



Statewatch Analysis

Changing the institutional framework for EU Justice and Home Affairs law without the Lisbon Treaty

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Introduction

Since the negative referendum vote on the Treaty of Lisbon, there has been some press discussion on the possibility of using the so-called ‘passerelles’ relating to Justice and Home Affairs (JHA) matters that exist within the current Treaty. A ‘passerelle’ clause allows for the amendment of the existing Treaty rules on decision-making and the jurisdiction of the Court of Justice, without a fully-fledged amendment to the Treaties, requiring a full national ratification process.

The following analysis examines the content and procedure for using the JHA passerelles. It will be seen that the passerelles would allow the Council to amend the institutional rules concerning JHA law to a position very similar, but not quite identical, to that under the Treaty of Lisbon. In particular, the rules on EU competence and opt-outs would be different. Furthermore, it would be open to the EU, if it wished to, to take a different approach than the Treaty of Lisbon as regards the issues of decision-making and the jurisdiction of the Court of Justice.

The status quo

Currently the rules governing EU JHA law are divided between the Treaty establishing the European Community (TEC) and the Treaty on European Union (TEU). The rules concerning immigration, asylum and civil law appear in a special Title IV of Part Three of the TEC (‘Title IV’), while the rules concerning policing and criminal law appear in Title VI of the TEU (‘the third pillar’).

Immigration, asylum and civil law

The Title IV issues are addressed by adopting the normal types of EC legislation, such as Regulations and Directives, which are directly effective and are supreme over national law. The Commission has its normal monopoly over legislative proposals (since May 2004). Since 2004/05, almost all measures in this area are

adopted by means of qualified majority voting (QMV) in the Council (made up of Member States' ministers), along with co-decision (equal voting power) for the European Parliament (EP). The exceptions are:

- a) measures concerning legal migration are adopted by means of unanimity in the Council and consultation of the EP;
- b) measures concerning family law are also adopted by means of unanimity in the Council and consultation of the EP; and
- c) measures concerning visa lists, visa formats and administrative cooperation are adopted by means of QMV in the Council with consultation of the EP.

There are two distinctions between Title IV and the rest of the TEC (ie the rest of the 'first pillar', which concerns issues such as the internal market and environmental law). First of all, the jurisdiction of the EU's Court of Justice is more restricted as regards 'references' from national courts asking the Court of Justice to interpret (or rule on the validity of) Community law in this area. The Court can only receive references from final national courts in this area, whereas in the rest of the first pillar *any* national court or tribunal can send questions to the Court of Justice. The result of this is that the Court has received a very small number of references concerning immigration and asylum law, although it has been receiving a bigger number of civil law cases. For example, in 2007 there was only one reference concerning immigration and asylum law, but ten references concerning civil law.

Secondly, there are specific 'opt-outs' in this area for the UK, Ireland and Denmark, set out in special Protocols attached to the TEC. The UK and Ireland have three months after a measure is proposed to decide whether they want to participate in negotiations. If not, discussions go ahead without them. If so, then discussions proceed with their participation. It is also possible for the UK and Ireland to opt in to a measure after it has been adopted. On the other hand, Denmark is unable to participate in the adoption of EC measures at all. Similarly, there are different rules for these Member States concerning their participation in the 'Schengen acquis' (ie measures which were set out in the original Schengen Convention of 1990 abolishing border checks between Member States, including measures implementing the Convention and measures building upon the Convention and its implementing measures). Basically, the UK and Ireland can apply to participate in all or parts of the Schengen *acquis*, but they need the agreement of all of the other Member States to do this. Denmark can participate in such measures, but they will only bind Denmark in the form of international law, not Community law.

Policing and criminal law

First of all, the third pillar uses different legal instruments from the TEC. Instead of Directives and Regulations, there are Framework Decisions, Decisions, Common Positions and Conventions. The legal effect of these measures is not fully clear, although the TEU rules out the 'direct effect' of Framework Decisions and Decisions, and the Court of Justice has ruled that Framework Decisions are subject to the principle of 'indirect effect' (meaning that national law within the scope of the Framework Decision must be interpreted consistently with the Framework Decision as far as possible).

