DRAFT CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN MEMBER STATES OF THE EUROPEAN UNION (7945/97 JUSTPEN 41, 6 MAY 1997, 10985/97 JUSTPEN 83 30 SEPTEMBER 1997)

Memorandum by JUSTICE to the House of Lords Select Committee on the European Communities

October 1997

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INTRODUCTION

1. JUSTICE is an all-party organisation concerned with upholding the law and its administration in order to protect human rights, and is the British section of the International Commission of Jurists. With the support of an Expert Advisory Panel comprising practising and academic lawyers and other experts we monitor relevant developments in the European Union. These include in particular the agreements proposed under the 'third pillar' (Title VI) of the Treaty on European Union (TEU). The Select Committee on the European Communities has recently reported on the problems of properly scrutinising such agreements before they are finalised.[1] Some of the topics concerned will ultimately be transferred to other sections of the TEU under the recent Treaty of Amsterdam. This will not, however, affect provisions on police and judicial cooperation which include the Convention under present scrutiny.
2. The importance of early scrutiny of draft third pillar Conventions by national parliaments is heightened by the progressive abandonment of an earlier rule under which a Convention signed by all Member States did not enter into force until ratified by every signatory. The Treaty of Amsterdam lays down that Conventions will normally require ratification by only half the Member States for them to come into force among those States. The present draft Convention goes even further; under Article 18(4), any two or more Member States (after ratifying it themselves) may make declarations that they will apply it to their relations with each other, regardless of the total number of ratifications. The Supplementary Explanatory Note from the Home Office fails to mention this. The same provision for 'rolling ratification' was included in the 1996 Convention on Improving Extradition between Member States of the European Union. **This effectively removes any remaining possibility of a national parliament amending or blocking the entry into force of a Convention after signature by its government.**

HISTORY AND SCOPE OF THE CONVENTION

3. The Council of Europe has been working for a considerable time on ways of updating its 1959 European Convention on Mutual Assistance in Criminal Matters and the 1978 Additional Protocol, both of which the UK finally ratified in 1991. The Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) spent some years on drafting a Comprehensive Convention on International Co-operation in Criminal Matters. This was, however, shelved in 1994 by a decision of the European Committee on Crime Problems (CDPC) to which PC-OC is answerable. PC-OC then began work on a less ambitious Second Additional Protocol to the 1959 Convention. This work, too, is temporarily in

[1] *Enhancing parliamentary scrutiny of the third pillar*, 6th Report, 1997-98, HL Paper 25.

abeyance. The reason in both cases appears to have been pressure from EU members of CDPC (including the UK) to suspend the drafting process until faster-moving work at EU level is completed.

4. A highly relevant background report of April 1997 by the Presidency[2] (supplied to the Committee in response to a recent request) noted that 'it is advisable to co-ordinate the activities at EU level and those within the framework of the Council of Europe regarding the work on nearly identical instruments on mutual assistance in criminal matters with a view to avoiding duplication of efforts. The draft EU Convention should be scrutinised in this connection before its adoption.'[3] This problem appears in practice to have been solved by stalling the work by the Council of Europe. Regular contacts at Secretariat level between the two bodies have, however, been recently instituted.

5. The relevance of the present draft Convention therefore extends beyond the EU, since it is likely to strongly influence whatever is finally agreed by the Council of Europe, and offered to all 40 of its members. This makes it all the more important to ensure that a Convention drafted at EU level, which is inevitably subject to political imperatives peculiar to third pillar procedures, does not tilt the balance against the protection of fundamental rights. The draft Convention and the earlier report to the Council show clearly that the drafting process is being driven by the tight deadline set by the High Level Group dealing with organised crime.[4] The original target for completion was the end of 1997, though it now seems certain to be delayed until some time in the UK Presidency during the first half of 1998.

6. The draft Convention represents a clear departure from the principle underlying the 1959 Convention, which dealt exclusively with cooperation between judicial authorities over matters connected with criminal proceedings. The implication was that charges had already been laid against those concerned or were at least in preparation. The present draft, however, introduces at least two topics (interception of telecommunications and controlled deliveries) which are investigative matters involving the law enforcement authorities. They do not presuppose any imminent proceedings; the only link with the judicial system is that there must (in at least one of the two Member States involved) be a need for judicial authorisation of the activity. The report to the Council[5] makes it clear that cooperation between police or customs authorities which does *not* require such authorisation will fall outside the scope of the Convention.

