Statewatch analysis

Transferring the Third Pillar

Professor Steve Peers
Department of Law, University of Essex

Introduction

The European Commission has announced that it will soon make a formal proposal to transfer some or all aspects of the current 'third pillar' of EU law (which concerns policing and criminal law) to the 'first pillar' of EU law (which concerns 'normal' EC law, covering such issues as the EU internal market, environmental law and labour law). The text of the Commission's formal proposal is not yet available.

The following analysis addresses four key issues concerning this proposed transfer:

a) Would this transfer be 'cherry-picking' the EU's stalled Constitutional Treaty?
b) How would the third pillar be transferred?
c) What would the transfer of the third pillar mean in practice?
d) What would happen to third pillar measures already adopted, or proposed?

This analysis will be updated when the Commission's formal proposal is available, and then updated further if there are subsequent developments.

The Commission also intends to propose an extension of qualified majority voting, rather than unanimous voting, in the Council (made up of delegates of national governments) as regards legal migration law. This planned proposal is not discussed in detail in this analysis, since legal migration law is not part of the 'third pillar', but part of the regular 'first pillar', although it is subject to some distinct rules compared to other areas of EC law (discussed further in part 3 below).

However, it should be emphasized, to avoid any misunderstanding, that the UK, Denmark and Ireland have an 'opt out' as regards EC legal migration

law. This opt-out would not be affected by any change in the Council voting rules.

1) Would this transfer be 'cherry-picking' the EU's stalled Constitutional Treaty?

YES, in the general sense that the Constitutional Treaty also would in effect transfer the third pillar into the first pillar.

But **NO** in the more specific sense, because in practice there would be some important differences between the transfer of the third pillar as set out in the Constitutional Treaty, and the transfer of the third pillar to be proposed by the Commission. These are discussed in detail in part 3 below.

Furthermore, the Commission's planned proposals involve the exercise of an existing provision of the Treaties, not a treaty amendment. It can be argued whether or not the exercise of an existing Treaty provision should be considered 'cherry-picking' or not.

2) How would the third pillar be transferred?

Article 42 of the current European Union (EU) Treaty provides:

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.

It should be noted that this decision must be unanimous, and that it would moreover have be approved by national procedures, which is likely to mean (depending on the law and practice in each Member State) procedures of some kind before national parliaments. It may even involve referenda in one or more countries. In the UK, it would entail an Act of Parliament amending the *European Communities Act*. Normally, the adoption of EU or EC measures by the Council does not (as a matter of EC/EU law) require any approval at national level, although some Member States have procedures for their national parliaments to control their government's voting in the Council.

The only other Council decisions subject to national approval are decisions on 'own resources' (the basic rules on financing the EU), amendments to the rules governing elections to the European Parliament, and the creation of a special EU court with certain jurisdiction over intellectual property.

As for a decision to change the voting rules for adopting legal migration law, this would also be an exercise of a current Treaty provision (Article 67(2)

EC). This would also require unanimous agreement of the Member States in the Council, but it would not be subject to national approval.

This requirement for national approval means that a decision under Article 42 EU would not take effect immediately after adoption by the Council, but only after the conclusion of the last national approval procedure – if indeed all the national procedures approved the decision. This might take a year or more, although it would probably take less than the two years it normally takes to approve an amendment to the EC/EU Treaties. This is because the process at national level for approval of the decision is likely to be less time-consuming and/or less onerous than the procedure for approving a Treaty amendment.

Also the procedure is less time-consuming at EU level, because there is no requirement to call an formal intergovernmental conference before adopting a Council decision under Article 42 TEU.

3) What would the transfer of the third pillar mean in practice?

Article 42 EU explicitly states that the third pillar would be transferred into a particular part of the EC Treaty: Title IV of Part Three of the EC Treaty ('Title IV'). This is important because Title IV, which presently deals with visas, borders, immigration, asylum and civil law, is different in some respects from the rest of the EC Treaty. These differences concern the jurisdiction of the Court of Justice and 'opt-outs' by the UK, Ireland and Denmark.