As for decision-making, all third pillar acts except implementing measures must be adopted by unanimity of the Council and consultation of the EP. The Commission shares the right of initiative with Member States.

The Court of Justice only has jurisdiction over references from national courts on the validity and interpretation of third pillar acts if Member States opt in to this jurisdiction. So far, 17 Member States have opted for this. Of these, one Member State (Spain) has exercised a further option to permit only final courts to send cases to the Court of Justice. As a result of these restrictions (and probably also because of the restrictions on the legal effect of third pillar measures), there are not many references to the Court of Justice on third pillar acts. There were, for instance, only three references in 2007.

Furthermore, the Court's jurisdiction is restricted as regards actions to annul third pillar measures, where it can only judge on cases brought by the Commission or Member States (and not also the EP or natural or legal persons, as in the first pillar). The Court also lacks jurisdiction over infringement actions, ie actions by the Commission (usually) or a Member State against a Member State for failure to apply the law. Instead, the Court has a special jurisdiction over dispute settlement between Member States, and (in a small number of cases) between the Commission and Member States. This jurisdiction has never been exercised.

Finally, there are no opt-outs regarding the current third pillar.

The Treaty of Lisbon

The Treaty of Lisbon would bring together all of the JHA provisions of the Treaties and make significant changes to them. First of all, as regards immigration, asylum and civil law, QMV and co-decision would be extended to legal migration issues (but not to family law). Co-decision would be extended to the issues of visa lists and visa formats (but not to the issue of administrative cooperation). The 'normal' jurisdiction of the Court of Justice would apply fully to all of these issues.

The opt-outs of the UK, Ireland and Denmark would be retained, but altered in a number of ways. In particular, the UK and Ireland would be subject to new rules concerning the position if they wanted to opt out of a measure amending an act which they had already opted in to. They would not be obliged to opt in to such amending measures, but if they failed to do so, the Council could decide to terminate their participation in the existing measures under certain conditions. As for Denmark, it would have the option of moving to a system of case-by-case opt-outs like that of the UK and Ireland. The Danish government was planning to hold a referendum in September 2008 on this issue, but this has now been delayed until the fate of the Lisbon Treaty is clearer.

Finally, the legal powers of the Community (ie the 'competence') to adopt measures in this area would be altered, to a greater or lesser degree depending on the subject matter. For instance, at the moment the EC can only adopt minimum standards as regards asylum law. But under the Treaty of Lisbon, the EU (which would replace the EC) would be able to harmonise national law fully if it wished.

As for policing and criminal law, the normal Community acts like Regulations and Directives, with their normal legal effect of direct effect and supremacy, would apply. However, the legal effect of third pillar measures adopted prior to the Treaty of Lisbon would stay the same until those measures were amended. QMV

and co-decision would apply to the adoption of many measures, with exceptions for operational police cooperation and the creation of a European Public Prosecutor (where unanimous voting would apply). But a special ‘emergency brake’ would apply to most aspects of criminal law: this would allow any Member State with serious concerns about a proposal upon its criminal justice system to stop discussions on that proposal. If Member States could not settle the dispute within three months, there would be a ‘fast-track’ for a smaller group of Member States (potentially as few as nine) to adopt the proposal without the dissenting Member State(s) - a process known as ‘enhanced cooperation’. There would also be a separate fast-track to enhanced cooperation as regards certain aspects of policing cooperation and the creation of the European Public Prosecutor. The Commission would only have to share its right of initiative with a *group* of Member States.

The normal jurisdiction of the Court of Justice would apply, except for the continuation of an existing exception regarding jurisdiction over national law-and-order measures, and a transitional rule limiting its jurisdiction over third pillar acts adopted prior to the entry into force of the Lisbon Treaty for a period of five years. During this period, the current rules on the Court’s jurisdiction over third pillar measures (as described above) would still apply to these pre-existing acts, but the new jurisdictional rules would apply to any new acts or any pre-existing acts which would be amended during this time. At the end of that period, the UK has the option to opt-out of all existing third pillar acts which have not been amended, and then apply to opt back in to some of them only if it wishes.

The amended versions of the various opt-outs for the UK, Ireland and Denmark relating to immigration, asylum and civil law would be fully extended to the issues of policing and criminal law.

