



openeurope



A bridge too far?

Giving up the veto in crime, justice and policing

Executive summary

"If we were to surrender competence to the European Union in relation, say, to criminal procedure or in relation to fundamental issues such as the presumption of innocence and the like... on a basic political level that would cause a very major reaction, and it was for that reason that the emergency brake was put into the Constitutional Treaty, and to attempt to re-visit this area without the emergency brake and to go down the road of QMV, in those circumstances I think the public would have very major misgivings about the capacity of the European Union to effectively impose European criminal law procedures on Member States. I think that would be a bridge too far for many people."

- Michael McDowell, Irish Justice Minister, 15 June 2006

"In the justice and home affairs area, we have agreed better arrangements for co-operation on police matters, crime and drugs. However, such co-operation will remain intergovernmental and subject to unanimity. Thanks to amendments that we also secured, the European Court will have no authority to decide cases brought in United Kingdom courts on those issues."

- Tony Blair, Hansard, 18 June 1997

EU ministers are meeting in Tampere, Finland, to discuss a proposal to transfer criminal justice and policing into the first or Community pillar of the EU's treaties.

The EU Commission has proposed that member states should agree to use the *passerelle* or "bridging" clause in the current treaties¹. If utilised it would mean that criminal justice and policing would for the first time become a community competence. This would abolish the national veto and would greatly increase the powers of both the EU Commission and European Court of Justice (ECJ) over a sensitive area of national policy.

For the first time in the UK's history criminal laws would be 'nodded' through parliament in secondary legislation, and so will not receive full parliamentary scrutiny, as they will be implementing EU legislation.

Political background

An opinion poll by ICM for Open Europe has found that the British public is opposed to giving up the veto by a proportion of nearly 3 to 1. 72% of respondents said that the UK should retain its right to veto crime, policing and legal immigration laws from Brussels. Only 26% were in favour of giving up the veto to avoid legislation being held up.

There have been [reports](#) that the Home Office and the Foreign Office are at loggerheads, with the Foreign Office playing down the significance of the shift. A spokesman for the FCO told the *Guardian* that Britain's "opt-in" arrangements in this area are effectively a "second veto". The article reported that FCO officials were worried that "Britain could be in danger of blocking the change, which could

¹ Article 42 TEU

be popular among some member states, when it will not really be deprived of its veto."

Key problems with giving up the veto:

(1) The 'opt-in' is not an effective safeguard.

Legal experts have warned that a ruling by the European Court of Justice in September 2005 (Case C-176/03) will undermine the UK's opt-in arrangement.

As a result of the case the EU is able to propose criminal sanctions in all areas of 'Community competence'. When it does so, the UK has no 'opt-in', and therefore would have to participate in any criminal justice measure that the Commission feels is necessary to "ensure the full effectiveness of a Community policy". This was a dramatic and unexpected ruling. However, its impact is currently limited, by the scope of community competence - e.g. the Commission can propose criminal legislation for environmental crimes, which are under its competence, but not criminal laws in general, as criminal law in general is not in its competence.

However, using the *passerelle* would make all of criminal justice a community competence, effectively unshackling the Commission from this constraint.

Richard Plender QC, who represented the UK in the case in question, told us that the ruling would create "a problem" for the UK when attempting to use its opt-in as "There is no opt-in or opt-out under this judgment".

The Court's ruling also considerably widens the *scope* of EC criminal action and allows EU laws to prescribe criminal offences and penalties in a much greater level of *detail*.

If ministers agree to use the *passerelle* clause the EU will be able to determine offences, penalties and other "appropriate measures" across the full sphere of criminal justice, which would not be subject to national vetoes in the Council and would ultimately be interpreted by the ECJ, not national courts.

Even without the court ruling, the 'opt-in' arrangement clearly would not give the UK as much control as a veto. Member states have to opt in at the start of the process of drawing up a piece of legislation. If, as the legislation is drafted, the UK or Ireland do not like the way it is coming out, it is not possible to opt back out again.

Ireland is the only other EU country which has an opt-in procedure apart from the UK. In evidence to the House of Lords Irish Justice Minister Michael McDowell cast doubt on the claim that the opt-in was like a veto.

*"I am not clear that the opt-in power gives us effectively the same outcome—it may or may not. Politically obviously opt-in means that the other Member States will go and be able to do their own thing, so to speak, and politically that may be more difficult to resist and more difficult to resist an opt-in rather than a unanimity requirement, and that depends on the politics of any issue at the time it comes to be decided."*²

² The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q 187, July 2006

(2) Going even further than the EU Constitution

If EU ministers agree to use the *passerelle* clause they would be accepting a shift of power over criminal justice which is even more radical than that contained in the EU Constitution.

It would give the EU Commission the sole right of initiative over criminal justice. Under the Constitution this right would have been shared between the member states and the Commission.

Using the *passerelle* clause would also sweep away some of the safeguards contained in the Constitution such as restrictions to act only in a limited number of serious cross border fields - not the entire sphere of criminal justice as is proposed, and the 'emergency brake' procedure, which would have halted negotiations on a proposal if a member state thought it "would affect fundamental aspects of its criminal justice system."