7. In our comments we deal first with the provisions which give us most cause for concern, namely Articles 6 to 9 on the interception of telecommunications. They

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[2] Note from Presidency to K.4 Committee, *Draft Report to the Council on the draft Convention on mutual assistance in criminal matters*, 7350/97 JUSTPEN 31 (14 April 1997), p.2. This was subsequently forwarded without amendment to the Committee of Permanent Representatives, apart from a general reservation on its conclusions by the Spanish delegation (7637/97 JUSTPEN 36). The latter reference is the one cited at various points in the notes accompanying the Articles of the draft Convention.

[3] *Ibid.*, p.2.

[4] Note from High Level Group to European Council, *Action Plan to combat organised crime*, 6276/4/97 (9 April 1997).

[5] Note from Presidency (note 2), p.8.

have implications for personal privacy and data protection, as guaranteed by Article 8 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights or ECHR), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Treaty 108), and associated Recommendations by the Council of Europe's Committee of Ministers. **We are not satisfied that adequate attention has been paid to the requirements of these international agreements on fundamental rights**. The EU's data protection Directive (95/46/EC) does not apply to 'activities of the State in areas of criminal law', so adherence to the norms established by the Council of Europe assumes an extra importance.

8. In addition, we shall comment briefly on certain other Articles of the present Convention which in our view deserve critical attention: Article 2 (procedures in connection with which assistance is to be provided), Article 3 (compliance with the formalities and procedures indicated by the requesting Member State), Article 10 (controlled deliveries), Article 11 (sending and service of procedural documents), Article 13 (temporary transfer of persons held in custody for purposes of investigation) and Article 14 (spontaneous exchange of information).

9. We also note here without further discussion the absence of any dispute resolution mechanisms and therefore any mention of jurisdiction by the European Court of Justice (ECJ) regarding interpretation or the settlement of disputes. Although (under a new Article 35 (ex K.7) TEU) the Treaty of Amsterdam will allow Member States to declare their acceptance of ECJ authority over a Title VI Convention, this may be excluded in the present case because the provision does not apply to 'the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

10. It appears that certain provisions (such as those on spontaneous exchange of information and controlled deliveries) will overlap those currently being finalised for another Title VI instrument, the Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II). Because of its late publication, we cannot comment on its provisions in detail but have added an Addendum on it. Although the text is likely to be on the agenda for signature at the next Justice and Home Affairs Council on 4-5 December 1997, it was not deposited for scrutiny until 18 November 1997. This leaves only three weeks for scrutiny; given its highly complex subject matter this cannot be sufficient. It will also complement the Convention on the Use of Information Technology for Customs Purposes, which will provisionally apply upon ratification by the eighth Member State (it was ratified by the UK in 1996).[6] Such overlap and confusion seems to us a typical consequence of the independent and secret drafting of Title VI instruments by different working groups answerable to the Council, involving different Government Departments in the UK.

11. Finally, significant overlaps exist with the Convention applying the Schengen Agreement, to which the UK is not a State party (although it has the right to opt-in to

[6] Convention on the Use of Information Technology for Customs Purposes, OJ No C 316/33, 27 November 1995; Agreement on the provisional application between certain Member States of the EU of the Convention on the Use of Information Technology for Customs Purposes, OJ No C 316/58, 27 November 1995.

parts of it when the Treaty of Amsterdam enters into force, subject to the other Member States' approval). The Schengen Convention already provides for controlled deliveries, amongst other things, an issue dealt with in Article 10 of this draft Convention. It is important, therefore, that the operation in practice of the relevant provisions of the Schengen Convention, in which the UK will in effect be participating, be reviewed. For instance, it would be wise for the UK to be involved in the on-going revision of the Schengen handbook on facilitating international mutual judicial assistance referred to in the work programme of the Austrian Schengen presidency (Doc. no. SCH/C (97)80).

