



**Evidence to the
House of Commons
Home Affairs Committee Inquiry
into current issues relating to
Justice & Home Affairs at EU level**

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1. JUSTICE is a UK-based independent all party law reform and human rights organisation that aims to improve justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists and has been strongly involved in monitoring the development of a European area of freedom, security and justice over the last years. It is part of a research network on the European Arrest Warrant, headed by the T.M.C. Asser Instituut in The Hague.
2. JUSTICE welcomes the House of Commons Home Affairs Committee's inquiry into current issues of EU justice and home affairs (JHA) and the opportunity it provides to comment on important issues of the implementation and future of the Hague Programme. We particularly welcome the fact that this very timely inquiry is conducted by a select committee with a domestic remit, thus emphasising the impact of JHA policy developments at EU level on UK home affairs.

Key observations

3. JUSTICE believes that
 - there is a growing trend for member states to move away from the commitments contained in the Hague Programme in the area of police and criminal justice co-operation;
 - the balance between elements of citizens' security on the one hand and justice and respect for fundamental rights on the other in JHA co-operation policies, struck in the Tampere conclusions and the Hague Programme, is in acute danger of being lost by the current impasses in the EU Council;
 - a change in the voting conditions in the Third Pillar under the *passerelle* cannot be considered as the panacea to the problems encountered in the EU Council in the area of police and judicial co-operation in criminal matters. More than just abolishing member states' veto powers would be needed to put the Hague Programme back on track.

JHA, the Treaty of Amsterdam and the Hague Programme

4. The member states of the European Union proclaimed in the Treaty of Amsterdam 1999 that the EU should be an area of freedom, security and justice. The Union's legislative competencies to achieve this goal in JHA areas were laid down both in the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). Areas

covered by these powers are asylum and migration, judicial co-operation in civil and criminal matters and police co-operation between member states.

5. Fleshing out the means and measures by which this area of freedom, security and justice should be achieved, member states at the European Council meeting in Tampere in 1999 committed themselves to a five-year programme of measures to be adopted at EU level to improve co-operation between member states in the different JHA policy areas. The Tampere conclusions were followed, in November 2004, by the “Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, the current multi-annual programme of legislative JHA measures. Member states, through the Hague Programme, intended, *inter alia*, to ‘*improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters.*’

The Hague Programme: the need for balance

6. The approach member states took in both the Tampere conclusions and the Hague Programme was one of careful balancing of measures and policies improving the security of EU citizens by means of improved criminal justice co-operation and enhanced operational police co-operation on the one hand and legislative projects aimed at strengthening the rights of those subject to such co-operation measures on the other. In his most recent speech at the European Parliament’s annual JHA debate on 27 September 2006, Commission Vice-President Frattini confirmed that ‘*[t]he strategic political goal remains striking the right balance between improving citizens’ security and promoting and defending people’s individual rights.*’
7. Two legislative projects contained in the Hague Programme provide good illustration of this tandem approach to the objectives of security and freedom/justice. JUSTICE also considers their fate to illustrate the present difficulties in keeping the Tampere/Hague promise of striking the balance between justice and security when it comes to negotiating EU instruments in the EU Council. The first of them is the draft Framework Decision on certain procedural rights in criminal proceedings, which the Commission proposed in April 2004 (COM(2004) 328 final). This instrument was meant to complement the numerous (draft) instruments aimed at enshrining the principle of mutual recognition as the guiding one in EU criminal justice co-

operation by strengthening the mutual trust member states need to have in the performance of each other's legal systems for the mutual recognition principle to work. In the Hague Programme, member states unanimously declared in November 2004 that *'[t]he further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.'* Yet, even on this rather modest instrument, merely fleshing out some of the rights which all member states already are obliged to respect under art 6 of the European Convention of Human Rights (ECHR), member states are now unable to agree upon. It is an open question when, if at all, agreement will be reached. Sadly, it is the UK (amongst other member states) which, despite outward support for this legislative project, has systematically undermined the adoption of a meaningful text in the Council negotiations.

8. A similar fate seems to have befallen the draft Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (COM(2005) 475 final). This instrument was designed to complement the 1995 Data Protection Framework Directive 95/46/EC in the area of police and criminal justice co-operation (the EU's Third Pillar), counterbalancing planned EU instruments aimed at significantly widening and simplifying information exchange between member states' law enforcement and internal security agencies (such as the draft Framework Decision on the principle of availability or the Third Pillar instrument providing the basis for the second generation Schengen Information System SIS II). The European Commission, in its Communication 'Implementing the Hague Programme: the way forward' (COM(2006) 331 final), considered that such information exchange initiatives *'must be accompanied by a legally binding legislation on data protection, ensuring a high level of protection of personal data in all the Member States.'* The Commission goes on to state that it *'regrets the lack of progress on the proposal which it put forward in October 2005 and considers that the quick adoption of its proposal by the Council is indispensable'*¹. JUSTICE fully endorses these statements. Again, we regret to note that it is the UK which, among other member states, is withholding support of significant elements of the Commission proposal while, at the same time, pushing for the adoption of the draft information exchange instruments.
9. While JUSTICE has concerns over the way the balance between security and regard for the fundamental rights of individuals has been struck in a number of instruments in the JHA areas of asylum and immigration and civil justice co-operation, these concerns generally

¹ At para 2.6.

relate only to the *detail and drafting* of individual instruments. What we are even more concerned about is what we perceive to be more fundamental differences in the general *conceptual approach* member states currently seem to be taking to the implementation of the Hague Programme in the area of police and criminal justice co-operation. These, we believe seem to have led to a marked decrease in the enthusiasm some member states have for further implementation of important projects contained in the Hague Programme.