As with Title IV issues, there would be a significant changes in the competence of the EU regarding these issues.

The existing ‘passerelle’ clauses

There are different clauses in the existing Treaties regarding changes to the legal framework as regards Title IV on the one hand, and the third pillar on the other.

The ‘passerelle’ concerning Title IV issues is set out in Article 67(2) of the TEC, and reads as follows:

After this period of five years:
....the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

The five year period referred to is the ‘transitional period’ of five years provided for in Article 67(1) TEC; this period expired on 1 May 2004.

As for the third pillar, the ‘passerelle’ is set out in Article 42 of the TEU, and reads as follows:

The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that actions in areas referred to in Article 29 shall fall under Title IV of the Treaty

establishing the European Community, and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.

Comparing the two measures, it is clear that they both require unanimous voting of the Member States and consultation of the EP. However, the third pillar passerelle also requires ratification in accordance with national procedures of Member States. This would likely entail ratification by national parliaments (certainly there would have to be an Act of Parliament in the UK), and possibly even one or more national referenda. Such national ratification processes would delay the entry into force of a decision under Article 42 TEU, and of course there would also be a risk that at least one national ratification process would be unsuccessful - thereby ending the whole process. On the other hand, the process of ratifying such a passerelle decision is likely to be quicker than the process of negotiating and ratifying Treaty amendments, and may in particular appeal to Member States if there is no prospect of the Treaty of Lisbon entering into force.

It should be recalled that the Title IV passerelle has been used before. When agreeing on the 'Hague Programme' in 2004, it was agreed that decision-making on a number of measures not already subject to QMV and co-decision would be altered. The Council therefore adopted a Decision according to Article 67(2) TEC applying QMV and co-decision to the adoption of measures concerning border controls, freedom to travel, irregular migration and asylum burden-sharing measures as from 1 January 2005.

However, it should also be recalled that when the Commission proposed in June 2006 that the Title IV passerelle again be used (as regards decision-making on legal migration as well as the jurisdiction of the Court of Justice) as well as the third pillar passerelle, these proposals were unsuccessful. Nonetheless, as pointed out above, this analysis examines the possible use of these provisions, since the political dynamics of this issue might change in light of the difficulties of ratifying the Lisbon Treaty.

It should be pointed out that the use of the Title IV passerelle after the end of the transitional period (so after 1 May 2004) is clearly a **legal requirement** under the existing Treaty framework, because the Treaty provides that the Council 'shall' act to change the rules on decision-making and jurisdiction of the Court of Justice. While the Council has satisfied its obligations to change the decision-making rules (as described above), it has taken no step to change the rules on the jurisdiction of the Court of Justice. So the Council is in a continued breach of its legal obligation to change these rules. This interpretation could be confirmed by the Court of Justice, if the EP, the Commission or a Member State sues the Council for 'failure to act'. Alternatively, an individual or NGO could pursue a complaint to the European Ombudsman against the Council's breach of its legal obligations.

Comparing the 'passerelles' to the Lisbon Treaty

How would the use of the passerelles compare to the Lisbon Treaty? First of all, as regards immigration, asylum and civil law, the extension of QMV and co-decision to **legal migration** matters by means of the Title IV passerelle would replicate one of the most important changes in decision-making provided for in the Lisbon Treaty. However, it would not be possible to use the Title IV passerelle to extend the co-decision procedure to decision-making concerning **visa lists and visa formats**,

which the Lisbon Treaty also provides for. This is because the current decision-making rules on these issues are set out in Article 67(3) TEC, which is expressly a 'derogation' from Article 67(2). Therefore the passerelle is inapplicable.

