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Constitution for Europe

Conseil des barreaux européens – Council of Bars and Law Societies of Europe
association internationale sans but lucratif

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Constitution for Europe

Introduction

The Treaty establishing a Constitution for Europe was adopted by the 25 European Union Heads of State and Government in Brussels on 17 and 18 June 2004. Referendums are to be held in at least twelve of the 25 Member States. The European Constitution, if ratified by the Member States, will replace the current EU treaties with a single, new text.

The main objectives of the Constitution are

- to simplify the overlapping series of Treaties and Protocols providing the current legal constitution for Europe;
- to enhance and streamline decision-making in the Union; and
- to enable citizens to feel more part of the European Union.

Critics of the Constitution point out that, compared to many existing national constitutions (e.g. the 4,600 word US Constitution), the European Constitution is very long, at around 265 pages and over 60,000 words in its English text. Nevertheless it remains considerably shorter and less complex than the existing set of treaties that it consolidates.

The guide is not a comprehensive analysis or assessment of the Constitution. Rather, it covers those parts which the CCBE believes to be of most interest and relevance to bars and law societies.

Structure

The Constitution is divided into four parts, explaining respectively the constitutional architecture of the European Union, the Union's Charter of Fundamental Rights, the policies and operation of the Union and, general and final provisions.

The format of the Constitution is as follows:

- Preamble
- Part I: (untitled)
- Part II: Charter of Fundamental Rights
- Part III: The Policies and Functioning of the Union
- Part IV: General and Final Provisions
- Annexes
- Protocols
- Declarations

Part I is the core constitutional part. It defines the Union - its values, aims, powers, citizenship, decision-making rules, budgetary arrangements and institutions. It also contains provisions on joining the Union, suspension from it and withdrawal from it.

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Part II incorporates the Charter for Fundamental Rights, designed to protect citizens against EU laws that might infringe their basic rights. Up to now, the Charter has had no binding legal force, but once the Constitutional Treaty takes effect, the Charter would have such force.

Part III consolidates the Articles from previous treaties dealing with the Union's policies, into a single Constitutional Treaty. It also goes into detail with regard to institutions, policy in the area of justice and home affairs, foreign policy, financial arrangements and decision-making.

Part IV sets out how Member States may go about ratifying and amending this new Constitutional Treaty.

What provisions most impact on lawyers?

The Constitution covers many areas. In this note, the CCBE focuses on three areas which are seen to be most relevant to lawyers.

(a) Justice and Home Affairs

The provisions regarding Justice and Home Affairs are to be found in Part III, Title III, Chapter IV.

Judicial cooperation in Civil matters

As in Article 65 of the EC Treaty, judicial cooperation remains restricted to civil matters having cross-border implications, always "in so far as necessary for the proper functioning of the internal market". The principle of mutual recognition of judicial and extrajudicial decisions is written into the Constitutional Treaty as a cornerstone of judicial cooperation in this area. The list of fields in which the Union may adopt such measures is widened to include those aimed at ensuring a high level of access to justice, elimination of obstacles to the proper functioning of civil proceedings, the development of alternative methods of dispute settlement, and support for the training of the judiciary and judicial staff.

As provided for in the 2001 Treaty of Nice, all legislative measures are subject to co-decision and qualified majority voting, with the exception of measures concerning family law with cross-border implications, for which unanimity is retained. However, the Constitution now includes in Article III-269 a paragraph enabling the Council of Ministers, acting unanimously, to extend the ordinary legislative procedure to certain aspects of family law.

Judicial cooperation in Criminal matters

As in the case of judicial cooperation in civil matters, the principle of mutual recognition of judicial decisions in criminal matters is enshrined in the Constitution, in accordance with the political agreement reached at Tampere in October 1999. The current acts (common positions, decisions, framework decisions, conventions) are replaced by [laws and framework laws](#) adopted using the [ordinary legislative procedure](#) (co-legislation by the Parliament and the Council of Ministers subject to review by the Court of Justice), except for the European Public Prosecutor's Office.

Criminal proceedings

Cooperation also covers the approximation of laws through the establishment of minimum rules in the following fields (Article III-270 of the Constitution introduces three areas of action):

- mutual admissibility of evidence (the Constitution does not, however, provide for the harmonisation of evidence or the manner in which it is handled);
- the rights of individuals in criminal procedure; and
- the rights of victims of crime.