INTERCEPTION OF TELECOMMUNICATIONS

12. Article 6(3) lists three categories of telecommunication to which different rules will apply; these are dealt with in Articles 7, 8 and 9, respectively. A distinction is made between fixed or mobile terrestrial telecommunications infrastructure on the one hand, and infrastructure using satellites on the other. In all cases it is laid down that a request for interception must be based on an order to that effect under the national law of the requesting Member State. The request may be for interception, recording and transcription or for interception and direct transmission of intercepted correspondence (the last word covering both conversations and other forms of communication such as fax messages).

13. In all cases, basic information is to be supplied concerning the subject's connection number or other identification, the existence of an order for interception and its desired duration. The requesting State is obliged to make no use of (and to destroy) any information 'the content of which a person could refuse to divulge ... if called upon as a witness to do so' under the law of the requesting State (that is, privileged communications). Beyond this, however, the safeguards for the individual vary with the category of interception concerned.

Terrestrial telecommunications

14. **Article 7** deals with the most straightforward case where the subject of investigation is located in another Member State and is using terrestrial infrastructure in that State. In this case the requested State is obliged to satisfy itself that under its own law the request is fully justified by the seriousness of the offence, or not otherwise unjustified in the circumstances of the case. The requested State *may* also (unless directly transmitting an intercept to the requesting State without recording it) require the deletion of irrelevant material either before or after transfer of the intercept; it may (subject to national laws in either State) require notification to the subject that interception has taken place (a privilege not available under UK law); and it may prohibit use of the intercept for purposes other than those forming the basis of the request.

15. These safeguards (apart from the exception for directly transmitted intercepts) are closely modelled on those laid down in the Council of Europe's Recommendation R (85) 10.[1] The Recommendation was drawn up to overcome national variations of interpretation of the 1959 Convention, which makes no reference to interceptions. The Explanatory Memorandum to the Recommendation emphasises the need to

'protect the individual against unjustified interception'; the safeguards seek to ensure that interception 'is resorted to only where it is absolutely necessary, as it implies a far-reaching invasion into the privacy of the subscriber who enjoys protection under Article 8 of the European Convention on Human Rights.'[7] **However, as we consider these safeguards to be fundamental for individual protection, consideration should be given to making them mandatory requirements rather than only discretionary**.

Satellite telecommunications

16. Satellite systems involve the signal from a hand-held unit being passed via a satellite to a ground station, which may well be in another Member State; commercial systems operating in the EU will require grounds stations in only three or four Member States. Interception is said to be only feasible if performed at a ground station. **Article 8** lays down provisions which cover the case where the subject of investigation is in the requesting State, but the ground station is not.[2] The rules depend on whether the requested State (on whose territory the ground station is located) records the intercept itself, or re-routes it back to the requesting State in real time. The report to Council states that 'the technical development requires an innovative approach on mutual assistance, while at the same time safeguarding the rules on the protection of human rights relevant in this respect.'[8]

17. If the requested State is to record the intercept itself, the safeguards are identical to those of Article 7 (except in the precise wording, at least in the English translation). The 'innovative approach' manifests itself in dealing with the alternative scenario of Article 8(4), where the intercept is simply re-routed back to the requesting State. Here most of the safeguards are absent; the only ground for refusing a request will be 'no or insufficient evidence of the existence of an order to that effect from the competent authority of the requesting State'. No distinction is therefore made from the case where interception takes place in the requesting State itself; the latter's national law is the only one to apply. In the case of the UK, a ministerial warrant under the Interception of Communications Act 1985 is sufficient.

18. The justification for this apparent abrogation of a Member State's full responsibility for what it allows to happen on its territory may be inferred from an explanatory comment on Article 6: 'The fact that each Member State has legislation on the investigation of telecommunications which meets the requirements of Article 8 of the ECHR was the starting point for the discussions. This legislation forms the basis for mutual confidence in the fact that only once an examination of whether the application of this method of investigation specifically meets the conditions of legitimacy and proportionality has been carried out in the requesting State will a request be made.'

19. No explanation is offered for the discrepancy between the minimal responsibility of a Member State for a satellite transmission intercepted and re-routed in real time from a ground station on its territory, and the case of a re-routed intercept carried out on a terrestrial system (para. 13) where the subject of investigation is in that

[7] Paras 4 and 17 of the Explanatory Memorandum (note 6 above).
[8] Note from Presidency (note 2), p. 18.

