



JUSTICE

**Comments to the
House of Lords EU Sub-Committee E
on the proposed use of Article 42
of the Treaty on European Union**

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Introduction

1. JUSTICE is an independent all-party law reform and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists. JUSTICE has been strongly involved in monitoring the development of a European area of freedom, security and justice. It is part of a research network on the European Arrest Warrant, headed by the T.M.C. Asser Instituut in The Hague.
2. We are grateful for the opportunity to submit our comments on the European Commission's proposal to make use of the *passerelle* clause of the EU Treaty (art 42 TEU). As an all-party organisation, JUSTICE advocates neither for nor against a politically highly controversial proposal such as the use of the *passerelle*, we confine our comments to some of the anticipated consequences of a potential application of art 42 TEU as well as a retention of the *status quo*.

Key observations

3. JUSTICE believes that
 - effective and coherent use of art 42 TEU may prevent an increasing resort to annulment actions by dissatisfied Member States, the European Commission or the European Parliament before the ECJ on grounds of lack of competence and choice of incorrect legal basis;
 - where art 42 TEU is used to import qualified majority voting (QMV) into the area of police and judicial co-operation in criminal matters, this must not occur without the parallel extension of the European Parliament's co-decision powers to those matters;
 - when QMV and co-decision are introduced under art 42 TEU, the Council of the European Union and the European Parliament must legislate with the utmost circumspection, mindful of the special nature of the criminal law and the unintended effects an EC measure may have on respective national criminal justice systems.

A clear legal regime for EU criminal law and justice

4. The ECJ's landmark judgments of 13 September 2005 in the Case *Commission v Council* (C-176/03) and on 30 May 2006 in *Parliament v Council* (C-317/4; C-318/04; the EU/US air passenger data case) have significantly increased the potential for confusion and uncertainty inherent in the continued co-existence of Third and First Pillar competencies and decision-making procedures.
5. The criterion the ECJ maintains determines the correct legal basis and competence *ratione materiae* of an EU/EC measure is its dominant actual purpose. Where the actual aim of a measure is to facilitate the prevention, investigation, detection and prosecution of terrorism offences, the ECJ is likely to hold that such a measure can only be adopted under the Third Pillar. However, where typical criminal law provisions are aimed at the furtherance of an express First Pillar policy (eg environmental protection, functioning of the internal market), these provisions will be regarded as ancillary to the main purpose of the instrument and thus share its legal basis under the First Pillar.
6. Not always will there be a clear dividing line between those criminal law provisions contained in an EU/EC legal instrument that are ancillary to measures at EC level (ie in furtherance of a First Pillar policy) and those provisions which contain purely criminal justice and co-operation provisions unconnected to First Pillar policies.
7. This uncertainty may lead to an increase of annulment actions under the TEC or TEU by a Member State, the Commission or, in the case of EC annulment proceedings under art 230 TEC, the European Parliament on grounds of incorrect legal basis and consequent lack of competence. A such action has apparently just been brought by the Republic of Ireland against the Council for annulment of the Data Retention Directive on grounds not dissimilar from those relied on by the ECJ in its air passenger data decision (*Parliament v Council* (C-317/4; C-318/04)).
8. Were art 42 TEU used to apply the Title IV voting procedures and competencies uniformly so as to bring legislation on police and judicial co-operation in criminal matters in line with the general First Pillar procedures, this would bring to an end disputes over voting rights and the correct legal basis for certain measures. However,

where the *passerelle* would be used in a fragmented, instrument-specific way, laying down different *regimes* for different areas of criminal justice legislation, very little clarity, if any, would have been gained. It would therefore seem sensible, where use of art 42 TEU is contemplated, to do so in a rather radical, clear-cut fashion. Only one voting procedure should apply to all Third Pillar instruments and this should be the one provided for in Title IV TEC. This would limit the scope for fruitless and disruptive litigation over the exact nature of a European criminal law and justice measure.

Member States' veto, QMV and the role of the European Parliament

9. Obviously, the most crucial aspect of the use of the *passerelle* is the effect on the voting procedure and thus the Member States' veto powers under the unanimity provisions in Title VI TEU. While Ireland and the UK enjoy the right to opt-in any measure adopted under Title IV TEC and will thus enjoy the same privilege under measures transferred from the Third Pillar to the First, all other Member States will feel the effect of a change in voting *regimes* more acutely and inescapably.
10. Yet, use of art 42 TEU will only improve the decision-making process in the Council as called for by Commission President Barroso in early May, where the Title IV TEC QMV provisions were applied across the board and without subject-related modifications.
11. JUSTICE is disinclined to propagate either the retention of present voting procedures or the application of QMV to all Third Pillar measures. Our experience has shown that, where sensitively applied, a Member State's veto (or even the threat of its use) may protect European citizens from the adoption of ill-conceived or draconian measures in the field of police and judicial co-operation in criminal matters. Conversely, the present voting conditions in the Third Pillar had the effect of stalling the adoption of instruments beneficial to the cause of fundamental rights protection in the EU, as under the unanimity rule consensus could not be reached (eg in case of the draft Framework Decision on certain procedural rights in criminal proceedings in the EU).
12. We are adamant, however, that where, under an art 42 decision, QMV would be applied to transferred Third Pillar matters, this abolition of Member State's veto right would have to occur in tandem with the extension of the European Parliament's current Title IV TEC co-decision powers. It is at present unclear if art 42 TEU

