(a) (formerly K.6(2)(a)), EU Treaty. See, for example, the Common

Position JHA/364/1999 adopted by the Council on negotiations relating to the draft Convention on Cyber Crime held in the Council of Europe.

21. Article 34(2)(b) (formerly K.6(2)(b)), EU Treaty. Framework decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. This is similar to the language used in Article 249 (formerly 189), EC Treaty, to describe the effect of a directive. However, framework decisions do not entail direct effect. For an example of a framework decision, see Council Framework Decision JHA/220/2001 on the standing of victims in criminal proceedings.

22. Article 34(2)(c) (formerly K.6(2)(c)), EU Treaty. These decisions are binding but do not entail direct effect. The Council, acting by a qualified majority, may adopt the measures necessary to implement those decisions at European Union level. For a recent example, see Council Decision JHA/427/2001 setting up a European crime prevention network. (An earlier Council Decision JHA/375/2000 on child pornography wrongly quotes its legal basis as Article 34 of the EC Treaty; this should be the EU Treaty.)

23. Article 34(2)(d) (formerly K.6(2)(d)), EU Treaty. Member States are required to begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions, once adopted by at least half of the Member States, come into force for those Member States. Measures implementing conventions may be adopted within the Council by a majority of two-thirds of the Contracting Parties. For an example of a Convention based on Article 34 of the EU Treaty, see the 1998 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters.

24. Article 38 (formerly K.10), EU Treaty, applying Article 24, discussed in Chapter 7, *mutatis mutandis*.

25. Article 32 (formerly K.4), EU Treaty.

26. Article 40 (formerly K.12), EU Treaty. For the procedures applying to this case, see below.

27. Article 41 (formerly K.13), EU Treaty. Compare Article 28, EU Treaty.

28. Without prejudice to the role of the Committee of Permanent Representatives, under Article 207 (formerly 151), EC Treaty.

29. Article 36(1) (formerly K.8(1)), EU Treaty.

30. Article 39(1) (formerly K.11(1)), EU Treaty. The measures in question are covered by Article 34(2)(b), (c) and (d), EU Treaty. The European Parliament must deliver its opinion within a time limit, of not less than three months, to be laid down by the Council; failing which the Council may act.

31. Article 39(2) (formerly K.11(2)), EU Treaty.

32. Article 39(3) (formerly K.11(3)), EU Treaty. In this connection, the European Parliament is required to hold an annual debate on the subject.

33. Article 36(2) (formerly K.8(2)), EU Treaty.

34. Article 35(6) (formerly K.7(6)), EU Treaty.

35. Article 40(2) (formerly K.12(2)), EU Treaty.

36. Article 42 (formerly K.14), EU Treaty. The Title of the EC Treaty in question would be Title IV, on visas, asylum, immigration and other policies related to free movement of persons.

37. Article 34(2) (formerly K.6(2)), EU Treaty. However, the Council may by qualified majority adopt measures necessary to implement the "other decisions" at European Union level.

38. Ibid. However, special procedures apply to conventions: Article 34(2)(d), EU Treaty; and, for purely procedural questions, the Council may act by simple majority: Article 34(4), EU Treaty.

39. Article 39(1) (formerly K.11(1)), EU Treaty.

40. Article 35 (formerly K.7), EU Treaty.

41. Article 33 (formerly Article K.5), EU Treaty.

42. For a discussion of the concept and scope of "preliminary rulings", see Chapter 19.

43. Article 35(1) (formerly K.7(1)), EU Treaty.

44. Article 35(2) (formerly K.7(2)), EU Treaty. The conditions on which the declaration may be made are set out in Article 35(3) (formerly K.7(3)), EU Treaty.

45. Article 35(4) (formerly K.7(4)), EU Treaty.

46. Article 35(5) (formerly K.7(5)), EU Treaty.

47. Article 35(6) (formerly K.7(6)), EU Treaty.

48. Article 35(7) (formerly K.7(7)), first sentence, EU Treaty.

49. Article 35(7) (formerly K.7(7)), second sentence, EU Treaty. For the relevant conventions, see Article 34(2)(d), EU Treaty.

50. Case C-170/96, *Commission v Council*.

51. The first of which is that the arrangements should be compatibe with the provisions on general cooperation laid down in Articles 43 and 44 (formerly K.15 and K.16), EU Treaty.

52. Article 40(1) (formerly K.12(1)), EU Treaty.

53. Article 40(2) (formerly K.12(2)), first paragraph, EU Treaty.

54. See Article 205(2) (formerly 148(2)), EC Treaty. Article 40(2) (formerly K.12(2)), third paragraph, EU Treaty.

55. Article 40(2) (formerly K.12(2)), second paragraph, EU Treaty. The last four words are, strictly speaking, superfluous.

56. Article 40(3) (formerly K.12(3)), EU Treaty.

57. Article 40(4) (formerly K.12(4)), EU Treaty.

58. Article 40(5) (formerly K.12(5)), EU Treaty. The "Schengen acquis" is discussed in Chapter 10.

59. Article 42 (formerly K.14), EU Treaty.

60. Article 40 (formerly K.12), EU Treaty. See paragraph 8-13.

61. Title VII, comprising Articles 43 to 45, EU Treaty. This Title was introduced under the Treaty amending the Treaty on European Union and came into force on 1May, 1999.

62. That is, in Article 11 (formerly 5a), EC Treaty. This Article is in somewhat similar terms, mutatis mutandis, to Articles 40 and 43, EU Treaty.

63. That is, in Article 40 (formerly K.12), EU Treaty.

64. Article 43(1) (formerly K.15(1)), (a) to (h), EU Treaty.

65. Article 43(2) (formerly K.15(2)), EU Treaty.

66. This is defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) (formerly 148(2)), ECTreaty.

67. Article 44(1) (formerly K.17(1)), EU Treaty.

68. Article 44(2) (formerly K.17(2)), EU Treaty.

69. Article 45 (formerly K.17), EU Treaty.