It should also be noted that the passerelle does not confer power on the Council to change the EC's competences as regards immigration, asylum and civil law. This could cause a complication as regards any decision to change decision-making regarding legal migration - since the current Treaty does not contain the restriction on EU competence set out in the Treaty of Lisbon, which provides that the EU has no competence to regulate the volumes of non-EU citizens from non-EU countries admitted to search for employment or self-employment. The Member States which wanted this restriction on the EU's competence (particularly Germany and Austria) would presumably object to any extension of qualified majority voting over legal migration in the absence of this limit on EU competence. However, it would be possible for the Council to amend the rules regarding decision-making as regards certain aspects of legal migration only. For example, the Council could extend QMV only as regards legal migration for non-economic purposes (ie the entry of family members), and/or only as regards movement of third-country nationals within the EU. Or the Council could simply provide that legal migration will be subject to QMV and co-decision except for the issue of the volumes of non-EU citizens from non-EU countries admitted to search for employment or self-employment, which would remain subject to unanimous voting.

As for the jurisdiction of the Court of Justice, the use of the Title IV passerelle is already legally required, as noted above. However, the Council is not required by Article 67(2) to extend the Court's normal jurisdiction fully to the areas of immigration, asylum and civil law. It is only required to 'adapt' the existing rules. An 'adaptation' could take the form of a more limited extension of the Court's jurisdiction over references for a preliminary ruling for national courts (for example, to appeal courts, but not to courts of first instance). Alternatively, the Council could provide for an optional extension of the Court's jurisdiction, leaving it to Member States to determine whether they wanted to permit appeal courts and/or courts of first instance to make references to the Court of Justice. Arguably the Council could even adapt the rules in respect of aspects of Title IV only (civil law, but not immigration and asylum law).

There could even be a combination of these approaches - for example, extending the Court's normal jurisdiction as regards civil law, requiring Member States to permit appeal courts to refer as regards immigration and asylum law and giving Member States an option whether to allow courts of first instance to refer immigration and asylum cases. The Council would presumably retain power to make further adaptations to the Court's jurisdiction later.

Finally, as for the opt-outs, the passerelle power does not extend to a power to amend the terms of the British, Irish or Danish opt-outs from Title IV, as the Lisbon Treaty would do.

As for the third pillar, the passerelle allows the Council to determine the relevant 'voting conditions'. This must presumably include the rules relating both to voting in the Council and to the role of the European Parliament. So it would be open to the Council to copy the Lisbon Treaty as regards voting rules as far as possible, providing largely for the extension of QMV and co-decision to this area, but with exceptions. It would also be open to the Council to include the Lisbon Treaty rules relating to the 'emergency brake', since the capacity of one Member State to block

decision-making is a type of voting condition. However, it would not be possible, by using the passerelle, to provide for 'fast-track' access to 'enhanced cooperation', as provided for in the Lisbon Treaty as regards several aspects of policing and criminal law. This is because the passerelle does not include a power to change the rules on *participation* in policing and criminal law measures, as distinct from decision-making.

It would also be open to the Council to take a more restrictive approach as compared to the Lisbon Treaty, and restrict the extension of QMV and co-decision to fewer issues. The Council could also delay the extension of QMV and co-decision for some issues to a later date, or make the extension for some issues subject to conditions (see Article 67(5) TEC, which made the extension of QMV and co-decision as regards asylum subject to conditions). In any case, there would still be residual power under Article 67(2) TEC to change the decision-making rules later, after the use of the passerelle, regarding any aspect of policing and criminal law which was not already subject to QMV and co-decision.

The concept of 'voting conditions' does not appear to encompass the role of the European Commission. So any transfer of the third pillar to the first pillar would mean that the rules set out in Title IV of the TEC would apply. This would mean that the Commission would have its full monopoly of initiative, rather than having to share that monopoly with groups of Member States as in the Lisbon Treaty.

As with Title IV issues, the passerelle does not give the power to the Council to alter the competences of the EU as regards policing and criminal law. This could again be relevant as regards the willingness of the Council to extend QMV and co-decision to aspects of criminal law and policing, since the Treaty of Lisbon was in effect a 'package deal' that extended QMV and co-decision in return for clarification of the EU's competences in this area. Again, as with Title IV, it might be possible to address this issue by extending QMV and co-decision only to specific aspects of criminal law and policing, defined as far as possible to be consistent with the Lisbon Treaty. However, since the Council could not use the passerelle to add to the EU's current competences, it could not use the passerelle to give the EU the wholly new power to adopt measures concerning a European Public Prosecutor (which the Lisbon Treaty provides for). Furthermore, unlike the Treaty of Lisbon, the use of the passerelle could not clearly solve the controversial issue of the extent of the *Community's* competence to adopt criminal law measures, because it could not amend the competence rules outside the JHA area either. At present, the Court of Justice has confirmed that the Community has competence to adopt criminal law measures relating to the environment, but has not addressed the question of whether the Community has any further criminal law competence.