State. Here the full safeguards of R (85) 10 apply. It was apparently felt impossible to reduce the safeguards in this case because it would have been a clear breach of the principle that a State is responsible for any infringement of the freedoms of a person on its territory; in addition, each Member State already has legislation (albeit variable between countries) to regulate the interception of terrestrial systems under its jurisdiction. On the other hand, satellite systems were not envisaged when these laws were passed, so the drafters of the Convention have felt more free to relax the normal rules.

20. We leave it to the Committee to decide whether this is strictly justifiable under international law, and whether the implied degree of trust between Member States would be sufficient in all cases to allow the UK to intercept and re-route telecommunications from a ground station on its territory, whenever a simple authorisation was presented without further justification. Under Article 17, no national reservation would permit a refusal to do this.

21. We do, however, question whether this is a wise precedent to set for future legislation in the wider context of the Council of Europe or even broader international associations of nations. If a global agreement based on the draft Convention was ultimately to come about, would it be necessary for the host of a ground station to comply with nominally authorised requests for re-routed intercepts from any country in the world that was a party to it? We consider later in this Memorandum (paras 39 to 46) the rather different approach that has been explored (in this and other matters) by expert committees in the Council of Europe.

22. We note that the Home Office feels that 'the provisions on interception of telecommunications will require further, careful consideration'.[9] It is not at present clear whether this relates to the issue discussed here, or merely to the unresolved question of how to deal with the scenario of Article 6(3)(c) (subject located in another Member State, using satellite telecommunications infrastructure there and his correspondence can only be intercepted in a third Member State). **We suggest that the desirability of including Articles 6 to 9 in any form in the present Convention should be seriously reconsidered by the Government. Failing that, the provisions on satellite telecommunications should be redrafted to incorporate in every case the safeguards of the Council of Europe Recommendation.**

Interceptions and global surveillance

23. In our evidence to the Committee on a different topic[3] we mentioned the existence of a still unpublished 1995 Memorandum of Understanding between the EU and third countries on the lawful interception of telecommunications. The third countries now party to this are Australia, Canada, New Zealand, Norway and the USA.[10] This group of 20, coordinated by the FBI, has been working towards a harmonisation of national laws to remove any obstacles to the interception of all forms of telecommunication by law enforcement agencies. In January 1995, the Council of the EU adopted a Resolution (based closely on criteria adopted by the USA) listing

[9] Explanatory Memorandum, para. 11.
[10] *Statewatch Bulletin* (London), July-October 1997.

'the Requirements of law enforcement agencies';[11] it was not, however, published until nearly two years later. These Requirements included access to all telecommunications and call-associated data, information on the geographical location of mobile subscribers, real-time interception, multiple interfaces for interception, decryption of transmissions encoded by service providers, and provision for simultaneous intercepts by more than one agency;

24. In a 1995 memorandum to the K.4 Committee and in other internal meetings, satellite methods were identified as posing potential legal problems for interception. The provisions of the draft EU Convention were clearly intended to deal with these so as to satisfy the above Requirements. **There is a serious risk that the Convention in its present form, combined with the international agreements discussed above, will open the way to extensive and increasing surveillance of individuals within the Union by law enforcement agencies both inside and outside the jurisdiction of Member States. JUSTICE would urge the Committee to undertake a full enquiry on the whole question of law enforcement agencies cooperation on interception of communications including electronic communications within the EU**.

OTHER ASPECTS OF THE CONVENTION

25. **Article 2** (procedures in connection with which assistance is to be provided) **represents a departure from the rule of double criminality**. The rule in this context serves to ensure that a person's rights (including that of privacy) are not infringed as a consequence of conduct that is not recognised as punishable in both the requesting State and the requested State. Furthermore, **the possible extension of rights of interrogation, search and seizure to cover 'infringement of public order provisions' would mean that a person could be subject to mutual assistance procedures in respect of conduct that might simply give rise to civil proceedings in this country**.

