

Address given by Michael McDowell on the European Constitution (12 May 2005)

Caption: On 12 May 2005, Michael McDowell, Irish Minister for Justice, Equality and Law Reform, analyses various aspects of the Treaty establishing a Constitution for Europe and emphasises the Irish Government's commitment to the Treaty.

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Speech by the Minister for Justice, Equality and Law Reform, Mr Michael McDowell, T.D., to the National Forum on Europe Seminar, 12 May, 2005.

Introduction

The world in which we live has been transformed in the thirty odd years since we joined the then European Economic Community. Economic prosperity, the opening up of travel opportunities and technological developments have radically changed the nature of the world in which we live as well as Ireland itself. The European Union has grown from European Economic Community and its membership has increased from nine to twenty five members. It will shortly further increase to twenty seven. Those changes have combined to create new challenges as well as new opportunities.

Ireland has benefited greatly from our membership of the European Union. Our membership has brought economic success and prosperity. It has had a positive impact on all parts of the country and on peoples' lives. The European Union is, I believe, central to our future development as part of a vibrant and forward-looking Europe. The European Constitution is in turn, I believe, central to the future development of the European Union. The Constitution will equip the Union to face the challenges ahead and ensure that it will function better and more coherently. That can only be to the benefit of an export-driven economy such as ours, and to the benefit of the outward looking society which Ireland has become.

The further development of the European Union as an area of freedom, security and justice will continue to be among the key challenges for the Union in the years ahead. That is why I welcome the changes which the European Constitution will make for the purpose of facilitating that cooperation in particular.

The changes which have transformed Europe and Ireland in the past thirty years have also created new opportunities for those who commit serious crime and acts of terrorism. Criminals have proved more than adept at availing of the ease of travel and modern means of communication, as well as the existence of borders and different jurisdictions to further their criminal enterprises. Similarly, Europe's economic prosperity has been reflected in an increase in illegal immigration. There has also been a significant growth in asylum seeking. These developments in turn present challenges for us in Europe to which we need to respond. Purely national responses are no longer adequate.

It was the realisation that purely national responses will no longer work that has prompted the development of cooperation in justice and home affairs matters at the level of the European Union. That cooperation has developed and evolved from modest beginnings.

From Justice and Home Affairs to Freedom, Security and Justice

Cooperation in justice and home affairs matters among the Member States of the European Union predates the formal Treaty arrangements created by the Maastricht Treaty. It was the scourge of terrorism which prompted the establishment of "TREVI" as a forum for police cooperation in 1975 outside the framework of the Treaties. September 11th and the Madrid bombings of March last year remind us of the need for continuing cooperation at the level of the Union for the purpose of combating terrorism. That informal cooperation was later extended to other forms of international crime and immigration and asylum matters.

The Maastricht Treaty of 1992 made these matters of common interest for the Member States and created a separate Justice and Home Affairs "pillar", distinct from the Community and the Common Foreign and Security Policy pillars. This new Third Pillar of the Union continued to emphasise the intergovernmental nature of JHA cooperation. Its distinguishing features included non-Community legislative instruments, decision making by unanimity, and quite limited roles for the Commission and European Parliament.

The Amsterdam Treaty of 1997 and the Nice Treaty of 2001 saw further developments. The immigration, asylum and civil law aspects of JHA cooperation were integrated into the Community framework while police and judicial cooperation remained subject to strengthened Third Pillar arrangements and a greater role for the Commission and Parliament. The Schengen acquis was also brought within the Community

framework.

The result is that the present arrangements for cooperation are based on a complex mosaic of European Community and European Union Treaty provisions. This means that different decision making procedures, different legislative instruments, and different institutional responsibilities exist for the purposes of different aspects than cooperation.