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Substantive criminal law

Article III-271 provides that the Union may define criminal offences and sanctions in 10 areas of particularly serious crime with cross-border dimensions: terrorism, illicit drug trafficking, organised crime, trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime. Neither this list, nor the list of aspects of criminal proceedings, is exhaustive: the Council of Ministers, acting unanimously after obtaining the consent of the European Parliament, may decide to extend them.

In addition, the Council may adopt, acting unanimously, minimum rules with regard to the definition of criminal offences and applicable sanctions (substantive criminal law), when the approximation of national laws proves essential to ensure the effective implementation of a Union policy in an area which has already been subject to harmonisation measures. This criterion makes it possible to cover the fight against racism and xenophobia, fraud affecting the financial interests of the Union, tax evasion, crimes affecting the environment and counterfeiting of the euro.

Eurojust

Article III-273 extends and clarifies the operational powers of Eurojust (the network of judicial authorities). Article 31 of the EU Treaty, as amended by the 2001 Treaty of Nice, entitled Eurojust to request a Member State to open an investigation, without this request being binding. The Constitution now provides that Eurojust can itself:

- initiate criminal investigations (taking due account of national rules and practices, as stipulated in Declaration No 23 annexed to the Final act of the IGC);
- propose to national authorities that prosecutions be initiated; and
- coordinate investigations and prosecutions being pursued by the competent authorities.

Eurojust's activities must comply with the Charter of Fundamental Rights, and are subject to [review by the Court of Justice](#).

European Public Prosecutor's Office

Article III-274 of the Constitution provides that the Council, acting unanimously and after obtaining the consent of the European Parliament, may establish a European Public Prosecutor's Office from Eurojust, but only to combat crimes affecting the financial interests of the Union. The tasks of the European Public Prosecutor's Office will include investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences of this type.

However, the Constitution leaves a door open by providing for the possibility for the European Council to extend the powers of the European Public Prosecutor's Office to include serious crime with a cross-border dimension. Any such decision may be taken at the same time as, or after, the decision establishing the European Public Prosecutor's Office and must be taken unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Court of Justice

As for the powers of the European Court of Justice in the field of justice and home affairs, the Constitution abolishes the limitations and derogations laid down in Articles 68 of the EC Treaty and 35 of the EU Treaty, thus enabling the Court in particular to review Member State compliance in this field. However, the exceptions relating to the review of the validity or proportionality of police operations, the maintenance of law and order and the safeguarding of internal security laid down in Article 35(5) of the EU Treaty are retained in Article III-377.

Other areas within Justice and Home Affairs

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The Constitution also contains a number of provisions regarding borders, asylum and immigration. The new Treaty provides that this field, including its financial implications, will as a general rule be governed by the principle of solidarity and a fair sharing of responsibility. As far as the procedures are concerned, the Commission will in future have sole right of legislative initiative. All measures will be adopted in the form of laws or framework laws through the normal legislative procedure, with the exception of emergency measures in the event of mass influx, for which the Parliament will merely be consulted.

The issue of police cooperation is also dealt with in the Constitution. The provisions regarding Europol result in a strengthening of the powers of Europol with regard to "serious crime affecting two or more Member States" by giving it responsibility for the coordination, organisation and implementation of investigations carried out jointly with the national authorities. However, any operational action by Europol must be carried out in liaison with the national authorities and the application of coercive measures remains the exclusive responsibility of national agents.

(b) The judicial system - Court of Justice and General Court

The Constitution changes the name of the European Court of Justice. The supreme body is now called the "Court of Justice" while the Court of First Instance of the European Communities is renamed "General Court". Article I-29 states that the Court of Justice of the European Union includes "the European Court of Justice, the General Court and specialised courts".

Article III-359 of the Constitution states that specialised courts may be attached to the General Court by means of European laws, adopted under the [ordinary legislative procedure](#). These laws, adopted on a proposal from the Court of Justice or the Commission, will lay down the rules on the organisation of the General Court and the extent of the jurisdiction conferred on it.

Article III-357 of the Constitution provides for the setting up of a panel to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General, before the governments of the Member States take the decisions regarding their appointment.

The Constitutional Treaty does not make any changes to the Court's tasks. However, it stipulates that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article I-29).