10. These fundamental differences concern two related, but distinct, aspects: first, the extent of the legislative competencies the EU have under the Third Pillar provisions of the TEU and, secondly, the basic concept different member states seem to subscribe to with regard to further EU police and criminal justice co-operation. The difficulties in the legislative process caused by these fundamental differences are exacerbated by the EU's pillar structure and the differences in the legislative procedures resulting from it. We believe, however, that these problems are neither caused nor would they be solved by changes to the voting conditions in the Third Pillar using the *passerelle*.

The Hague Programme and the demise of the Constitutional Treaty

11. As just described, the first of the problems JUSTICE has identified as a major factor for the current blockade in Council negotiations of important measures in the area of police and judicial co-operation in criminal matters is the issue of the extent of the EU's legislative competencies in this area.
12. The UK's official primary concern about the two legal instruments mentioned above is the alleged lack of a sufficient legal basis in the EU Treaty for their adoption as drafted by the Commission. Yet, the UK Government supported the inclusion of the two instruments in the unanimously adopted Hague Programme. Not only did the UK commit to the adoption of a minimum set of procedural rights in criminal proceedings applicable throughout the EU by the end of 2005, it went even further on the issue of the approximation of laws by supporting the following statement in the Hague Programme: '*The European Council recalls that the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.*'² Now it is the UK's position that the Treaties would *not* provide the legal basis for instruments that not only cover cross-border cases but lead to an actual approximation of laws to provide the backdrop for the application of the mutual recognition principle in criminal justice co-operation. Such measures, it is argued in Council negotiations also with regard to the Commission draft of the

Third Pillar Data Protection Framework Decision, could only be adopted on the basis of the EU Constitutional Treaty, the fate of which is all but certain after the negative Dutch and French referenda in 2005.

13. JUSTICE finds the UK's change of heart surprising. While the Hague Programme was intended to contribute to preparing the EU for the entry into force of the Constitutional Treaty in 2006, the measures envisaged in the Programme were not intended to be dependent on the coming into force of the Treaty. This is demonstrated by the deadline of 2005 member states laid down for the adoption of the Procedural Rights Framework Decision in the Hague Programme, clearly prior to the planned coming into force of the Constitutional Treaty in the second half of 2006. Yet, where a member state's only concern about an EU instrument is the sufficiency of the legal basis in the TEU for its adoption it would otherwise support, we think the most appropriate course of action for this member state would be to actively participate in the negotiations and, after the adoption of the instrument, to bring an annulment action in the European Court of Justice (ECJ) on the ground of lack of legal basis. The ECJ would then be in a position to adjudicate upon the issue and authoritatively clarify the legal position. We regret that this is not what the UK and certain other member states seem to be prepared to do.

Member states' approaches to EU police and criminal justice co-operation and the Hague Programme

14. The second, perhaps even more fundamental issue which, we believe, contributes to the present near paralysis in the Council, is a change in the basic attitude of some member states to what the mechanisms of police and criminal justice co-operation should be. This has become most evident in the negotiations of the proposal for a European Evidence Warrant (EEW) and of a number of proposals for improved cross-border police co-operation, such as the draft Council Decision of 18 July 2005 on the improvement of police cooperation between the member states of the European Union (COM(2005) 317 final). In these negotiations, one of the stumbling blocks seemed to be the extent to which mutual recognition of domestic evidence warrants or the carrying out by member states' police forces of cross-border hot pursuit and surveillance should depend on the verification of dual criminality of the offence to be investigated. Political agreement on the European Evidence Warrant could only be reached after significant concessions were made to Germany and the Netherlands on this issue. Over the draft police co-operation measures, however, no such agreement seems to have been reached yet.

² At para 3.3.2.

15. The mutual recognition principle, which, in broad terms, lies at the heart of both measures, does not appear to enjoy the full support it once did when the Framework Decision on the European Arrest Warrant, the 'flagship' amongst Third Pillar mutual recognition measures, was adopted in 2002. The Finnish EU presidency's press release on the most recent informal JHA ministers' meeting in Tampere between the 20 and 22 September 2006³ demonstrates this when it speaks of the recent difficulties which the negotiation of mutual recognition instruments posed in the Council. Some JHA experts JUSTICE has spoken to even go so far as saying that the mutual recognition principle as a basis for police and criminal justice co-operation is doomed.
16. **The uncertain fate of the mutual recognition programme, at least as originally envisaged by member states in the 1999 Tampere conclusions and the Hague Programme, and the failure of member states to make good the promises in the Hague Programme to adopt certain rights-oriented instruments leading to an approximation of member states' laws lead us to believe that the initial momentum for the improvement of EU-wide police and criminal justice co-operation as expressed in the Tampere conclusions and the Hague Programme has been lost.** It is thus not surprising that the Chairman of the House of Lords EU Committee, Lord Grenfell, in a letter to the Attorney General of 22 June 2006⁴, wondered whether member states might want to reconsider more generally the extent of judicial co-operation in criminal matters they now wish to have and asked the question if member states were still committed to the Hague Programme.