Much has nevertheless been achieved. The following examples illustrate just a few of those achievements:

- Europol has been established to give practical support to police investigations in relation to cross-border crime. Eurojust serves a similar function for the purpose of facilitating cooperation among prosecuting authorities. Eurojust was to play a key role in facilitating the successful prosecution in Belgium of those responsible for the trafficking of illegal immigrants from the Continent to Ireland in 2001, which led to the deaths of eight people in Wexford.
- The legal framework for judicial cooperation in combating crime has been developed through the implementation of the principle of mutual recognition by way of the European Arrest Warrant and by reference to orders freezing property and confiscation orders. These instruments improve our capacity to secure the return of persons who commit crime and the profits they make from that crime. It is already apparent that cases are being dealt with more quickly under the new EAW arrangements.
- Minimum standards have been developed in relation to asylum procedures, reception facilities and the qualification of persons as refugees as well as criteria for determining the Member State responsible for examining asylum applications which are intended to create a level playing field and prevent abuses of the asylum process. The Dublin II Regulation for this latter purpose, for example, has resulted in over 90 transfer orders being issued in respect of persons who had previously lodged any asylum application in another Member State before doing so here.

The Constitutional Treaty

Much, however, also remains to be done if the Union is to fully become an area of freedom security and justice.

It will be clear from that short sketch that cooperation in JHA matters has evolved over time from purely intergovernmental to a more hybrid form of cooperation. It will also be clear that Member States have been willing to pool greater sovereignty as their experience of that cooperation has developed. The changes, which the European Constitution will make, when seen in that context of those developments, show that it represents not only the natural evolution of a process begun with the Maastricht Treaty in 1992 but, equally, the increasing confidence which Member States place in cooperation at the level of the Union. The European Constitution therefore represents a further welcome stage in the process of developing cooperation and will bring it within a single legal and institutional framework, while preserving some of its unique characteristics which remain both necessary and desirable.

The changes which the European Constitution makes will, I believe, significantly enhance the capacity of the Union to facilitate cooperation in justice and home affairs matters in the context of the development of the Union as an area of freedom, security and justice, while meeting our key national concerns.

The European Constitution will, in particular, bring real added value by:

- firstly, greatly simplifying the existing legal framework and setting out clear objectives for future cooperation governing cooperation;
- secondly, making decision making for the purpose of achieving those objectives more effective and

efficient;

- thirdly, strengthening democratic control in the decision making process; and
- fourthly, ensuring the development of cooperation in this field is consistent with respect for fundamental rights and the different legal systems and traditions of Member States.

I want now to explain in a little more detail how the European Constitution creates this added value.

Greater clarity and simplicity

It will be clear, from what I have outlined, that the present arrangements for cooperation are based on a complex mosaic of European Community and European Union Treaty provisions. The European Constitution will sweep away much of the complexities which derive from those different Treaty bases and provide a single, and more accessible, framework for the development of cooperation in this area.

The European Constitution defines the objectives of the Union for this purpose, as well as the respective roles of the Commission, Member States and the European and Member State Parliaments, in a clear fashion. The overriding objective, set out in Chapter IV of the Treaty, is that the Union should constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of Member States. The more detailed objectives for the purposes of that area of freedom, security and justice are further elaborated as:

- ensuring the absence of internal border controls and framing a common policy on asylum, immigration and external border control which is based on solidarity between Member States and which is fair towards third country nationals;
- ensuring a high level of security through measures to prevent and combat crime, through measures for coordination and cooperation between police and judicial authorities, through the mutual recognition of judgements in criminal matters, and, where necessary, the approximation of criminal laws;
- facilitating access to justice, in particular through the principle of mutual recognition of judgements in civil matters.

Those more detailed objectives are also updated by reference to each of the four areas of cooperation dealt with in Chapter IV – border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation – taking account of the progress already made in developing the Union as an area of freedom, security and justice. These clearly spell out the limits of Union competence and nature and scope of the cooperation which is envisaged. The European Constitution also provides a mechanism which will enable new areas to be identified for cooperation in relation to judicial cooperation in criminal matters. Any such extension will be decided by unanimous decision of the Member States and will require the consent of the European Parliament.