(3) Enabling the EU to push through controversial laws which are currently being blocked

One of the EU Commission's central objectives for using the *passerelle* clause is to be able to push through measures which are currently being blocked in the European Council. Several of the measures which it wants to push through are extremely controversial and could cause particular problems in the UK.

One proposed measure attempts to harmonise rights for suspects in custody across the EU. If passed every suspect across Europe would be handed a 'Letter of Rights' once arrested, which they are granted by "European Union law". The House of Lords has warned that if this proposal is passed it could become impossible to stop the "creeping competence" of the Commission, and could lead to the "incremental unification of criminal procedure throughout the EU."³

Another proposed measure criminalising racism and xenophobia could overturn amendments made to the recent Bill on Religious Hatred. After a campaign led by the comedian Rowan Atkinson, an amendment was passed which safeguarded comedians from prosecution for insulting behaviour. The EU Commission's proposal would overturn this amendment and would outlaw "public insults". If a dispute arose, it would fall to European judges to ultimately interpret the law.

(4) Increasing the powers of the European Court of Justice

Using the bridging clause would hugely increase the role of the European Court of Justice over member state's criminal law. For the first time the Court would have full jurisdiction over criminal law, something which has long been resisted by successive UK Governments. The ECJ would become the highest court in the UK's criminal law system and would begin to determine the substantive criminal law for EU nations.

This could create practical problems. It often takes up to two years for the ECJ to give its interpretation of a particular case. If it started ruling on criminal cases

³ EU Committee, 1st Report, Procedural Right in Criminal Proceedings, 7 February 2005

national governments could be forced to hold suspects in custody for up to two years before a final ruling is given.

(5) Giving the EU exclusive 'external competence' over criminal justice

As the EU legislates in particular areas it gains external competence over them. This means that it begins to represent member states in international negotiations on these issues.

If EU ministers agree to use the bridging clause in the treaties and transfer criminal justice into the first pillar the UK will lose its right to negotiate bilateral extradition treaties with foreign countries as well as deportation agreements. This could make it even harder for the UK to deport foreign suspects in the future.

(1) What is being proposed?

The European Council of 15 June asked the EU Commission and the Finnish Presidency to work together to explore “the possibilities of improving decision-making and action in the area of Freedom, Security and Justice on the basis of existing treaties.”

The Commission has since brought forward proposals to utilise the *passerelle* or bridging clause in the Treaty on the European Union which would see criminal justice and policing being moved into the first or ‘community’ pillar.⁴

The *passerelle* clause in question is Article 42 of the Treaty on the European Union. It provides that:

“The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action 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.”

Criminal justice and policing is currently in the third or intergovernmental pillar of the treaties. This means that member states have a veto over all proposed measures and are able to initiate EU legislation themselves. The European Court of Justice has only a very limited jurisdiction over these areas and the European Parliament is merely consulted.

EU justice and home affairs ministers will attempt to reach political agreement on the proposal at the informal summit in Tampere on the 22 September. If they decide to use the bridging clause it would represent a substantial shift in control over home affairs policy from the national to the European level.

Transferring Justice and Home Affairs issues into the first pillar would mean that:

- All proposals to harmonise criminal law across the EU and matters of police cooperation would be agreed on by Qualified Majority Voting (QMV) in the Council of Ministers.
- Criminal law and policing would come under the jurisdiction of the European Court of Justice (ECJ) which has until now had only a very restricted say on third pillar matters.
- The EU would gradually gain more power over criminal matters. Once the EU gains competence in a certain area the member states lose the right to propose new laws in that field of law.
- The EU Commission would gain the sole right to initiate legislation in these matters. By gaining a monopoly over the right to propose laws on criminal justice and police cooperation the EU Commission would enjoy *greater*

⁴ Implementing The Hague Programme: the way forward, 28 June 2006
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/254&format=HTML&aged=0&language=EN&guiLanguage=fr>

power than it would have received from the EU Constitution under which it would have had to share the right to propose new laws.

- The EU would also gain exclusive external competence over criminal justice and policing. This could preclude member states agreeing bilateral treaties with non-EU countries on issues such as extradition and the deportation of foreign criminals.

(2) Will the UK sign up to it?

The British Government has not yet said whether it will agree to the proposed use of the *passerelle* clause. It has indicated it will “consider”⁵ the idea and “will not reject” the proposal.⁶

Geoff Hoon told the European Scrutiny Committee that “The Government are looking at whether there are advantages for the United Kingdom in using those existing treaty arrangements but have so far not reached any clear conclusion, but I would imply mention that we do benefit and have practically benefited from Government co-operation in this area... there may be areas where we judge it is in the interests of the United Kingdom to have further and better co-operation in this area, but we have not reached that conclusion yet”.⁷

There have been suggestions that Home Secretary John Reid is not as keen on the proposal as his predecessor Charles Clarke. While the UK is clearly not as big a supporter of utilising the bridging clause as some other countries, such as France, the Government is certainly not ruling it out.