This part examines in turn the following implications of the transfer of the third pillar:

a) the role of the Council;
b) the role of the European Parliament;
c) the role of the European Commission;
d) the role of the [European] Court of Justice;
e) the EU's powers over criminal law and policing;
f) the types of legislation adopted, and its legal effect; and
g) the 'opt-outs' for the UK, Ireland and Denmark.

3.1 The Council

At present, the Council unanimously to adopt any third pillar measure, except when it adopts implementing measures (this is quite rare). If the Council adopts an 'Article 42 decision' to transfer the third pillar to the first pillar, it is up to the Council to decide what the 'voting conditions' in the Council will be in future. The decision the Council reaches would be set out in the Article 42 decision.

The Council will have discretion to retain unanimity for some or all of the subjects currently dealt with in the third pillar. Likewise it will have

discretion to apply qualified majority voting (ending the national veto of each Member State) on some or all issues. It is likely that the Article 42 decision would apply qualified majority voting to some areas, and maintain national vetoes on some other areas.

This can be compared to the Constitutional Treaty, which (if adopted) would extend qualified majority voting to most criminal law and policing measures, but retain unanimity for certain policing decisions (concerning police operations) and for any legislation creating a European Public Prosecutor. But the Article 42 Decision would NOT have to follow the model of the Constitutional Treaty: it could subject fewer areas to qualified majority voting, or even (although this is probably unlikely) more areas to qualified majority voting, as compared to the Constitutional Treaty.

Furthermore, the Council would not be limited, when adopting the Article 42 Decision, to a simple choice between qualified majority voting on the one hand and unanimous voting on the other. It could provide for other types of voting rules. In particular, it could provide for the so-called 'emergency brake' procedure, which the Constitutional Treaty would apply to certain aspects of criminal law. This procedure in principle entails qualified majority voting, but allows any Member State to block the adoption of a measure on specified grounds. Again, the Article 42 Decision would not have to follow the Constitutional Treaty model; it could have a wider or a narrower application of the 'emergency brake' clause if the Council so decided.

Finally, it would be open to the Council to decide that for some or all areas within the scope of the current third pillar, qualified majority voting would only apply after a transitional period (or several different transitional periods), and/or to decide that qualified majority voting for some or all areas would only apply after a later decision by the Council (probably to be taken unanimously).

3.2 The European Parliament

Currently the EP is only consulted on third pillar proposals. Presumably the Council's power to determine 'voting conditions' in the Article 42 Decision also applies to the role of the EP. In most areas of EC law, qualified majority voting in the Council is accompanied by the 'co-decision' powers of the EP, giving that institution joint decision-making powers with the Council. The Article 42 Decision is likely to follow this model, but this is not guaranteed, as there is no legal obligation to combine qualified majority voting with co-decision. So it is possible that the Article 42 Decision could reject co-decision for some or even all of the areas where the Council votes by a qualified majority.

As with the arrangements for Council voting, it is possible that co-decision with the EP in some or all areas would only be applicable after a transitional period and/or a future unanimous vote by the Council.

In comparison, the Constitutional Treaty would apply co-decision to every area of policing and criminal law which would be subject to qualified majority voting in Council.

3.3 The European Commission

At present the Commission shares the power of initiative with Member States over policing and criminal law matters. The Constitutional Treaty would share the power of initiative on these matters between the Commission and a group of Member States (at least one-quarter).

If the third pillar is transferred to Title IV EC, then the normal rule of EC law (a Commission monopoly over making proposals) would apply (this rule has applied to Title IV since 1 May 2004). However, it is arguable that the Council's power to determine the 'voting conditions' in the Article 42 Decision would also apply to the Commission's role, or that the Council can exercise powers in the Article 42 Decision besides those powers expressly mentioned in Article 42 EU.

But the latter argument, which is also relevant to other issues (see below), is not convincing; the better argument is that 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. Also, a further argument for narrow interpretation is that 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.

3.4 The Court of Justice

For the reasons set out in part 3.3, the Article 42 Decision cannot regulate the jurisdiction of the Court of Justice and the EU's other courts over policing and criminal law matter, since this is clearly not a 'voting condition'.