The European Constitution will, in addition, replace the multiplicity of legal instruments which currently exist for the purpose of cooperation in justice and home affairs matters by a smaller number which will now be common to all aspects of the Treaty.

Greater efficiency and effectiveness

The European Constitution will make decision making more effective and efficient through the extension of qualified majority voting and other institutional changes.

The ordinary legislative procedure – qualified majority voting and co-decision with the European Parliament – is being extended to additional areas of cooperation, including many aspects of judicial cooperation in criminal matters, as well as police cooperation and all remaining areas of policies in relation to border checks, asylum and immigration. Unanimity, however, is being retained for certain key decisions and a

further safeguard is introduced by way of the emergency brake to which I will return. The extension of the ordinary legislative procedure to these new areas is a necessary and proportionate response to the need for greater efficiency in the face of enlargement. It is also, I believe, the result of the growing confidence with which Member States approach cooperation at the level of the Union in the light of their experience of the operation of existing Treaty provisions.

The Constitutional Treaty, while preserving the rights of Member States to bring forward initiatives for the purposes of police and judicial cooperation in criminal matters, will now require any such initiatives to be sponsored by at least a quarter of Member States. This will also contribute to greater efficiency by ensuring such measures have a reasonable prospect of adoption.

Strengthen the role of Member State Parliaments and the European Parliament

The European Constitution will also strengthen the role of the European Parliament and Member State Parliaments in the decision-making process, thus ensuring greater democratic control in the development of the Union as an area of freedom, security and justice.

That is, in part, a natural consequence of the extension of the ordinary legislative procedure to new areas of freedom, security and justice cooperation. The European Parliament will become co-legislators for the purpose of the great majority of measures to be adopted under Chapter IV. The European Parliament will also continue to be consulted in matters in which unanimity is required at the level of the Council. In addition, provision is made for the European Parliament and Member State Parliaments to have a scrutiny role in relation to the Europol and Eurojust.

With regard to Member-State Parliaments, the Protocol on the Role of National Parliaments in the European Union and the Protocol on the application of the principle of Subsidiarity and Proportionality are intended to enhance the role national parliaments place in the European legislative process. They also give national parliaments an important role, in particular, in monitoring the application of the principles subsidiarity and proportionality for the purpose of the legislative process. Moreover, Chapter IV, together with the Protocol, make special provision in relation to legislative measures directed to police and judicial cooperation in criminal matters for this purpose. The effect of those enhanced monitoring provisions is that a review of a proposed measure will be triggered where a reasoned opinion represents a quarter, instead of a third in the ordinary way, of the votes allocated to national parliaments.

Ensure respect for fundamental rights and the different legal systems and traditions of Member States

The European Constitution will ensure that the requirement that the development of cooperation is consistent with respect for fundamental rights and the different legal traditions of Member States is embedded in the Constitutional Treaty.

The European Constitution reaffirms the values upon which the Union is founded. These include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Those values are reinforced in the European Constitution through the incorporation of the Charter of Fundamental Rights into the Treaty and provision for the accession by the Union to the European Convention on Human Rights. The Charter will have application to the institutions of the Union when they are exercising their powers and to Member States when they are implementing Union law. These provisions, which are of general application, will underpin the Union's statement of values. In addition, the opening words of Chapter IV set the further headline in that specific context for by providing that the Union will constitute an area of freedom, security and justice with respect for the fundamental rights and the different legal systems and traditions of the Member States. All measures brought forward for the purposes of Chapter IV will have to respect this new constitutional imperative.

The requirement to respect the different legal traditions of Member States is further underpinned by:

- the new constitutional recognition of the principle of mutual recognition as the basis for judicial cooperation in both civil and criminal matters;
- the recognition of the right of Member States to maintain or introduce higher levels of protection in the context of the provision being made for measures in the area of criminal procedure;
- the retention of a requirement for unanimity for decision making purposes in the most sensitive areas including the provisions relating to the possible establishment of a European Public Prosecutor; any extension of Union competence in the area of criminal procedure or the approximation of criminal law; family law measures with cross border implications and certain aspects of police cooperation; and
- the possibility of recourse to the emergency brake in cases in which proposals in the area of judicial cooperation in criminal matters would affect fundamental aspects of the criminal justice system of a Member State.

