



Statewatch analysis

EU: Cementing the European state - new emphasis on internal security and operational cooperation at EU level

by Tony Bunyan

The Reform Treaty agreed by EU governments in Lisbon on 17-18 October is to be formally "signed-off" by the Council in December. All EU governments are then expected to get their national parliaments to adopt it by the end of 2008 so that it can come into effect by the time of the European Parliament elections in June 2009. National parliaments will be allowed to "debate" the contents of the Treaty but not to change a "dot or comma" - they either have to accept or reject the whole package.

A wholly undemocratic process

As Deirdre Curtin sets out on in this issue the "process" of adopting the Reform Treaty was shrouded in mystery and secrecy. In June the Council adopted a "negotiating mandate" for the new Treaty which was utterly incomprehensible - it contained hundreds of changes to the two existing Treaties which could not be comprehended unless transposed into those texts. The Council did not provide this transposition until 5 October, just two weeks before agreement was to be reached.

In the whole of the EU only the Statewatch website carried the transposed texts (from 9 August) thanks to Steve Peers' (Professor of Law, University of Essex) superb and ongoing, series of analyses which set out the legal changes to the two amended Treaties - the Treaty on the European Union (TEU) and the renamed Treaty on the Functioning of the European Union (TFEU) [1]

Overall it is hard not to conclude - as a number of commentators have - that after the debacle of the rejected Constitution EU governments did not want there to be a debate in national parliaments or civil society which might interfere. The Council was happy to leave the level of public debate preoccupied with the sole question of whether or not the Treaty was the same as the Constitution.

The abolition of the "third pillar"?

Much play has been made of the fact that "third pillar" police and judicial cooperation is finally to be brought under "normal" EU legislative procedures (immigration and asylum was moved over in 2006). This means the Council and the European Parliament having to jointly agree on new measures - this is currently called "co-decision" and will be called the cumbersome "ordinary legislative procedure". It is said to replace "consultation" where the opinion of the parliament was routinely ignored by the Council. The reality is somewhat more complicated.

First, the legal status of the third pillar acquis, some 700-plus measures adopted between 1976-2009 will be preserved (Article 9, Protocol 10) unless they are subsequently amended or replaced. The new powers for the European Court of Justice will not apply to this acquis for five years (ie: 2014).[2] Moreover, the third pillar acquis, to be inherited and perpetuated under the Treaty, lacks legitimacy as it was adopted with little or no democratic input by parliaments or civil society.

Second, the "third pillar" moves to the TFEU, Title IV where it is declared that, finally, it will all come under current co-decision procedure where the European Parliament (EP) has an equal legislative role to that of the Council. Since March 2006 the EP has had co-decision powers over nearly all immigration and asylum measures. However, all nine immigration and asylum measures that have gone through have been agreed in secret, "trilogue", negotiations with the Council - will the same happen when it has powers over police and judicial procedures? (see "Secret trilogies and the democratic deficit" in vol 16 no 5/6)[.3]

Third, under the new Title IV there are ten areas covered by the new "ordinary legislative procedure". However, there are still four areas where the EP is only to be "consulted" and four areas where the new (that is, to justice and home affairs issues) concept of "consent" is introduced.

Under the "consent" procedures the Council will act unanimously and the EP will be "asked to consent" without changing a "dot or comma" - or will we see an extension of secret trilogies?

The "consent" procedure concerns: a) mutual recognition of judicial decisions and approximation of laws where "any other aspects of criminal procedure" can be added (Art 69.e.d); b) minimum rules defining offences and sanctions covering ten areas can be extended to "other areas of crime" (Art 69.f.1); c) the creation of a European Prosecutors Office to deal with financial crime but the scope can be extended by "consent" (Art 69.i.4) d) Art 69.i.1 is very confusing - a European Prosecutors Office may be set up under "special legislative procedure" (ie: consultation) and the Council shall act with the "consent of the European Parliament". At national level it would be unheard of to extend the scope of laws without going through normal legislative procedures (ie: co-decision).

One of area which the EP is only to be "consulted" is the highly contentious issue of:

"measures concerning passports, ID cards, residence permits and any other such document"

"Measures concerning" could refer not just to the issuing of documents but the databases on which the personal data, including biometrics are held, data-sharing, data-mining and data protection.

Under the Nice Treaty (Article 18.2, 2002) the EU is expressly precluded from laying down the law in these issues. If there are issues on which parliaments (national and European), let alone the people, should have say this is surely one of them.

Fourth, the European Council (that is, the Summit meetings of the 27 Prime Ministers or Heads of State) will in this area:

"define the strategic guidelines for legislative and operational planning" (Article 62)

This formalises the role taken by the European Council in adopting the Tampere (1999) and Hague (2004) programmes which were agreed without any public debate whatsoever.[4] These "programmes" effectively lay down the legislative priorities and expansion of EU operational actions in justice and home affairs on which the Commission has to present proposals.[5]

Fifth, there are two new bodies are being created concerning "internal security". The first is the Standing Committee on operational cooperation on internal security" (Article 65, known as COSI). There has been a debate as to its composition, is it to be a high-level committee of officials advised by the numerous agencies and bodies or will be latter be simply advisory? Article 65 leaves this open by saying the agencies "may be involved in the proceedings of the committee" (see Statewatch, vol 15, nos 1 and 3/4). What is absolutely clear is that the European Parliament and national parliaments are simply to be "kept informed" on its proceedings, which on past form will be will ensure neither scrutiny or accountability in any meaningful sense.