Following the use of the passerelle, all future EU measures in this area would take the form of the 'normal' type of Community acts (ie Directives and Regulations), with the legal force of EC law (direct effect and supremacy). This would be consistent with the Lisbon Treaty. However, unlike the Lisbon Treaty, there would be no express rule regarding the continued validity of pre-existing third pillar acts until their amendment or repeal. Nevertheless, it might be assumed that the transitional rule in the Lisbon Treaty on this issue states the obvious - so that even in the absence of an express rule to this effect, all of the pre-existing measures would remain in force until their amendment or repeal. To avoid any uncertainty, it would be best, if the passerelle were used, to replace pre-existing measures rather than simply amend them.

This brings us to the jurisdiction of the Court of Justice. Since the use of the passerelle would transfer the third pillar into Title IV of the TEC, the rules on the Court's jurisdiction regarding Title IV would *prima facie* apply. As noted above, those rules are currently restrictive as compared to the Court's normal jurisdiction - and they are also different from the rules currently governing the Court's jurisdiction over third pillar matters. But there is an existing legal obligation to 'adapt' those rules as regards Title IV. So there might already be changes to the Court's jurisdiction over Title IV made before the transfer of the third pillar to the first pillar, or which come into force simultaneously with that transfer.

Moreover, it would be open to the Council, when transferring the third pillar to the first pillar, to use its power to 'adapt' the Court's jurisdiction to copy the Treaty of Lisbon regime for the Court's jurisdiction over policing and criminal law matters - ie the exception for law enforcement measures and the five-year transition for pre-existing measures. The Council could alternatively retain the transitional regime for a longer or shorter period, or even retain the existing rules on the Court's third pillar jurisdiction (or aspects of those rules) indefinitely. In any case, there would still be residual power under Article 67(2) TEC to adapt the rules on the jurisdiction of the Court of Justice further at a later date.

However, the passerelle does not confer power on the Council to allow the UK to opt-out of pre-existing third pillar legislation which has not been amended at the end of a five year transitional period - or at any other point. This is because, as noted above, the passerelles only govern voting rules and jurisdiction of the Court of Justice, not the participation of Member States in JHA measures.

Finally, in the same vein, the effect of transferring the third pillar to the first pillar would be that the existing opt-outs which apply to the UK, Ireland and Denmark as regards immigration, asylum and civil law would be extended *without* amendment to future measures concerning policing and criminal law. This compares to the Treaty of Lisbon, which would extend the existing opt-outs to these areas of law *with* amendments, which were summarised above.

Conclusion

If the EU wishes to use the existing passerelles regarding JHA matters to try to replicate the amendments which the Treaty of Lisbon would make to these areas of law, it could largely do so. It could replicate the rules on the Court of Justice in their entirety, and it could also extend QMV and co-decision to legal migration and most of criminal law and policing, including the 'emergency brakes' provided for in the Lisbon Treaty. However, it could not amend the EU's competences in any JHA area, and so any extension of QMV and co-decision would have to be carefully drafted so as to respect the particular concerns of Member States about extensions of QMV. There could be no conferral of power on the EU to adopt rules concerning a European Public Prosecutor.

The rules on the legal effect of EU measures would essentially be the same as those under the Lisbon Treaty, whereas the rules on opt-outs would entail an extension of the existing British, Danish and Irish opt-outs from immigration, asylum and civil law to policing and criminal law matters *without* amendment - instead of making the complex amendments to the opt-out rules which the Lisbon Treaty provides for.

The decision to use the passerelles would also offer the Council the opportunity to consider a different approach to the issues of decision-making and jurisdiction of the Court of Justice over JHA matters than the Treaty of Lisbon provides for. In fact, the Council could either be more or less ambitious than the Treaty rules. The Council's approach to this issue could have an important impact on securing support for national parliaments for the transfer of third pillar matters to the first pillar.