So the Title IV rules would apply to policing and criminal law. What are these rules? At present, they are the normal rules applicable to the Court's EC law jurisdiction, which principally confer jurisdiction on the Court over:

a) references from all national courts on the validity and interpretation of EC law, with the final courts obliged to refer;
b) annulment actions against EC measures, which can be brought by Member States, EU institutions and natural or legal persons subject to varying standing conditions; and

c) infringement actions against Member States for breach of EC law, usually brought by the Commission.

However, Title IV currently contains a significant exception to these normal rules: only *final* national courts can send references to the Court, although it seems clear that these courts are still under an obligation to send references. Article 67(2) EC explicitly requires the Council to 'adapt' the provisions relating to the Court ('the Council, acting unanimously after consulting the European Parliament, ***shall*** take a decision …adapting the provisions relating to the powers of the Court of Justice.') '[a]fter' an initial transition period of five years, which ended on 1 May 2004. But the Council has not taken such a decision (the decision does not require ratification by national procedures).

The Commission has stated that it intends to propose measures on the 'enhancement of the role of the Court of Justice' as regards Justice and Home Affairs. The details of this planned proposal are not yet available, but this could mean that the Commission will propose that the 'normal' EC Treaty rules would apply to the Court in Title IV matters. If such a proposal is approved, this would mean that those normal rules would in principle apply to policing and criminal law matters after the entry into force of the Article 42 Decision.

But the situation could be more complicated than that, as there are three alternative scenarios. First, the Council might decide to amend the Court's Title IV jurisdiction, but to provide still for rules different from the 'normal' EC law rules on the Court's jurisdiction (for example, allowing appeal courts, but not courts of first instance, to refer questions; and/or giving discretion to Member States to decide whether lower courts should have the power to refer questions to the Court or not). In that case, those *amended* rules would apply to policing and criminal law matters after the entry into force of the Article 42 Decision. Secondly, the Council might decide, despite the Commission's planned proposal, *not* to change the current Title IV rules (although this would maintain in force an illegal failure to act by the Council). In that case, the *current* Title IV rules would apply to policing and criminal law matters after the entry into force of the Article 42 Decision.

Thirdly, regardless of what the Council decides as regards the Court's jurisdiction over immigration, asylum and civil law, the Council could argue that Article 67(2) EC gives it the power to maintain a *different* set of jurisdictional rules for policing and criminal law than would apply to immigration, asylum and civil law. This could mean maintaining in force the current jurisdictional rules for EU policing and criminal law (as described below), or a variation of those rules, or a completely new set of rules. But the Council would have to agree unanimously on the use of Article 67(2) to establish such rules; if it does nothing, then whatever jurisdictional rules apply to the Court of Justice as regards immigration, asylum and civil law will automatically apply to policing and criminal law once an Article 42 Decision entered into force.

In any case, Article 67(2) would still constitute a legal power for the Council to adapt the rules on the Court of Justice further in future, even after the entry into force of the Article 42 Decision, if it desired.

The Court's current powers over the third pillar are as follows:

a) references from national courts on the validity and interpretation of EC law, but with discretion of each Member State as to whether to accept this jurisdiction at all, to confine it to final courts only, and whether to oblige final courts to refer;
b) annulment actions against EU measures, but only the Member States and the Commission have standing to bring them; and
c) dispute settlement proceedings between Member States, or (in a small number of cases) between Member States and the Commission.

Powers (a) and (b) have been exercised a number of times in practice, and further cases are pending, so it is quite wrong to assert that the Court currently has no jurisdiction over third pillar issues. But its powers are clearly more limited than under normal EC law. In particular, only 13 Member States have taken up the option in (a), to permit their national courts to send references on third pillar matters to the Court (these Member States are all the 'old' Member States except the UK, Ireland and Denmark, but none of the new Member States except the Czech Republic and Hungary). Two of these Member States have limited the power to send references to final courts only (Spain and Hungary).