Fresh impulses for JHA – the 'passerelle': a panacea?

17. Not surprisingly, in its Communication of June 2006 the European Commission has noted that there is '*an urgent need to find a new impetus in the area of Freedom, Security and Justice as part of an ambitious, policy-driven agenda for citizens*'⁵. JUSTICE shares this view. However, while the solution presented by the Commission (the activation of the so-called *passerelle*) might bring benefits to EU lawmaking in the Third Pillar, we have doubts whether a change in the legislative procedure for the adoption of instruments in the area of police and judicial co-operation in criminal matters will provide the fundamental impulse needed to regain sufficient momentum for the adoption of crucial instruments strengthening the rights of EU citizens in the context of law enforcement and criminal justice co-operation.

³ http://www.eu2006.fi/news_and_documents/press_releases/vko38/en_GB/168727/

⁴ <http://www.parliament.uk/documents/upload/HLSubE912806ltr220606.pdf#search=%22grenfell%20attorney%20general%2022%20june%202006%22>

18. As presently envisaged by the Commission, the use of art 42 TEU (the *passerelle* or bridging clause) by unanimous Council decision and subsequent adoption through member states' parliaments, where necessary, would, broadly speaking, have the effect of ending the unanimity requirement for the adoption of criminal justice co-operation instruments in the Council by introducing qualified majority voting (QMV), which already applies in the other JHA areas, such as civil justice and asylum and immigration. Member states' veto power would thus be abolished in most, if not all, areas of the Third Pillar. The role of the European Parliament would be significantly strengthened: while presently the Parliament plays only a consultative role in police and criminal justice legislation, it is expected that it would be given the power to block measures under what is called the co-decision procedure. Again, this would align the legislative process in the Third Pillar to that in the First Pillar JHA areas. The ECJ would also be given a more significant role in the Third Pillar in that the preliminary reference procedure under the TEC would be made generally applicable to the Third Pillar without the need of an additional declaration by member states (which the UK, amongst other member states, has, so far, withheld). **We believe that it is fair to say, as the Commission does⁶, that this application of the 'Community method' (as opposed to the current Third Pillar 'Union method') to the Third Pillar would bring greater transparency and certainly more democratic accountability to EU legislation in the Third Pillar.**
19. Yet, member states' veto power can both be a blessing and a curse. Depending on how this veto power is used by member states, it can prevent ill-conceived measures from being adopted without making adequate modifications and providing appropriate safeguards for fundamental rights, as was shown in the Council negotiations on the EEW. Then again, other, most welcome measures may be blocked by even a single member state exercising its veto. **JUSTICE believes that police and criminal justice co-operation is a very sensitive area where neither the current lowest common denominator approach nor blind majority activism are the most appropriate courses of action. Abolition of the veto power should therefore be considered with greatest care.**
20. However, we consider it important to point out that the effect of a change from unanimity to QMV in the Third Pillar would be least felt by the UK as it enjoys an opt-in right to JHA co-operation measures governed by the TEC under a protocol to that Treaty. Thus, the UK would only ever be bound by a European criminal justice instrument adopted by QMV where it decides to be so bound.
21. We wonder, however, whether the use of the *passerelle* would bring to an end the trend in criminal justice co-operation, and even more so in the area of police and security agency co-

⁵ COM(2006) 331 final, at para 1.

⁶ At para 3.2.

operation, of fragmented bilateral or multilateral co-operation between member states outside the frame of the EU. The most prominent example of this trend is, of course, the 2005 Prüm Convention or Schengen III, a treaty on improved police co-operation and information exchange between law enforcement agencies between Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain. We doubt that even the introduction of QMV will prevent Europe from becoming an area of security and justice of multiple paces. Reaching agreement on co-operation instruments between two or more member states will still be significantly easier than reaching it in Council even under QMV.

22. As already hinted at at para 10 of our evidence, **JUSTICE believes that the current problems with implementing the police and criminal justice measures envisaged in the Hague Programme go beyond simple issues of voting conditions in the EU Council. They will only partly be solved by moving away from the unanimity principle in the Third Pillar. Rather, what seems to be needed is an open discourse between member states, the European Parliament and the European public to reach a new consensus on the direction and principles for the future development of EU police and criminal justice co-operation. A chance for starting such an open dialogue seems to have been missed at the most recent programmatic informal JHA ministers' meeting in Tampere this September. We can only urge the Committee to press the UK Government to seek and actively engage in such a dialogue.**

Maik Martin

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