Regarding private individuals' access to the Court of Justice, the relevant provision provides that any natural or legal person may institute proceedings against "a regulatory act which is of direct concern to him or her and does not entail implementing measures" (Article III-365). This is seen to be wider than what previously existed.

(c) The Charter of Fundamental Rights

The Charter of Fundamental Rights had been agreed prior to the Constitution for Europe. However, the Charter has not been part of the Union's Treaties and had no binding legal force. Under Part II of the European Constitution, the Charter of Fundamental Rights would have binding legal force:

- the institutions, bodies and agencies of the Union would have to respect the rights written into the Charter;
- the same obligations would be incumbent upon the Member States, but only when they were implementing the Union's legislation; and
- the Court of Justice would ensure that the Charter is adhered to.

However, inclusion of the Charter would not give the Union extra powers, or affect the balance between its area of operation and that of the Member States. Relevant provisions in the European Constitution are as follows:

- Part II, which incorporates the Charter, explicitly says that it “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union”;
- it also states that full account is to be taken of national laws and practices; and
- it says that nothing in the Charter is to be interpreted as restricting or adversely affecting human rights, as recognized by, inter alia, the Member States’ constitutions.

The content of the Charter is broader than that of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It draws on the previous European Social Charters worked out by both the EU and the Council of Europe. While the ECHR is limited to civil and political rights, the Charter of Fundamental Rights covers other areas (such as the right to proper administration, social rights, the protection of personal data, bioethics).

The rights under the Charter, as now incorporated, apply to every person in the EU except where it is stated that they are ‘citizens rights’ and thus apply only to those who are EU citizens. In the Annex can be found a summary of the headings of the Charter, showing what it covers.

(d) Other provisions

Legal personality

The European Union has legal personality under the Constitution. This means that it is able to represent itself as a single body in certain circumstances under international law. Most significantly, it is able to sign treaties as a single body where all its member states agree. This provision is not new in one sense, since the European Community has always had legal personality. But the parallel Community and Union structures are now merged and simplified into a single entity, so a new recognition of the Union’s legal personality is required.

Role of national parliaments

Member states’ national parliaments are given a new role in scrutinising proposed EU laws, and are entitled to object if they feel a proposal oversteps the boundary of the Union’s agreed areas of responsibility.

Conclusion:

The CCBE hopes the guide will be of some assistance in explaining how the Constitution might impact on bars and law Societies in a number of areas, particularly in those Member States where a referendum on the Constitution will be held. More detailed information and explanations on all Constitution provisions and changes to the old Treaties can be found at the following websites:

http://europa.eu.int/constitution/index_en.htm

<http://www.answers.com/topic/treaty-establishing-a-constitution-for-europe>

<http://www.forumoneurope.ie>

Annex

Charter of Fundamental Rights - headings

Dignity

- Human dignity
- Right to life
- Right to the integrity of the person
- Prohibition of torture and inhuman or degrading treatment or punishment
- Prohibition of slavery and forced labour

Freedoms

- Right to liberty and security
- Respect for private and family life
- Protection of personal data
- Right to marry and right to found a family
- Freedom of thought, conscience and religion
- Freedom of expression and information
- Freedom of assembly and of association
- Freedom of the arts and sciences
- Right to education
- Freedom to choose an occupation and right to engage in work
- Freedom to conduct a business
- Right to property
- Right to asylum
- Protection in the event of removal, expulsion or extradition

Equality

- Equality before the law
- Non-discrimination
- Cultural, religious and linguistic diversity
- Equality between men and women
- The rights of the child

- The rights of the elderly
- Integration of persons with disabilities

Solidarity

- Workers' right to information and consultation (within the undertaking)
- Right of collective bargaining and action
- Right of access to placement services
- Protection in the event of unjustified dismissal
- Fair and just working conditions
- Prohibition of child labour and protection of young people at work
- Family and professional life
- Social security and social assistance
- Health care
- Access to services of general economic interest
- Environmental protection
- Consumer protection

Citizens' Rights

- Right to vote and to stand as a candidate at elections to the European Parliament in any Member State
- Right to vote and to stand as a candidate at municipal elections in any Member State
- Right to good EU administration
- Right of access to documents
- European Ombudsman
- Right to petition the European Parliament
- Freedom of movement and of residence
- Diplomatic and consular protection

Justice

- Right to an effective remedy and to a fair trial
- Presumption of innocence and right of defence
- Principles of legality and proportionality of criminal offences and penalties
- Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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