The Constitutional Treaty would provide that the 'normal' powers of the Court of Justice would apply to all Justice and Home Affairs matters, except for the continuation of a limit in the Court's jurisdiction to rule on the 'validity and proportionality' of police operations (this limit is already set out in the current third pillar jurisdictional rules). But it should be recalled that since there is not just a power, but a clear legal *obligation* under the current Treaty rules to alter the jurisdiction of the Court as regards immigration, asylum and civil law, a decision to do that could not be regarded as 'cherry picking' the Constitutional Treaty, by any possible definition of 'cherry picking'.

3.5 EU powers

Again, for the reasons set out in part 3.3, the Article 42 Decision cannot alter the current powers of the EU as conferred by the third pillar of the EU Treaty, since this is clearly not a 'voting condition'. So the current EU powers would continue to apply without amendment (although of course, the decision-making rules, the jurisdiction of the Court, the types of legislation and their legal effect, and the rules on participation by Member States would or could be amended).

The importance of this is that the Constitutional Treaty *would* amend the current third pillar powers of the EU. So any Article 42 Decision would

manifestly be different from the Constitutional Treaty on this issue. In particular, the Constitutional Treaty would clarify EU powers over aspects of criminal and (more modestly) policing law, expand the powers relating to Europol and Eurojust (the EU police and prosecutors' agencies), and most controversially of all, provide for a power (though not an obligation) to create a European Public Prosecutor's Office to deal with fraud against the EU (and possibly other matters), if the Council agrees unanimously to create such a body.

Put another way, adopting an Article 42 Decision, rather than the Constitutional Treaty, would mean that the powers relating to Europol and Eurojust would be more limited, and that there would be no new powers whatsoever to create a European Public Prosecutor. On the other hand, in the case of criminal law, it is not entirely clear whether the Constitutional Treaty could be regarded as expanding or rather narrowing the EU's current powers, because there is great disagreement over the scope of those current powers.

Also, the transfer of policing and criminal law matters to the 'first pillar' would mean that the EC would gain external competence over policing and criminal law matters according to the normal rules relating to EC external competence. This means, broadly speaking, that the EC would have external competence over these issues to the extent that EC law had harmonized criminal law and policing matters as a matter of domestic EC law. In practice, it is likely that the EC in most cases would share external powers with the Member States in this area, but there would likely be some areas where the EC's power became exclusive (meaning that Member States could not undertake treaty obligations at all on that issue). In comparison, under the current third pillar, it is not clear if there are any constraints on Member States' treaty-making powers, no matter how much legislation the EU has adopted on a particular subject.

3.6 Legislation and legal effect

Since the Article 42 Decision cannot alter the rules relating to EC legislation and its legal effect, since this is not a 'voting condition', those rules would apply to policing and criminal law matters. The EC would therefore use Directives, Regulations and (first pillar) Decisions, with the legal effect of direct effect (the power to invoke the measure in a national court), indirect effect (for Directives) and supremacy (priority over conflicting national laws and even constitutions, according to the Court of Justice). The third pillar measures of Framework Decisions, (third pillar) Decisions and Conventions could no longer be used.

The clear difference between the first and third pillars is that Framework Decisions and (third pillar) Decisions cannot confer direct effect, according to the EU Treaty, while the EC measures certainly would confer direct effect. On the other hand, the legal effect of Conventions is not mentioned in the EU Treaty, and it could potentially be argued that the principle of

supremacy already applies to the third pillar, perhaps in a weaker form than under EC law. Also, the Court of Justice has already ruled that Framework Decisions have 'indirect effect', exactly as Directives do (this principle requires national law to be interpreted consistently with EC/EU legislation as far as possible).

It should be emphasized that, according to the Court of Justice, the principles of direct effect and indirect effect (in EC or EU law) cannot be applied to worsen the position of a criminal suspect as regards substantive criminal law, although they can be applied to alter a suspect's position (for better or worse) as regards criminal *procedure*.

3.7 Opt outs

Since the Article 42 Decision cannot alter the rules relating participation of Member States in Title IV measures, since participation rules are not as such a 'voting condition' (although of course there is a link between participation and decision-making), the Title IV rules on (non-)participation of certain Member States would apply to policing and criminal law matters after an Article 42 Decision took effect.

