



Article 109 of the UK Anti-Terrorism, Crime and Security Bill

Implementation of "third pillar" measures

Executive Summary

Article 109 of the new bill would confer extensive powers on the UK executive as regards implementation policing and criminal law at the EU level. Such measures have not received adequate parliamentary scrutiny by the European Parliament and the adoption of these proposals would undercut the UK government's traditional argument that parliamentary scrutiny of such measures is principally the job of national parliaments.

The new powers would be of great constitutional importance, extending well beyond anti-terrorism measures to cover every aspect of crime and policing law and many crimes within the scope of such rules. Moreover, the delegated powers in this area would go well beyond the powers conferred by the European Communities act as regards criminal sentencing and would in effect allow the executive to set criminal sentences without involvement of the UK parliament in many areas.

Outline

The proposed Article 109 of the Bill would allow the UK executive to pass secondary legislation 'for the purpose of implementing any obligation arising by or under the third pillar' of the European Union (Art. 109(1)(a)), exercising UK rights pursuant to this Title (Art. 109(1)(b)), or 'dealing with matters arising out of or related to' such obligations or rights (Art. 109(1)(c)).

The 'third pillar' is defined as comprising the following (Art. 109(2)):

- a) matters concerning policing and criminal law in the present Title VI of the Treaty on European Union (TEU);
- b) matters concerning the 'Schengen acquis' (concerning *inter alia* extradition, mutual criminal assistance, cross-border surveillance by police officers and a database listing *inter alia*, persons wanted for extradition and questioning in connection with criminal offences); and
- c) agreements between the 'European Union' and third states or bodies relating to such issues.

Moreover, the 'third pillar' includes amendments to Title VI of the TEU made by the Treaty of Amsterdam and by the Treaty of Nice (Art. 109(3)), although the latter has not yet entered into force. Indeed, the European Communities Amendment Bill, whose passage is required for the UK to ratify the Treaty, has not yet been approved by Parliament.

Also, the power which would be conferred by Article 109 would apply to obligations which arose 'before or after the passing of this Act' (Art. 109(1)(a)).

There are limitations on the exercise of these powers, similar to the limitations regarding European Community legislation in the European Communities Act (Art. 109(5)). However, there is a significant exception: when implementing third pillar rules, the UK executive will be able to **create criminal sentences for periods of over two years in length**, in certain circumstances (Art. 109(7)).

Amendments have been tabled to the Bill (though not by the Home Office) which would, if adopted:

- a) limit the power conferred by Art. 109 to the implementation of anti-terrorist legislation (amendments 102, 103 and 59); and/or;
- b) limit the power conferred by Art. 109 to the implementation of EU anti-terrorist legislation and two EU extradition conventions (amendment 104); and/or
- c) delete the executive's ability to impose criminal sentences of longer than two years by this procedure (amendments 21 and 22).

Constitutional Significance

It is first of all clear beyond doubt that **the proposal has constitutional implications**. It is astounding that the government would deny this, as a Minister apparently has done (see House of Commons Research Paper 01/99, page 47). In extending the delegated powers conferred by the *European Communities Act* to a new area of legislation, it extends the executive's powers to adopt legislative measures without first arranging for adoption of an Act of Parliament. Indeed it extends considerably greater executive power than extended by the *European Communities Act* as regards the imposition of criminal sentences. Since the relevant powers in the European Communities Act were considered a matter of great constitutional controversy, discussed at length in Parliament at the time, as were the subsequent amendments to that Act (particularly during ratification of the Treaty on European Union), it is hard to see why this new proposal should be regarded differently.

The current proposal of course differs hugely from the *European Communities Act*, or any amendments to that Act, in that it is being proposed as emergency legislation.

While the executive measures to be adopted pursuant to the Bill would be subject to the 'affirmative resolution' procedure, this would mean that there was no ability of the UK Parliament to insist on amendments to these measures.

Since it will be arguable that measures adopted pursuant to Art. 109 are *ultra vires* as they have gone beyond the power of the enabling legislation, the implementation of the UK's third pillar obligations will be subject to legal uncertainty that could be avoided if those obligations were implemented by Acts of Parliament.