26. Quite apart from the policy objections, we are advised that this Article would create a serious resourcing problem. Mutual assistance is bedeviled by delays and lack of experience in most European countries, including the UK. Expanding the scheme at this point would only exacerbate the problem. **We note that the UK delegation had entered a reservation on this Article, and recommend that the Government be asked to explain its position to the Committee**.

27. **Article 3** (compliance with formalities and procedures indicated by the requesting Member State) would again present a resourcing problem. When a request to the UK for the interview of a potential witness or defendant is made by another Member State, the request is generally framed as a request for a magistrate to hear the witness. At present the bulk of the interviews are in practice carried out by the police. An obligation to interpret the request literally and bring all such cases before a magistrate would cause further delays in the system.

28. The switching of all mutual assistance interviews to a hearing before a magistrate

[11] *Official Journal of the European Communities*, C 329 (4 November 1996), pp. 1-6.

would also have the effect of undermining existing obligations of confidence, since these obligations may not be relied upon when a witness is summoned to appear before a magistrate. Curiously, the right of confidence is preserved in Article 12(6)(f) (see below) in respect of persons summoned to be heard by video conference or telephone.

29. Finally, it is not clear how UK legislation would be amended to give effect to this Article. It is possible that any enactment passed in compliance with the obligation of Article 3(1) would erode the measures of administrative protection currently available, such as the Codes of Practice for the Police and Criminal Evidence Act (PACE), since these are not 'fundamental principles of law'. **For a number of reasons, therefore, this Article should be reconsidered**.

30. **Article 10** allows for 'controlled deliveries' to be carried out on the territory of a requested Member State. Such operations which involve prohibited goods being allowed into a country in order to determine its final destination are allowed under international law.[12] They are a more frequent investigative tool in other countries than the UK and are usually accompanied with the deployment of undercover agents and tasked informants. The recent Van Traa inquiry in the Netherlands on covert policing pointed out several dangers associated with controlled deliveries, not least the lack of police control over the participating informants.[13] It recommended that such operations should be tightly controlled and, as a general, rule only small amounts of prohibited goods should be involved.

31. In the UK such operations (including the use of informants) are regulated through internal guidelines only which are not made public. This, combined with the permissive character of Article 10, has potentially serious implications for the criminal justice system. **JUSTICE would therefore similarly question whether this matter should properly form part of the convention (see para.22). If it is to be included, it is essential that it is flanked with strict controlling measures including a provision that it is the *requested* state who should be in charge of the operation.**[14] This should also be considered alongside the provisions of the Naples II Convention mentioned in para. 10 above.

32. **Article 11** (sending and service of procedural documents) could give rise to injustice if, in accordance with Article 11(3), the translation of only 'important passages thereof' is to be permitted when there is reason to believe that the addressee does not understand the language in which the original was drafted. Given the possible consequences of such documents, particularly in the context of trials and convictions in the absence of the defendant (as allowed in most other Member States), **it is of the utmost importance that where necessary, procedural documents are accompanied by a full translation**. What are not 'important passages' to the requesting State may be of considerable importance to the addressee.

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[12] The 1988 UN *Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances*

[13] There may also be difficulties with undercover agents claiming diplomatic immunity, as experienced by the van Traa inquiry: Final report, Parliamentary Inquiry Committee, p.293.

[14] *Cf.* draft Second Additional Protocol to the CoE *Convention on Mutual Assistance in Criminal Matters,* Article 16.

33. There is a possible ambiguity in **Article 12(6)(f)** (claiming a right not to testify to a hearing by video conference). **The reference to 'legislation' could be taken to limit the protection to statutorily imposed duties of confidence, whereas the protection should plainly extend to other duties of confidence recognised by national laws**.

34. It follows from **Article 13** that, in the absence of a declaration under Article 13(6), a prisoner may be transferred without consent from the *requesting* Member State by agreement between the 'competent authorities', which according to the explanatory comments could simply be the respective police forces if nominated as competent by those States. Our first comment is that **the judicial authorities should be solely responsible for making such a decision**. An application by the police would then be subject to examination (for instance) by a judge.