The main opponent of the scheme is reported to be Germany, which is concerned that it is tantamount to ‘cherry picking’ from the Constitution. Under the Constitution the pillar structure would have collapsed and the EU’s institutions would have gained slightly less control over criminal justice and policing than if the *passerelle* clause is used. In Germany’s view if EU ministers do agree to use the *passerelle* clause, negotiations on the EU Constitution would then have to be reopened, which they are completely opposed to. As these proposals go further than those in the EU Constitution it would be interesting to see if EU Governments would attempt to bring back some of the powers given away under the *passerelle* when they restart EU Constitution negotiations.

Germany’s opposition is not based on ideological concerns about the transfer of power to the EU over criminal justice, but an attempt to preserve the EU Constitution in its present form. It will be the Germans who will spearhead the drive to bring back the EU Constitution which will begin with a declaration in Berlin in March 2007.

However if Germany does block the move for now, it will come back on the agenda under its Presidency of the EU next year. In its capacity as chair of the European Council Germany will come under heavy pressure to act as deal brokers and be

⁵ Parliamentary written answer to Graham Brady MP, 6 June 2006

⁶ *Telegraph*, 6 May 2006

⁷ Wednesday 12 July 2006

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/c1515-i/c151502.htm>

much more consensual. As the UK discovered during the acrimonious budget negotiations last year it is frowned upon in EU circles if the Presidency makes a stand against a proposal which most other member states agree with.

In this pamphlet we look at the implications of the move for member states' ability to control their own criminal justice policies. We will argue that it represents a significant shift from the national to the European level over a key area of policy.

It is an area in which the UK Government has been reluctant to cede control to Brussels in the past and we argue that it should block these proposals now.

(3) What they said before...

"In the justice and home affairs area, we have agreed better arrangements for co-operation on police matters, crime and drugs. However, such co-operation will remain intergovernmental and subject to unanimity. Thanks to amendments that we also secured, the European Court will have no authority to decide cases brought in United Kingdom courts on those issues."

- Tony Blair, Hansard, 18 June 1997

"In the area of Justice and Home Affairs we continue to have problems, in particular with the proposal for majority voting for criminal procedural law, Article 166. This could change fundamental principles of our legal system, such as habeas corpus, which we are not prepared to accept."

- Peter Hain, 31 May 2003, European Convention

"On judicial and criminal procedural law it is very difficult for us. We have accepted extensions of majority voting on everything else in the Third Pillar, but if you look at our judicial system and court system - and other countries are in the same position - it becomes impossible for us."

- Peter Hain, 11 June 2003, European Convention

"Criminal procedures go the heart of our legal systems, and this is one area where we have got to keep unanimity... European crime fighting should deal with cross border matters where the crime is committed across borders or the perpetrator crosses a border to try to escape justice, or where there is evidence of criminal assets in other Member States. In other words, European Union action should not touch purely domestic cases."

- Peter Hain, 3 April 2003, European Convention

"We firmly believed it was inappropriate to harmonise criminal law at EU level. We believe criminal law is a matter for member states cooperating inter-governmentally." UK Government official, *Times*, 14 September 2005

(4) Why the 'opt-in' is not an adequate safeguard

UK ministers have indicated that if the *passerelle* clause were to be used the UK's distinctive common law legal system would not be threatened by majority voting because of its opt-in safeguard clause.

Tony Blair told the House of Commons:

*"Fortunately as a result of what we have negotiated, we can opt in or out at our leisure. That is the right thing to do... we might want to participate in that process, but it is up to us. That is the benefit of the flexible arrangements that we negotiated."*⁸

If criminal justice is moved into the first pillar, it will be moved into title IV of the Treaty Establishing the European Community. Under this title the UK and Ireland are able to exercise what is known as the *opt-in* procedure.

When a new measure is proposed the Government has three months to choose whether it wants to opt-in and be bound by the negotiations and the resulting law. However, once it has opted-in to a directive the UK is no longer able to *opt-out* again.

As the House of Lords EU Select Committee reports:

*"It is generally understood that having opted in to a particular proposal the UK cannot subsequently opt out and is bound by the results of the negotiation on the measure in question."*⁹

Once the UK has chosen to participate in a new proposal it is bound by it. It will also be bound by any future amendments to the legislation which is passed. The Government would be unable to change its mind, even if the resulting piece of legislation is radically different from the original proposal (as is often the case). It is therefore wholly inaccurate for the Prime Minister to claim that "we can opt in or out at our leisure".

Opting-in is not as strong a safeguard as unanimity

Ireland is the only other EU country which has an opt-in procedure apart from the UK. The Irish Justice Minister Michael McDowell cast doubts in his evidence to the House of Lords over whether the opt-in was as strong a safeguard as unanimity. He said:

"I am not clear that the opt-in power gives us effectively the same outcome—it may or may not. Politically obviously opt-in means that the other Member States will go and be able to do their own thing, so to speak, and politically that may be more difficult to resist and more difficult to resist an opt-in rather than a unanimity requirement, and that depends on the politics of any issue at the time"

⁸ *Hansard*, 19 July 2006

⁹ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Paragraph 149, July 2006

it comes to be decided... I would be very loathe to concede the point that we have a double lock on all issues."¹⁰