It should be emphasised that framework decisions are usually far less precise than directives. Therefore, the UK executive, in using the powers which it wishes to acquire under this Bill, will have far greater discretion to make changes to UK criminal and policing law than it now enjoys as regards, for example, environmental and employment law when implementing directives.

Finally, it should be noted that the UK has traditionally argued that measures in the area of policing and criminal law should be adopted intergovernmentally because they are principally a matter for national parliamentary control and scrutiny. With its proposal to confer power to implement all such measures upon its executive, the UK is contradicting its long-standing policy.

Scope of the proposal

The implementing powers which Art. 109 would grant to the executive are not limited to terrorism, or to any matter within the scope of Title VI of the EU Treaty. Nor are they limited to specific types of Title VI measures, such as decisions, framework decisions or conventions. Moreover, they are

expressly not limited in time; they would thus apply to Conventions adopted before the entry into force of the Treaty of Amsterdam. It is not clear whether they would apply to Joint Actions adopted before the entry into force of the latter treaty, or to resolutions, conclusions or recommendations adopted before or after that Treaty. This is because the legal effect of such measures is unclear, and so it is arguable whether or not they constitute 'obligations' for the UK. However, it seems clear that Art. 109 could **not** be used to implement any 'obligations' dating from before entry into force of the TEU on 1 November 1993.

It is not clear what it meant by the references to 'rights' or measures 'arising out of or relating to' rights and obligations deriving from the third pillar.

The UK applied to join the 'Schengen acquis' in May 1999, and was accepted by a Council Decision adopted in May 2000. This commits the UK to participate in measures relating to the measures listed above (*inter alia*, extradition, mutual criminal assistance, cross-border surveillance by police officers and a database). However, UK participation has yet to come into effect, as it is subject to a further unanimous decision of the Council that all the conditions for participation have been met. It is not clear when this decision will be taken.

There are not yet any treaties agreed with third states or bodies relating to third pillar matters, but negotiations are under way with Norway and Iceland as regards extradition and mutual assistance. Additionally, plans to sign extradition and mutual assistance treaties with the United States are under consideration, and there is apparently a 'model' mutual assistance treaty ready for agreement between the EU and third states.

Subject-matter

What subject-matter would be affected by the proposal? There is no precise limitation placed upon the powers in Title VI of the TEU: the EU can therefore apparently adopt any measure on procedural criminal law (extradition, mutual assistance, jurisdiction), substantive criminal law (definition of crimes, including extent of criminal liability, and sentencing rules) and cooperation between policing and law enforcement agencies, including development of EU-wide entities, for example Europol (police intelligence agency) and Eurojust (agency for prosecutors' coordination of investigations and trials).

The issues subject to proposed or agreed third pillar measures falling within the definition of Art. 109 include to date:

- a) **definition of crime** (including rules on liability and jurisdiction) as regards: environmental crime; facilitation of illegal entry, movement of residence; drug trafficking; trafficking in persons; child pornography, prostitution and other sexual exploitation; fraud in public procurement; corruption; fraud against EC financial interests; racism and xenophobia; terrorism; private corruption; counterfeiting the euro; counterfeiting credit cards, debit cards or other means of payment; and money laundering; a proposal regarding attacks on computer systems is expected imminently;
- b) **criminal sentences** as regards: facilitation of illegal entry, movement of residence; drug trafficking; trafficking in persons; child pornography, prostitution and other sexual exploitation; terrorism; counterfeiting the euro; and money laundering; further proposals regarding racism and xenophobia and attacks on computer systems are expected imminently;
- c) **mutual assistance** as regards all forms of crime, covering both policing and criminal trials, including such issues as obligatory testimony by telephone or videoconference, telecommunications interception, cross-border undercover police operations and joint teams of national investigators; Eurojust will also have powers to liaise with prosecutors and magistrates as regards coordination of

trials;