35. Secondly, we feel that there should be a safeguard to parallel that of Article 11(1)(c) of the 1959 Convention, namely that **a transfer may be refused if it is liable to prolong the prisoner's detention**; the deduction rule of Article 13(4) might not be sufficient if a person was nearing the end of a period of detention. The judicial authorities should also have discretion to refuse transfer if there are other overriding grounds, as provided by Article 11(1)(d) of the 1959 Convention. We may add that the references in Article 13(5) to various Articles of the 1959 Convention are confusing and unsatisfactory, since these refer specifically to transfers in the opposite direction by the requested State. The wording should be redrafted accordingly.

36. **Article 14** (spontaneous exchange of information) allows the competent authorities (in this case, under Article 15, the judicial authorities alone) to exchange information without a request being made. The information can relate to violations of public order provisions as well as to criminal offences. **We are concerned that no mention is made of rules on data protection**, since the EU Directive on this subject is not applicable. (see para.7).

37. In this connection we should comment on the reply by the previous administration to a letter from Lord Hoffmann, who asked about the extent to which existing international obligations, including the Council of Europe Convention on data protection, would be relevant in providing protection for the individual in the context of exchanging criminal records.[15] In a reply dated 24 April 1997 (supplied to us by the Committee), Baroness Blatch stated that 'The Council of Europe Convention provides, in effect, that there shall be no obstacles to the transfer of data among countries which have ratified the Convention.' She added that the latter Convention extends to all automated data processing, and that parties to the Convention 'are entitled to assume that all partner countries which have ratified have acceptable levels of protection'.

38. The Minister did not, however, explain that the Convention also allows derogations from a number of its key provisions for purposes which include measures necessary

[15] *Correspondence with Ministers*, 12th Report, 1996-97, HL Paper 69, p. 33.

'for the suppression of criminal offences', and that the UK (like many other States) has included corresponding exceptions in its legislation. It is for this reason that Conventions relating to police co-operation such as the Schengen Convention and the Europol Convention[16] contain specific references to data protection safeguards, though in the case of the second of these Conventions we have strongly criticised their effectiveness.[17]

THE COUNCIL OF EUROPE APPROACH

39. Although it is argued in some quarters that it is now irrelevant to consider what measures the Council of Europe may have been considering in this area (para. 3 above), it is nevertheless instructive to look at the approach which its Committee of Experts was exploring before the work was halted. Where the field of telecommunications is concerned it is not at all the case that, as claimed in the report to the Council (para. 4 above), 'nearly identical instruments' have been envisaged. Those working on a Second Additional Protocol to the 1959 Convention did not consider it necessary to deal with the interception of telecommunications, though in certain other respects there was a nominal overlap with the EU approach. However, we shall see below that even here there are crucial differences.

40. The Council of Europe now treats telecommunications as an inseparable component of the much broader field of information technology. This is discussed, for instance, in the Explanatory Memorandum attached to a 1995 Recommendation which was originally aimed at dealing specifically with computer-related crime;[4] the title was changed to adjust to the reality that computers now use telecommunications to exchange data. With the advent of the integrated services digital network (ISDN), former distinctions become even less meaningful.

41. With this in mind, the Council of Europe has started to draft a Convention to deal with 'cybercrime' and interceptions in an inclusive manner. From this point of view, to attempt to deal with one particular form of telecommunications (such as satellite linkage with ground stations) under the heading of judicial cooperation makes little sense, and could lead to different forms of legislation imposing mutually incompatible sets of legal obligations on participating States.

42. Returning to the drafting of the Second Additional Protocol, we understand that although it was not intended to cover interceptions, it would probably have covered not only controlled deliveries but also cross-border searches into computer networks and other cross-border investigations. However, in these three categories an important condition was to be imposed: that the obligation to render mutual assistance was restricted to cases where the authorities of the requesting State were conducting investigations *within the framework of criminal proceedings in respect of an extraditable offence.* This was evidently a recognition that the terminology of the 1959 Convention, which applies in principle to any kind of offence, was unsuitable for investigative and potentially intrusive matters involving law enforcement agencies rather than the judiciary.

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[16] *Europol*, 10th Report, 1994-95, HL Paper 51.
[17] *Ibid.*, evidence pp. 15-42.