Sixth, the second new entity appears in the Treaty in Article 66 which resurrects intergovernmental cooperation between the member states to allow:

cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security

That is to say internal security agencies like MI5. The EU has long wanted to replace the "Club of Berne", an informal grouping of security and intelligence agencies formed in 1971. Its participants include agencies from

the UK, France and Germany. However, it has never been a vehicle for intelligence gathering available to the EU.

There are no provisions set out for scrutiny or accountability and its intergovernmental form access to its proceedings and documents will be highly problematic.

Both of these two new entities concern "internal security", a concept much, much wider than just policing, judicial cooperation and immigration - it encompasses all matters referring to the maintenance of law and public order and the civil-military capabilities. Also, as constantly referred to by EU officials, there is an umbilical link between "internal" and "external" security which links to the next observation.

Seventh, the "second pillar" (defence and foreign policy) is to remain intergovernmental with the European Parliament, on occasion, "consulted".[6] Under this pillar it is proposed to set up a "European External Action Service" whose "organisation and functioning" will be decided by the Council. The Council has long wanted to establish such a "diplomatic" service to live alongside the Commission's world-wide Representations network in over 170 countries. This is because the Commission's remit does not extend to formal diplomatic relations and, crucially, intelligence-gathering (eg: military, counterterrorism).

"Areas" of "freedom, security and justice"

One of the achievements of the Amsterdam Treaty (agreed in 1997) was to bring inside the treaty-framework the Schengen acquis. However, since then the Prum Treaty was adopted by 17 EU member states (one part of it has been incorporated, another has not) and the emergence of "G6" - the six largest states meeting in virtual secrecy to agree a collective position on new initiatives to be pushed inside the Council structures.

In the judicial and police cooperation chapters of the Reform Treaty a single member state can suspend the "ordinary legislative procedure" and the European Council has four months to find agreement. On the other hand, if there is not agreement on a measure then nine member states (one third of the 27 governments) can establish "enhanced cooperation" - they simply have to "notify" the Council, the European Commission and the European Parliament and then can proceed automatically.

"State-building"

The introduction of COSI, EU-wide internal security agency cooperation and the European External Action Service are classic instances of EU "state-building" - of which there are more examples in the new Title IV on judicial and police cooperation (and immigration and asylum).

"State-building" is taken to mean both the creation of bodies and agencies to act on an EU-wide basis (eg: SIS II, FRONTEX, Europol, Eurojust, European

Gendarmerie etc) and where administrative (Article 67 covering the whole of Title IV)) and operational cooperation is centrally organised by the EU (eg: police cooperation, Article 69.i & j).[7]

Chapter 5 on police cooperation (and "other specialised law enforcement services") will establish "cooperation" covering all "criminal offences" embracing all agencies. This will include the establishment of measures for the:

"collection, storage, processing, analysis and exchange of relevant information"

and for "investigative techniques" (which means telephoning tapping, bugging, informants, agent provocateurs etc) for serious forms of organised crime.

In addition "operational cooperation" between the agencies will be established following "consultation" with the European Parliament (Art 69.j.3). The parliament will also be "consulted" (Art 69.l) on the rules for agencies to operate in another member state.[8]

Conclusion

Whatever the arguments over the Constitution-Reform Treaty in the area of justice and home affairs the Treaty is virtually the same - with some additions.

Tony Bunyan, Statewatch editor, comments:

"Overall we are witnessing the extension, and cementing, of the European state with potentially weak democratic intervention on policy-making and no scrutiny mechanisms in place on implementation and practice"

Box summary: EU Reform Treaty

The Treaty amends the Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC - which is renamed the Treaty on the Functioning of the European Union (TFEU)).

The word "Community" is replaced throughout by "Union."

Justice and Home Affairs is renamed the so-called "Area of Freedom, Security and Justice"

A permanent President of the European Council will be "elected" for 2 and a half years and can be re-elected.

A "double-hatted" High Representative for Foreign Affairs will chair the Council of Foreign Affairs and be a Vice-President of the Commission.

From 2014 “qualified majority voting” in the Council will require a “double majority” with 55% of the States representing 65% of the population. Under the “Ioannina compromise” a minority of member states can ask for a re-consideration of a legislative proposal before its adoption.

From 2014 the number of Commissioners will be reduced to 2/3rds of the number of member states. A system of rotation will be introduced to ensure that each member is represented in two out of three “colleges” (one every five years).

Footnotes

1. See Statewatch’s Observatory:

<http://www.statewatch.org/euconstitution.htm>

2. While the role of the ECJ is extended in the Treaty the restriction on looking at the actions and operations of member states' law enforcement agencies remain as now. This restriction takes on wider implications as EU level police and security agencies' roles grow.

3. Back in 1999 the use of 1st reading agreements was first proposed to deal with highly detailed technical measures or an uncontroversial nature which is legitimate. However, the use of this procedure for controversial measures such as the Visa Information System (VIS), the Border Code and SIS II's EU-wide database is clearly not legitimate.

4. The next "programme" is being drawn up by a secret group coordinated by Germany for adoption in 2009. In evidence to the Constitutional Convention in 2003 Statewatch and the Standing Committee of Experts (Utrecht) said multi-annual programmes should be sent to national and European Parliament before adoption.

5. This does not preclude the Commission from exercising its powers to propose other measures but these are rarely of great significance.

6. Another casualty in the Treaty is in the second pillar Article 24 is that data protection standards - and the "free movement" of data on foreign policy issues, like PNR, SWIFT and telecommunications monitoring under the US FISA, will be decided solely by the Council - and excluded from the jurisdiction of the European Court of Justice.

7. The concept of "state-building" also applies to the second pillar - defence and foreign policy.

8. Only for Europol are scrutiny "procedures" to be laid down" for national and European parliaments - but not for the myriad of other agencies and bodies created.

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