- d) **policing powers** in such matters as customs forces exchanging personal data or in 'hot pursuit' or surveillance or other undercover work across borders, and a large extension of cross-border surveillance powers for the police as compared to the current Schengen rules; Eurojust will also have powers to liaise with prosecutors, magistrates and police officers as regards investigations; Europol will shortly have its powers extended to deal with all forms of crime and will be given formal powers to ask national forces to begin investigations and participate in operations of joint teams of officers;
- e) **mutual recognition** of decisions taken by any court in any Member State as regards: sentences imposing driving bans or financial penalties; orders regarding freezing or confiscation of assets and evidence, or orders concerning information held on a computer (proposal coming shortly);
- f) **mutual recognition of criminal records**, even for the purpose of determining whether a person has committed a crime, despite the very limited use of this principle in the UK; and
- g) **extradition**, within the framework of 1995 and 1996 Conventions, and the proposed new framework decision on arrest warrants.

Corpus Juris and the EU Public Prosecutor

The Commission is also due to publish soon a Green Paper concerning *inter alia*, the creation of a European Public Prosecutor, who would have power to investigate and try certain offences based on the *Corpus Juris* proposal which has been criticised by both Houses of Parliament in recent years. **If the proposals on Corpus Juris and the European Public Prosecutor are agreed at EU level, they could be implemented by the UK executive without an Act of Parliament pursuant to Art. 109 of this Bill.**

Sentencing

On sentencing in particular, EU measures set a 'minimum maximum' sentence. In other words, they state that 'the maximum sentence for this offence must be at least X years'. The bill would therefore give power to the executive to **set a minimum sentence for an offence at any level it chooses**, and a **maximum sentence at any level it chooses** above the minimum proposed. In effect, whenever an EU act sets a criminal sentencing guideline, **the UK executive will have a free hand to set whatever sentences it likes** regarding the relevant offences.

It should be noted that the sentencing rules agreed or proposed in EU measures to date all set 'minimum maximum' sentences **above the two-year limit imposed by the European Communities Act**. They range from four years, in the adopted framework decisions on counterfeiting the euro (which applies fully to the UK despite its opt-out from monetary union) and on money laundering, to up to twenty years, as in the framework decision on terrorism.

The 'overload' argument

The Secretary of State has argued that there will be a legislative overload if Article 109 is not agreed. In response to that it should be noted that:

- a) third pillar Conventions agreed by the Member States (and Protocols to them) do not have a deadline for their implementation; in any event, UK legislation is often fully or wholly already in compliance with such legislation;

b) only four framework decisions have been agreed in over two and a half years since the Treaty of Amsterdam entered into force, with implementation deadlines averaging two years; in any event, UK legislation is often fully or wholly already in compliance with such legislation;

c) most 'decisions' adopted within the EU third pillar concern only internal matters such as EC funding programmes and Europol internal rules, which would not require changes to UK legislation in any event;

d) the government has not explained why, with a crime bill proposed in nearly every parliament, it is not possible to include measures implementing EU third pillar obligations in such Bills, rather than confer implementing power on the executive;

e) The EC adopts approx 100 Directives a year—as compared to the 4 framework decisions to date. So there is an enormous numerical difference between the national legislative workload imposed by the first pillar as compared to the third.

It is particularly difficult to see how the 'overload' argument could justify the special power (not applicable to the European Communities Act) relating to criminal sentences, since not all framework decisions contain provisions relating to criminal sentences and in any event the UK is in conformity with a large number of these provisions already. Also, the proposed or adopted measures contain provisions on sentencing often set out 'aggravating circumstances' which can justify a higher sentence. The UK government has often pointed out during third pillar negotiations that this concept is rarely if ever found in UK law, but now it has suggested giving the executive powers to make such major changes in the very structure of national criminal sentencing policy without parliamentary amendment.

For up-to-date background and analysis on this Bill and EU measures post 11 September please see:

Statewatch News online: www.statewatch.org/news

Statewatch "Observatory" on freedom and democracy: www.statewatch.org/observatory2.htm