43. This restriction is, in our opinion, very much preferable to the less well defined scope of the draft EU Convention, where even 'infringement of public order provisions' is to be covered (para. 25 above) and interceptions of telecommunications will in some cases require only a valid order under the law of the requesting State. Only in the case of controlled deliveries (Article 10) is there a restriction to deliveries 'in the framework of criminal investigations into extraditable offences'. Even here the wording is more permissive, since there is no reference to impending proceedings.

44. The difference between the two approaches seems to exemplify the different philosophies which guide the Council of Europe and the EU in its third pillar mode. The first institution has long rested on the bedrock of the European Convention on Human Rights, and its legal instruments are carefully designed not to pose a threat to such rights. The second, while paying lip service to the ECHR (and only since Amsterdam giving it a proper place in Community law), has been more 'pragmatic' (or less principled) and driven by political pressures for action. As we have seen, some of these come from outside the Union.

45. Where crime is concerned, these pressures have intensified with the effective abolition of internal borders and a widespread fear of a possible spread of organised crime. In this atmosphere, individual rights have been viewed as only one factor to be balanced against the need for firm action. The problem for national parliaments is of course that, unlike a Council of Europe Convention, the signing of a third pillar Convention implies a commitment to ratify it and put it into effect as soon as possible, whatever reservations there may be about its details. As the Select Committee has long recognised, this makes it imperative to ensure that the final draft poses no incipient threat to human rights.

46. A most unfortunate conflict of interests therefore appears to have arisen over the different approaches to a new Convention adopted by the Council of Europe and the European Union. The dominance of the Union, with its greater resources and the ability to call working groups together for discussion at more frequent intervals (typically once a month, compared with twice a year for the Council of Europe), has led to a sidelining of work at the Council of Europe which could have provided a sounder and more lasting basis for agreement. **The UK's Presidency of the Council will provide an opportunity to put relations between the two bodies on a more productive footing**. Indeed, the Government could use its current membership of the 'troika' (of previous, present and next Presidencies) to start the process immediately.

CONCLUSIONS

47. We feel that it would be a surprising and retrograde step if the Government, at the same time as it moves at last to incorporate the European Convention on Human Rights, were to sign a Convention containing as many defects as we have identified in the present draft. Our overall impression is that the imprecise or permissive drafting of a number of Articles leaves a great deal to be desired, and could in each case lead to an erosion of the individual rights at present guaranteed under UK law.

Our main conclusions are as follows:

- **The desirability of including Articles 6 to 9 (telecommunications interception) in any form in the present Convention should be seriously reconsidered by the Government (para. 22). Failing that, Article 8 (satellite telecommunications) should be redrafted to incorporate in every case the safeguards of the Council of Europe's Recommendation R (85) 10 on this topic (paras 16-22).**

- **There is a serious risk that the Convention in its present form, combined with existing understandings with third countries on the interception of telecommunications, will open the way to extensive and increasing surveillance of individuals within the Union by law enforcement agencies, including those outside the jurisdiction of Member States (paras 23-4).**

- **Similarly, we question the desirability of including Article 10 (controlled deliveries) in this Convention (para 30). In any event, such operations should be flanked by strict controls because of their potential impact on the criminal justice system. The draft Naples II Convention covering customs cooperation between Member States is relevant in this respect; it has yet to be put to Parliament for scrutiny.**

- **Article 2 (scope of the Convention) represents a departure from the principle of double criminality, and the reference to 'infringement of public order provisions' would mean that a person could be subject to mutual assistance procedures in respect of conduct that might simply give rise to civil proceedings in this country (paras 25-6).**

- **Article 3 (compliance with formalities indicated by requesting State) could lead to delays in the system, undermine existing obligations of confidence, and erode the administrative protection offered under instruments such as the PACE Codes of Practice (paras 27-9).**

- **Article 11 (service and translation of documents) should not allow only 'important passages' to be translated for the benefit of a recipient; the whole document should be translated to avoid injustice (para. 32).**

- **References to 'legislation' concerning the right not to testify in Article 12 (hearings by video conference) should by replaced by 'laws', to recognise duties of confidence recognised by national laws other than statutory legislation (para. 33).**

- **The transfer of a prisoner without his consent to assist investigations in another Member State (Article 13), where this is done at the request of law enforcement agencies of the State in which he is in custody, should be subject to judicial control (paras 34-5).**

- **The rules on the spontaneous exchange of information (Article 14) should include specific safeguards for the protection of personal data (paras 36-8).**

- **The Government should use its influence, particularly when holding the**

Presidency of the Council, to bring about a better working relationship between the EU and the Council of Europe regarding the drafting of similar Conventions (paras 39-46).