The UK Government's legal advisers have also made it clear that it would have a different "negotiating position" under the opt-in procedure rather than under unanimity. Home Office EU legal adviser Kevan Norris told the House of Lords that:

*"There is a different legal position, clearly, in that if we were under the opt-in and the First Pillar and we decided not to opt-in, then we are not bound but also we are not participating around the table, so in a sense we could be left behind, whereas clearly with the Third Pillar and unanimity we are going to be sitting in and playing the game. As a lawyer I am not expressing a choice between the two, but I think the fact that we have the opt-in does not mean that we are necessarily not going to be affected because if we do not opt-in other Member States can go ahead without us, whereas if we are sitting around the table under the Third Pillar we may well achieve a result which we want to participate in, so there is a clear difference in the negotiation positions."*¹¹

Opt-in rendered meaningless by ECJ ruling

A controversial ruling by the European Court of Justice in September 2005 (Case C-176/03) creates extra complications for EU ministers. In this landmark judgment the ECJ ruled for the first time that the European Community is able to set criminal sanctions. In this particular case the Court determined that the EC had the power to create environmental criminal offences. The Court ruled that if criminal sanctions were deemed necessary to ensure the effectiveness of an EU policy then the EU could pass them using the community method.

If a directive is passed using the community method it will be proposed by the EU Commission, voted on by the European Council and European Parliament and it will fall into the jurisdiction of the ECJ. Crucially decisions in the Council are reached by qualified majority voting and no country therefore has a veto.

The ECJ's ruling will give the EU Commission plenty of scope to get around the UK and Ireland's opt-in clause. As Richard Plender QC, who represented the UK Government on the case in question, told us, "There is no opt-in or opt-out under this judgment". If the Commission decides it is necessary to produce new criminal penalties and offences in order to "ensure the full effectiveness of a Community policy" in an area of criminal justice, the UK will not be able to opt out of the new law and will be bound by it.

When we asked Richard Plender QC whether the UK would now have a problem because the ruling called the UK's opt-in arrangement into question he said "Yes, I think we have."

The Government was dismayed by the ECJ's judgment. A British official told the *Times*, "We firmly believed it was inappropriate to harmonise criminal law at EU level. We believe criminal law is a matter for member states cooperating inter-governmentally."¹²

¹⁰ The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q 187, July 2006

¹¹ The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q 239, July 2006

¹² "Europe wins the power to jail British citizens", *Times*, 14 September 2005

Widening the scope of EU action on criminal justice

Although the ECJ ruling was simply concerned with the environmental sector, the EU Commission has said that the principle can be extended to all areas that are community competences. In other words - all areas that are in the first pillar.

In a communication setting out its interpretation of the trial the Commission said:

*"In this case, the Community policy concerned is environmental protection. However the judgment lays down principles going far beyond the case in question. The same arguments can be applied in their entirety to the other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital)... Appropriate measures of criminal law can be adopted on a Community basis... to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom... The Court makes no distinction according to the nature of the criminal law measures. Its approach is functional. The basis on which the Community legislature may provide for measures of criminal law is the necessity to ensure that Community rules and regulations are complied with."*¹³

The ruling has thus allowed the Community to impose criminal sanctions, in areas where it has competence. If EU leaders agree to make criminal justice a "community competence" by shifting it into the first pillar then the EU will be able to begin imposing criminal sanctions across the entire field of criminal justice.

This is a considerable shift from the current treaties which only refer to the specific "field[s] of organised crime, terrorism and illicit drug trafficking". Had it not been for this ruling the European Commission would still only be able to propose criminal sanctions in a limited number of fields once the *passerelle* is used.

Commission able to prescribe punishments to member states

It will also allow EU laws to be much more specific, as for the first time they will be able to explicitly define offences and require member states to agree to more than just minimum sentences. Whereas the current treaties merely allow the EC to establish "minimum rules relating to the constituent elements of criminal acts and to penalties"¹⁴

Since the ECJ ruling the Commission has stated that it will now be able to set

"the definition of the offence - that is, the constituent element of the offence - and, where appropriate the nature and level of the criminal penalties applicable, or other aspects relating to criminal law... it is necessary to direct the action of the Member States by specifying explicitly (i) the type of behaviour which

¹³ Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council

¹⁴ Article 31(e), Title VI, TEU

*constitutes a criminal offence and/or (ii) the type of penalties to be applied and/or (iii) other criminal-law measures appropriate to the area concerned.*¹⁵

Although member states have said that the Commission has gone too far in its interpretation and that the EU should only set the parameters of offences and not the specifics, Professor Steve Peers, an EU expert from the University of Essex agreed with the Commission's reading of the judgment:

*"My understanding of paragraph 48 is that it does not rule out the Community being relatively specific and being very, very prescriptive as to what precisely Member States should ban".*¹⁶

Legal experts have questioned the wisdom of allowing the EU greater scope to define criminal offences and set penalties. Richard Plender QC argued in his written evidence to the House of Lords EU select committee:

*"in view of the substantial differences that exist between the criminal codes and systems of the Member States, both in substance and in procedure, it would be inapt to confer on the Community legislature the power to define criminal offences."*¹⁷

The Commission is already using its new powers to the full

The determination of the Commission to maximise its new powers can be seen in the number of criminal offences it has proposed to create since the ECJ ruling, including firearms trafficking¹⁸, employing illegal immigrants, and a new timeshare directive¹⁹. The Commission also told the Justice and Home Affairs Council on 21 February that it intended to bring forward new proposals for directives on environmental crime, enforcement of intellectual property rights²⁰, and ship source pollution.