The emergency brake will allow a Member State, which considers that a proposed measure would affect fundamental aspects of its criminal justice system, to request that the negotiation of the proposal be suspended and the proposal must be referred to the European Council. The European Council, which acts by unanimity in such matters, can decide to either request the Commission, or the group of Member States who initiated the proposal, to redraft the proposal or it can decide to approve the suspended measure. It is also open to Member States, in the absence of a decision by the European Council, to pursue cooperation through the provisions for enhanced cooperation provided that at least one third of Member States want to pursue cooperation in relation to the measure in question. This will ensure that a Member State's concern to protect fundamental aspects of their own legal system does not have to act as an obstacle to the development of cooperation between other member States.

I also want to stress, in relation to judicial cooperation in family law matters, that cooperation under the European Constitution is concerned with such matters only insofar as they have cross-border implications, unanimity remains the means for decision making, and that our right not to participate in individual measures is preserved by the European Constitution.

Common Travel Area

I have already mentioned that special arrangements exist under the Treaty of Amsterdam in relation to Ireland and the United Kingdom for the purpose of the provisions dealing with visas, asylum, immigration and other policies related to the free movement of persons as well as the Schengen acquis. Those arrangements were necessary because we wished to maintain the Common Travel Area with the United Kingdom in circumstances where the UK wished to maintain its controls at ports and borders and because we, like the UK, were not parties to the Schengen arrangements. Those arrangements mean that we are not bound by the relevant Treaty provisions, or measures adopted under them, except to the extent to which we choose to opt into them.

The European Constitution will preserve these pre-existing arrangements and, therefore, ensure that the Common Travel Area with the UK will be maintained. That means, in practice, that freedom of movement into and out of Ireland will continue to be maximised. The Government will, of course, also continue to seek to exercise our right to opt into the measures in question to the maximum extent consistent with the maintenance of the Common Travel Area. Measures in relation to which we have opted in under these arrangements include the Council Directive on the admission of third country nationals for the purposes of scientific research which help maintain our leading position in the area of research and development, and is important for our continued economic prosperity, and the Council Decision establishing a European Refugee Fund.

Conclusion

The European Constitution reflects much of the work of the Convention Working Group on Freedom, Security and Justice, chaired by the former Taoiseach and current EU Ambassador to the United States, John Bruton. That Working Group, in submitting its report, noted that areas such as cross-border crime, asylum policy and control of the Union's external borders could no longer be effectively dealt with by States acting

on their own. It further noted that the battle against crime was an area in which the European Union could demonstrate its relevance to citizens in the most visible way and that public concern had been heightened following the events of September 11th.

Those concerns remain even greater today in the aftermath of the Madrid attacks of 11 March, 2004 in which nearly 200 people lost their lives. Cross-border crime, the trafficking of people, and terrorism all continue to threaten our freedom and security. They are cross-border issues which are not susceptible to action at national level alone but which also require cooperation and coordination at the level of the Union. Action at the level of the European Union can have a real impact on the quality of life of our citizens. It was important therefore that we equip the Union with the means to be effective.

The Irish Government approached the negotiations on the European Constitution conscious of that need for change in the Treaty arrangements if the Union was to be properly equipped to meet the challenges it faces in developing an area of freedom, security and justice. We also approached the negotiations concerned to ensure that any such new arrangements would include appropriate recognition of the value we place in our own legal system and traditions.

I believe that the new European Constitution will equip the Union in the manner now required. I am satisfied that the changes which the European Constitution makes will bring significant added value to the way in which we organise our cooperation. I am also satisfied that the European Constitution gives proper and adequate recognition to our concern to maintain our legal system and traditions and ensures that we can do so.