October 1997

ADDENDUM

Draft Convention on Mutual Assistance and Cooperation between Customs Administrations (11089/97, ENFOCUSTOM 53)

Introduction

Significant overlaps exist between the draft Convention on Mutual Assistance in Criminal Matters and the draft Convention on Mutual Assistance and Cooperation between Customs Administrations (the Naples II Convention). The latter was deposited for scrutiny on 18 November 1997, although it is on the agenda for adoption at the 4-5 December 1997 meeting of the Justice and Home Affairs Council. As a preliminary matter, we note that this leaves less than three weeks for Parliamentary scrutiny, which given the complex nature of the Convention cannot be regarded as sufficient. JUSTICE expresses its deep concern over this.

Because of the close relationship between the two draft Conventions mentioned above, as well as the Convention applying the Schengen Agreement, it is imperative that the operation in practice of the Schengen Convention be reviewed and that all three instruments be considered together. To this end, and in the limited time available, we would like to make the following brief comments with regard to the draft Naples II Convention.

Data protection

The exchange of information is central to cross-border cooperation between customs authorities. In this light, it is significant that Article 25 of the draft Naples II Convention (data protection for the exchange of data) does not refer to the 1981 Council of Europe Data protection Convention or to Recommendation R(87)15 on the use of data in the police sector. Whereas at present, all Member States have ratified the Data Protection Convention, several of the States lined up to join the EU have not (e.g. the Czech Republic, Poland and Bulgaria). Since the Naples II Convention is not likely to be revised before these States join, it is important that strong data protection provisions are included now.

Article 25(2)(h) states that data "*shall enjoy at least the same protection as is given to similar data in the Member State which received them*." There is thus nothing to stop a Member State with a high level of protection transferring personal data to a State where such protection is inadequate or non-existent. There is no reference to the "*adequate level of protection*" required for transfers to third countries both by the Data Protection Directive and by such instruments as the Europol Convention.

Article 25(2) merely contains elements of the principles underlying the Data Protection Convention, but no obligatory mechanism for ensuring that they are respected. Subparagraph (i) demands "*effective controls*" but goes on to state that the task of control may be assigned to an independent national monitoring authority with effective powers to enforce compliance. The importance of independent supervision is highlighted in the very vague wording of subparagraph (g), on time limits for the retention of data: without independent supervision, this is an empty letter.

Subparagraph (a) states that the use of data by the recipient authority "*shall be authorised only for the purposes referred to in Article 1(1).*" However, this is extremely broad and covers any activity which facilitates mutual assistance, limited only by conditions which may be imposed by the communicating State.

<u>The role of the Court of Justice.</u>

Article 26 of the Naples II Convention, dealing with the role of the European Court of Justice, has been left blank. We would like to stress again that it is vital that the Court should have full jurisdiction over the Convention to ensure its uniform application throughout the EU in accordance with the requirements of the European Convention on Human Rights, and human rights principles arising from other international instruments. The Explanatory Memorandum sets out, in paragraph 12, that the Presidency has suggested that the provisions on the powers of the Court under new Article 35 TEU (ex Article K.7) should be followed. JUSTICE supports this suggestion, while stressing that it is vital that the Court will have full jurisdiction to hear references from national courts. The Government should be pressed to set out its position on this.

ecommendation R (85) 10 of the Committee of Ministers concerning the practical application of the European Convention on Mutual Assist riminal Matters in respect of letters rogatory for the interception of telecommunications (Council of Europe, 1986). An Explanatory Memoran so provided.

ne existence of a ground-based station is not actually specified either here or in Article 6(3)(b), so as to allow for unforeseen tech elopments. The Article covers any case in which 'correspondence can only be intercepted in another Member State'.

nhancing parliamentary scrutiny (note 1), evidence Q86.

ecommendation R (95) 13 of the Committee of Ministers concerning problems of criminal procedural law connected with information techno uncil of Europe, 1995).