All of these new crimes would be created under the first pillar and would therefore be passed using QMV, in collaboration with the European Parliament and would fall under the jurisdiction of the European Court of Justice. This is a considerable transfer of power, which, apart from the initial coverage of the ruling in the press, has gone largely unnoticed. Should the third pillar be transferred into the first by EU ministers the Commission's level of activity is sure to increase even more rapidly. This is bound to cause friction with the member states, 11 of whom fought against the Commission in case C-176/03. In the proposed IP directive the Commission has already begun to prescribe quite specifically what constitutes an offence and how the offence should be punished.

¹⁵ Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council)

¹⁶ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q58, July 2006

¹⁷ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, July 2006

¹⁸ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EC on the control of the acquisition and possession of weapons

¹⁹ Consultation published 2 June 2006

²⁰ Proposal for a European Parliament and Council Directive on Criminal Measures aimed at ensuring the enforcement of Intellectual Property Rights

Summary: the opt in is not 'as good as a veto'

- In the wake of this controversial ECJ ruling, if the *passerelle* clause is used by EU ministers it could have a revolutionary impact on how criminal laws are drafted in the UK. It would mark a huge shift in control from the Westminster parliament to Brussels.
- Criminal justice and policing would become a 'Community competence'. All new legislation would be voted through under majority voting and can be amended radically by MEPs. The ultimate interpretation of criminal law would also be made by the European Court of Justice for the first time.
- The EU is able to propose criminal sanctions in all areas of 'Community competence'. The UK will not be able to exercise its opt-in, and therefore would have to participate, in any criminal justice measure that the Commission feels is necessary to "ensure the full effectiveness of a Community policy". The ruling sweeps away the limitations in the treaties which only allow EU action in limited areas and only allow the establishment of "minimum rules".
- Using the *passerelle* clause would therefore allow the EU to determine offences, penalties and other "appropriate measures" across the full sphere of criminal justice, which would be approved by majority in the Council and ultimately interpreted by the ECJ. This bodes ill for common law countries such as the UK and Ireland which are likely to find themselves in a minority and unable to exercise their opt-out clause.

(5) Other problems with using the passerelle

As well as the fundamental point about giving up the veto, there are several other problems with moving justice and home affairs into the first pillar. In some ways such a move would go even further than the rejected EU Constitution. It would mean the Commission would have the sole right to propose legislation, and would give the European Court of Justice significant powers in this area for the first time. It would also limit the UK's right to make external agreements with non-EU countries which cover these issues - for example extradition agreements with other countries.

(a) Going even further than the EU Constitution - The Commission would have monopoly on proposing new legislation

If EU ministers agree to the Commission's request the EU would gain even more power over criminal justice than it would have under the EU Constitution. As the Government has acknowledged the EU Commission would gain the sole right to propose new legislation.²¹ Under current arrangements either member states or the Commission are able to propose legislation in this field.

Under the EU Constitution the Commission would have shared this initiative with member states. If a minimum of 7 national governments agreed on a proposal they would have been able to launch it together.

Giving the EU Commission the sole right to initiative could lead to a reduction in the flexibility and effectiveness of actions in this area. Criminal justice policy is generally conducted in a reactive manner, responding to new issues as they happen and troubleshooting problems with existing legislation as they become apparent.

National governments are clearly best placed to be able to respond to new issues as and when they crop up. In recent years the 'big 6' member states have taken the lead in responding to security incidents such as the 7/7 London bombings, and the recent plot to blow up planes on route to the United States. If member states lost the right of initiative their ability to respond and push new measures through quickly would be severely curtailed.

Furthermore if the EU Commission gains a monopoly over proposing EU criminal justice laws, there is a risk that it would take an inflexible programmatic approach, rather than responding to events as they arise.

As the Commission has argued:

"the right of initiative shared with the Member States sometimes had the effect that national concerns were given priority over Tampere priorities".²²

If the Commission takes on the sole right to propose there is a danger that it will begin prioritising its own proposals driven by its extensive programmes of legislation rather than responding effectively to "national concerns" such as terror threats, which will vary significantly between member states.

²¹ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q250, July 2006

²² Commission communication: "Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations", 2004

The Irish Justice Minister Michael McDowell has said that there would not be any advantage in giving the EU Commission the sole right of initiative over EU criminal law legislation:

"I do believe that the area of criminal justice in particular is one in which sole right of initiative should not be transferred to the Commission. I think that there is no particular reason why it should. It is hard to point to any advantage in conferring a monopoly on the Commission, and since the Treaty favours a modification to a four-member initiative I do not see that it would be right for me to concede that there is any advantage in giving the Commission a monopoly of competence in the area".²³

JUSTICE, the law reform campaign group, has argued:

"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 Constitutional Treaty".²⁴

(b) EU will be able to determine all criminal offences not just 'cross border' crimes

Under the Constitution the EU's right to propose laws on criminal offences and sanctions was restricted to a limited number of "areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis".²⁵ The Constitution actually lists the areas of crime where the EU can act, such as terrorism, organised crime, corruption as well as seven others. If the EU wanted to legislate on a new area it would have to be agreed unanimously in the European Council and also receive the assent of the European Parliament.