Under the Title IV rules, the UK and Ireland have the power to opt out of any Title IV proposal shortly after it is first made. If they opt in to discussions, but then stand in the way of agreement between the other Member States, the legislation can be adopted without their participation. If legislation is adopted without their participation, they may opt in after its adoption, subject to the approval of the Commission.

In practice, the UK has opted in to all asylum measures, most civil law and irregular migration measures, and few measures dealing with legal migration, visas or border control. Ireland has opted in to nearly all asylum measures, all civil law measures, most irregular migration measures, and few measures dealing with legal migration, visas or border control (though it has opted in to more legal migration measures, and fewer visas/borders measures, than the UK). Neither the UK nor Ireland has ever been 'left behind' after they decided to participate in negotiations. Ireland has opted in to one measure after its adoption; the UK has never opted in to any measure after its adoption.

There is NO evidence whatsoever that the UK or Ireland have ever been coerced or pressured to opt in to measures that they did not wish to participate in. But equally there is no evidence that the UK or Ireland have had any influence over proposed legislation once they decided to opt out of negotiations.

Denmark is excluded from all Title IV measures, except for specific aspects of visa law, and for measures building on the Schengen Convention. In the latter case, Denmark decides whether to approve those measures or not and they have the legal effect of international law, not EC law.

These opt outs do not apply to the current third pillar. But, for the reasons set out above, they WOULD apply if the third pillar was transferred to Title IV of the EC Treaty. This is quite different from the Constitutional Treaty, which would NOT give the UK or Ireland an opt out over policing and criminal law matters except those related to tax (the UK and Ireland opt-out over immigration and asylum measures would, however, be retained by the Constitutional Treaty). The UK and Irish position would therefore be fundamentally different than it is today, or than it would be under the Constitutional Treaty.

As for Denmark, the Constitutional Treaty would apply its current Title IV opt-out to police and criminal law matters. This would be identical to the effect of an Article 42 Decision. But the Constitutional Treaty would allow Denmark to change its opt-out to match the UK and Irish version (a power to opt in to or out of each specific measure). An Article 42 Decision would not grant Denmark that power. So the Danish position (over the medium term) would be substantially different too.

4) What would happen to third pillar measures already adopted, or proposed?

The Council's powers under Article 42 EU appear to be directed to future action. If this is correct, then an Article 42 Decision could not change the status or nature of any third pillar measures adopted before its entry into force, such as the Framework Decision on the European Arrest Warrant, unless or until the EC adopted a measure amending, replacing or repealing a prior third pillar measure. Equally it appears arguable that the current rules on the Court of Justice's jurisdiction would continue to apply to third pillar measures adopted before the Article 42 Decision's entry into force.

As for currently proposed measures or future proposals, any measures adopted before the Article 42 Decision's entry into force would be covered by the current third pillar rules, as just described. Any proposals not adopted by the time that the Article 42 Decision entered into force would have to be adopted according to the EC Title IV rules on decision-making, jurisdiction, etc. as described above. It is not clear whether the legislative process would have to start from scratch on those measures, or could continue (with the necessary adaptations) where it left off (with, for example, all proposals for Framework Decisions automatically converted into proposals for Directives).

5) Conclusions

An Article 42 Decision would be comparable to the application of the Constitutional Treaty as regards the general idea of transferring the third pillar to the first pillar. But the rules on participation by Member States and on the powers of the EU would certainly be different under an Article 42

Decision than they would be under the Constitutional Treaty. It is possible that the rules relating to the jurisdiction of the Court of Justice and decision-making (most notably the voting rules in the Council) would be different too.

It is important that the extent of these differences, and also the practical effect of the UK, Irish and Danish opt outs (which, as noted above, have NEVER appeared to result in coercion upon the UK or Ireland to participate in any proposal or adopted measure against the will of those States' governments or parliaments) is fully understood so that the debate over the merits of adopting an Article 42 Decision can take place on an honest and accurate basis.

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