empowers the Council, when deciding on the use of the *passerelle*, to lay down rules on the powers of the European Parliament in the legislative process which deviate from the normal Title IV TEC process of co-decision under arts 251, 67(2) TEC. The term “voting condition” used in art 42 TEU leaves open the question, whether it only refers to the actual voting procedure in the Council or is meant to cover the whole legislative process, thereby granting the Council the power to unanimously determine the involvement of the Parliament in the adoption of transferred Third Pillar measures. JUSTICE would prefer a restrictive interpretation of the powers given to the Council in art 42 TEU, so that the co-decision procedure would apply automatically to measures transferred under the *passerelle*. We endorse the statement made by Commission President Barroso in his speech at the Joint Parliamentary Meeting on the “Future of Europe” on 9 May 2006 in Brussels where he said that “*we must improve democratic accountability. We must ensure democratic control inside normal Community procedures, with European Parliament scrutiny.*” Only where it is ensured that proposed measures receive thorough scrutiny in a Parliament that has the power, if need be, to block a given measure, could a relinquishing of Member States’ veto under the TEU be contemplated. JUSTICE thus strongly supports the introduction of the co-decision procedure in Third Pillar matters in case use is being made of art 42 TEU.

13. We are concerned, however, that the use of art 42 TEU, when read restrictively, could end the right of individual Member States to initiate legislative measures under art 34(2) TEU, as under the normal First Pillar procedure the right to initiate legislation lies exclusively with the European Commission under arts 67, 251 TEC. In a politically sensitive area such as criminal law and justice we cannot see any reason why the right to initiate legislation should be confined to the Commission and not be shared with the Member States as envisaged in the Constitution Treaty. Again, it is far from clear whether or not art 42 TEU mandates the Council to decide on the right to initiate the legislative process as part of the “voting conditions” decision.
14. However, in light of our warning above (para 8), it will have to be borne in mind that any rules under art 42 TEU laying down a legislative procedure deviating from the standard Title IV TEC procedure may expose measures adopted under these special legislative provisions to annulment proceedings before the ECJ brought by dissatisfied Member States, the Commission or Parliament under art 230 TEC on grounds of choice of incorrect legal basis and thus deficient legislative process. Such

a situation could only be avoided by adopting “voting conditions” under art 42 TEU identical with those under Title IV TEC.

Legislating with a sensitivity for the nature of the criminal law

15. We firmly believe that the ECJ should enjoy the regular powers provided for in the TEC (with the modifications laid down in art 68 TEC). In our opinion, an art 42 decision would automatically make the Title IV TEC provisions applicable to those Third Pillar measures covered by the art 42 decision. This includes the competence to pronounce on whether or not a Member State has implemented a directive correctly.
16. Such competence, which the ECJ does not enjoy under the present Title VI TEU provisions, would mean that correct implementation and actual application of provisions contained in police and judicial co-operation instruments laying down procedural safeguards for individuals (such as those provided for in the Framework Decision on the European Arrest Warrant) could be more effectively controlled. The ECJ could thus play a significantly greater role in safeguarding fundamental rights in the context of EU police and judicial co-operation, which JUSTICE would warmly welcome. Moreover, use of the *passerelle* would allow *all* Member States’ courts of last resort to avail themselves of the preliminary reference procedure of art 234 TEC (as modified by art 68 TEC), which so far is reserved to those courts whose states have made a declaration under art 35(2) TEU.
17. Yet, we consider criminal law and procedure to have a special place in Member States’ legal orders. Great harm could be done by measures taken at EC level that, while regulating or harmonising certain specific aspects of Member States’ criminal justice systems, do not pay sufficient attention to the effects these measures might have on national legal systems’ internal coherence. With QMV in the Council and the ECJ’s stronger role in watching over the implementation of transferred Third Pillar measures under art 42 TEU, it will be all the more important for those involved in the legislative process to ensure that criminal justice measures taken at EC level are carefully tailored to the aim they are meant to achieve. Council and Parliament will have to legislate with the utmost circumspection, mindful of the special nature of the criminal law and the unintended effects an EC measure may have on respective national criminal justice systems.

Maik Martin

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