This would not be the case if the *passerelle* clause is utilised. There would be no cross border limitations as the scope for action would be much wider. The EU would not be restricted to acting in only a limited number of fields.

Taken in light with the court judgment this would mean that the EU will have greatly increased the number of offences it can deal with and it can be much more prescriptive about how offences should be punished even than under the EU Constitution.

(c) No 'emergency brake'

As well as allowing wider scope for action than under the EU Constitution, if used the *passerelle* clause would also sweep away another safeguard in that text. Article III-271(3) of the EU Constitution set out what was known as the 'emergency brake' procedure. This provision, put simply, allowed national governments to stop negotiations and refer them to the European Council for a vote if they felt a particular law "would affect fundamental aspects of its criminal justice system."

²³ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q193, July 2006

²⁴ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, P 73, July 2006

²⁵ Article III-271 Treaty Establishing a Constitution for Europe

While this measure is clearly not as effective as a veto it certainly would have been another mechanism which member states could use to attempt to stop negotiations on a particular issue of concern.

The Irish government has signalled that it is considering blocking the use of the *passerelle* clause on the basis that there will be no emergency brake procedure.

(d) Passerelle doesn't allow flexibility

The UK Government has argued that if the EU wishes to secure political agreement on the transfer of the third pillar into the first then "sufficient legal flexibility"²⁶ will be found in the treaties in order to reinstate these provisions.

Unfortunately this is not possible under the current treaties. Short of treaty change, there is nothing that national governments can do to restrict EU action once the *passerelle* is used. The actual *passerelle* clause in the Treaty Article 42 EU states that the only provision member states are able to negotiate on when transferring criminal justice and policing into the third pillar is the "relevant voting conditions relating to it". They are unable to change any other parts of the current treaty text.

As Professor Steve Peers argues:

*"Article 42 EU exhaustively sets out what the Council can decide in a transfer decision, because Article 42 is a derogation from the normal rules governing Treaty amendments and should therefore be interpreted narrowly... Article 42 expressly states that Title IV of the EC Treaty would be applicable to third pillar matters transferred; if the Article 42 Decision provided for the application of rules (going beyond the Council discretion to decide on 'voting conditions' when adopting that Decision) which conflicted with the rules applicable to Title IV, that Decision would therefore exceed the powers conferred by Article 42."*²⁷

(e) Giving the European Court of Justice jurisdiction

If the bridging clause is used by EU ministers, and they agree to move police and criminal justice cooperation into the first pillar it will hugely increase the role of the European Court of Justice over member state's criminal law. For the first time the Court would have full jurisdiction over criminal law, something which has long been resisted by successive UK Governments. The ECJ would become the highest court in the UK's criminal law system and would begin to determine the substantive criminal law for EU nations.

If the *passerelle* clause is used the ECJ will have jurisdiction over:

- References from national courts on the validity and interpretation of EC criminal law. Final courts would be obliged to refer to the courts in Luxembourg.²⁸

²⁶ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q251, July 2006

²⁷ "Transferring the Third Pillar", Professor Steve Peers, *Statewatch* analysis

²⁸ Under current Title IV laws, which is where criminal justice measures will be transferred to if the *passerelle* clause is used, only the final national courts can send references to the ECJ. However as part of the discussions on the *passerelle* the EU Commission is also proposing to extend the ECJ's jurisdiction over Title IV measures (see Commission's

- Annulment actions against EC criminal law. These cases can be brought by individual citizens, member states and EU institutions.
- Infringement actions against member states over breaches of EC criminal law. These actions will invariably be brought by the EU Commission.

The ECJ's jurisdiction over police cooperation and criminal justice would thus be significantly extended. Under current third pillar rules the ECJ is allowed to rule on references from national courts but member states do not have to accept its jurisdiction over these measures. Neither the UK nor Ireland currently permits their national courts to refer third pillar measures to the ECJ.

For the first time the ECJ would be able to interpret EC measures as applied in the UK in the criminal field, bypassing the decision of the UK Government not to accept its jurisdiction in the past. The ECJ would also be allowed to review the validity or proportionality of police and law enforcement operations.

This raises the possibility of significant practical problems. National courts could have to wait for more than *two years* before hearing the ECJ's interpretation of a particular case. This could mean that national governments will have to hold defendants in custody throughout the whole protracted procedure.

The fact that the EU Commission would gain the power to bring infraction proceedings against Member States over their implementation of EC criminal measures would mean that the ECJ will gain great power to determine the UK's criminal laws.

(f) Giving the EU exclusive rights to negotiate extradition treaties

If EU ministers agree to transfer criminal justice and policing into the first pillar member states will lose the right to negotiate treaties with non-EU countries in most of these areas. If the EU agrees a law on a particular subject it would then gain 'external competence' over it.

As Professor Peers explained to the Lords, once the passerelle is used:

*"The external competence of the Community would apply once the Community had acted internally Member States would lose external competence to conclude treaties."*²⁹

The most obvious area in which member states will see an immediate impact is the loss of the right to negotiate extradition treaties with non-EU countries. The EU has already legislated comprehensively on intra-EU extradition through the European Arrest Warrant. Therefore the EU would have exclusive competence over extradition treaties at the expense of member states. The Irish government told a

"Communication on the adaptation of the provisions of Title IV relating to the powers of the Court of Justice") so that all national courts can refer justice and home affairs issues to the ECJ. For a more detailed discussion of this issue see the *Statewatch* analysis, "Transferring the Third Pillar", by Professor Steve Peers.

²⁹ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q 110, July 2006

House of Lords enquiry that if the *passerelle* was used it could complicate the conclusion of future bilateral extradition treaties with the US.

This could also cause very real problems for future UK governments as they attempt to negotiate deportation arrangements with countries for criminals, particularly terrorists. This is already made difficult due to the provisions in the ECHR which state that criminals may not be deported to their home country if they run the risk of torture. The British government is currently negotiating with countries to gain assurances that they will not torture criminals deported from the UK. It is entirely possible that such measures could be blocked by the European courts if the *passerelle* is used. Alternatively the EU could negotiate new arrangements with these countries which might make it even more difficult for Britain to expel terror suspects.

The EU's external competence over criminal justice and police cooperation would also lead to a further erosion of the British and Irish opt-in procedures. It is likely that even if the UK and Ireland decide not to opt-in to new laws they would still lose external competence over it.

Article 10 of the Treaty Establishing the European Community says that member states "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." Legal experts have warned that this article on "loyal cooperation" could be used by the ECJ to strike down any bilateral deal agreed by the UK on issues which it had not opted-in to.

The Irish Department of Justice, Equality and Law Reform, told the Lords that:

*"it would appear that Article 10 TEC (duty of co-operation) might be interpreted as precluding Ireland from enjoying the right to negotiate separate agreement with that same third state in relation to the area of co-operation in respect of which Ireland had decided not to use its opt in right without having due regard to the terms of the Community's agreement with that third state. It might also be the case that the same Article could impact upon Ireland's right to negotiate such as agreement with a third country in a situation where there was no Community agreement in place but there was a relevant legislative instrument into which Ireland had not opted."*³⁰

³⁰ The Criminal Law Competence of the European Community", House of Lords EU Select Committee, July 2006

(6) What would giving up the veto mean in practice?

One of the EU Commission's central objectives for using the *passerelle* clause, as it states in its communication "Implementing the Hague programme: the way forward" is to be able to push through measures which are currently being blocked in the European Council.³¹

The Commission argues that this will increase the efficiency of decision making procedures in the European Council, essentially speeding up the process of agreeing new laws. But as the Charlemagne column in the *Economist* recently argued "Arguments about logic and efficiency are beside the point. Legal systems are not supposed to be efficient. They are designed to ensure that innocent people are not found guilty. If that requires inefficiencies, so be it."³²

In this section we will look at some of the measures which are currently blocked and which the Commission has said it wants to push through the Council once the *passerelle* clause is used.

Example 1

The procedural rights directive: increasing rights for those in police custody

This controversial framework decision³³ aims to create a harmonised set of rights for suspects in custody across the EU. The proposal is currently being held up by a minority of member states, because of the wide ranging implications it could have for their legal systems.

If the current proposals were to go ahead police authorities would be required to hand a "Letter of Rights" to all suspects detained in police custody throughout the EU. The letter would state at the top that "European Union law requires all Member States of the Union to guarantee common minimum standards in respect of certain rights" which would be outlined on the first page.

The second page would detail other rights which national member states would grant. Although these rights already exist throughout the EU they would now be granted by "European Union law", leaving other less important issues to the member states.

In calling for the use of the *passerelle* clause the EU Commission regularly argues that member states need to work more closely together to fight the threat of cross-border crimes. However, the Commission wants this proposal to apply not only to cross border crimes but also purely internal ones.

The House of Lords EU Committee has warned that if this measure made it onto the statute book it could have serious consequences. They argue that "there is the risk that this approach might lead, over time, to the incremental unification of criminal procedure throughout the Union."³⁴

³¹ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/254&format=HTML&aged=0&language=EN&guiLanguage=fr>

³² "Justice by majority", 8 June 2006, *Economist*.

http://www.economist.com/people/displaystory.cfm?story_id=E1_SDPGJJV

³³ Formally known as the "Framework decision on certain procedural rights in criminal proceedings throughout the European Union"

³⁴ EU Committee, 1st Report, Procedural Right in Criminal Proceedings, 7 February 2005

Negotiations on this framework decision are currently stalled. As the proposal currently falls under the third pillar, every country has a veto over it allowing it to exert a considerable degree of control.

While the majority of member states are in favour of pressing ahead with the framework decision a few are blocking it. The UK, Czech Republic, Ireland, Malta, Cyprus and Slovakia have all called for the proposal to go ahead only as a Council Declaration. However, if QMV was being used this would be far short of a blocking minority.

Many legal experts have questioned the need for and the wisdom of attempts to harmonise rights across the EU. Richard Plender QC told us:

"I think there is an enduring danger of trying to harmonise aspects of legal systems which are themselves fundamentally diverse... we think we are harmonising but quite often we are aligning points of similarity in fields of difference".

The EU Commission has recently released another proposal which calls for the harmonisation of the presumption of innocence across the EU. Irish Justice Minister Michael McDowell, Irish Justice Minister, has warned that it could pose particular difficulties for common law countries:

*"A desire is slowly building up to codify in some way or to Europeanise the presumption of innocence and what it means. The common law States, which in criminal justice include ourselves, yourselves, Malta and Cyprus to some extent have a difficulty on occasions in criminal justice legislation under framework decisions in impressing on our fellow Member states the difficulties that some of their concepts pose for common law systems. If we were to surrender competence to the European Union in relation, say, to criminal procedure or in relation to fundamental issues such as the presumption of innocence and the like... on a basic political level that would cause a very major reaction, and it was for that reason that the emergency brake was put into the Constitutional Treaty, and to attempt to re-visit this area without the emergency brake and to go down the road of QMV, in those circumstances I think the public would have very major misgivings about the capacity of the European Union to effectively impose European criminal law procedures on Member States. I think that would be a bridge too far for many people."*³⁵

In his explanatory memorandum on the green paper UK Attorney General Lord Goldsmith warns that:

*"There are major differences between our common law systems and the civil law systems which characterise much of the rest of the European Union. A legislative approach designed to harmonise systems across EU Member States would be likely to require significant changes to our primary legislation for which we see no need. We trust that responses to the Green Paper will show the unwisdom of pursuing legislative measures at this time."*³⁶

³⁵ "The Criminal Law Competence of the European Community", House of Lords EU Select Committee, Q198, July 2006

³⁶ 7 June 2006

If the veto is surrendered, and as McDowell notes, the Common law countries fail to “impress” upon other member states the “difficulties” posed by such proposals, they could well see themselves being outvoted in the Council and forced to accept them.

Example 2 Offences on Racism and Xenophobia³⁷

Back in 2001 the Commission put forward a proposal for a new measure to harmonise offences of “racism and xenophobia” across the European Union. It has been stalled for several years because it has thrown up a number of difficult legal problems not least for the UK.

Overturing recent UK legislation on religious hatred

If this measure is pushed through by majority voting there is the very real concern that hard won amendments made to the recent UK Racial and Religious Hatred Bill will have to be overturned. There was considerable controversy over the bill when it was proposed by the Government in June 2005. Critics, memorably led by comedian Rowan Atkinson and Christian campaign groups argued that it threatened the right to free speech. After a series of stormy parliamentary sessions the Government was defeated by a backbench rebellion and amendments were included.

The amendments removed clauses which would have outlawed abusive and insulting behaviour to other religions. They also inserted a clause which made it clear that criticising another religion would only be an offence if the protagonist intended their comments to stir up religious hatred.

However, article 4(b) of the Commission’s proposal would outlaw “public insults or threats towards individuals or groups for a racist or xenophobic purpose” and does not include the safeguards which stress that the person must intend to cause religious hatred.

If the Commission’s proposal went through in this form it could thus potentially overturn a piece of legislation that was the subject of intense public scrutiny and campaigning in the UK. Indeed, such was the opposition to the Government’s original proposal it is one of the few times that Tony Blair’s government has actually been defeated in a parliamentary vote.

If this law was to be overturned by new EU legislation it would render meaningless an important national debate over the correct balance between tolerance and the freedom of speech.

It is also important to remember that if the *passerelle* clause is used, the final interpretation of the UK’s religious hatred legislation would be made by European judges not the British courts.

³⁷Proposal for a Council Framework Decision on combating racism and xenophobia
http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52001PC0664&model=quichett

Creating legal uncertainty

There are also worries that the wording in the directive is overly vague and would create legal uncertainty. Current UK law does not have a criminal offence of xenophobia. The Government argues that racism and xenophobia are essentially one and the same thing - but why then is there the need for both to be enshrined in legislation?

The proposal would also make criminal the 'public condoning' of genocide and war crimes and the 'gross trivialisation' of the Holocaust. The Lords EU select committee argue that "it is not clear what is meant by these terms. In the interests of legal certainty, it is necessary that these terms should be clarified." ³⁸

Crossing the Government's red lines

During the negotiations on the EU Constitution the UK Government was insistent that it wanted to maintain the veto over criminal penalties in areas such as racism and xenophobia. It agreed that serious cross border crimes could be dealt with by majority voting, but maintained that lesser offences were more appropriately dealt with by unanimity.

Such was the concern about giving up the veto over crimes of racism and xenophobia that then Home Office Minister Lord Filkin told parliament that it was "an issue that ministers have been highly focused on and highly vexed about." ³⁹

³⁸ House of Lords EU Select Committee, 29th report, 23 July 2002

³⁹ <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/136/3043003.htm>