EUROPEAN PARLIAMENT

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Policy Department C

Citizens Rights and Constitutional Affairs

"The implementation of Art. 42 TEU in the JHA field (sector by sector, internal and external aspects) which has not yet been communitarised in accordance with the fixed objectives of the Constitution following the non-adoption up to now of the draft treaty establishing a Constitution for Europe"

BRIEFING PAPER

Résumé:

The adoption of a decision transferring the 'third pillar' to the first pillar would have a different impact from the adoption of the Constitutional Treaty as regards the competence of the EU, participation in policing and criminal law measures by Member States, and probably the role of the Commission. As regards decision-making in the Council and European Parliament, and the jurisdiction of the Court of Justice, it is possible (but not certain) that the adoption of such a *passerelle* decision would have a different impact from the adoption of the Constitutional Treaty; this depends upon the Council's discretion when negotiating the *passerelle* decision.

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TRANSFER OF THE THIRD PILLAR

INTRODUCTION

The following analysis details the impact of the planned use of the *passerelle* clause (Article 42 EU) in the context of the proposed Constitutional Treaty. In particular it compares the likely results of the use of Article 42 EU as compared to the results of the ratification of the Constitutional Treaty.

COMPETENCE ISSUES

It is assumed that the Council does not have any power pursuant to Article 42 EU except to transfer current third pillar matters to Title IV of the EC Treaty, and to establish the relevant 'voting conditions' following the transfer. In other words, Article 42 exhaustively sets out the Council's powers relating to transferring the third pillar to the first pillar. This interpretation is justified because Article 42 is a derogation from the normal method of amending the Treaties (as set out in Article 48 EU), and so should be interpreted restrictively.

It follows that the Council can only use Article 42 to transfer the EU's current third pillar competence to the EC Treaty. But the Council cannot amend that competence in any way. This is relevant because the Constitutional Treaty would amend the current third pillar competence in several respects.

In particular:

a) the Constitutional Treaty would create the power to establish a European Public Prosecutor (Article III-274 of the Constitutional Treaty), a power wholly absent from the current Treaty framework;
b) Europol's powers would be more broadly defined in the Constitutional Treaty (compare Article 30(2) EU with Article III-276 of the Constitutional Treaty);
c) the powers relating to police cooperation would be slightly altered by the Constitutional Treaty, in particular conferring powers on the EU regarding 'common investigative techniques' rather than 'common evaluation of particular investigative techniques' as at present (compare Article 30(1) EU with Article III-275 of the Constitutional Treaty);
d) as regards criminal law cooperation, Article III-270(1) of the Constitutional Treaty would alter Article 31(1) of the EU Treaty by referring expressly to mutual recognition in criminal matters and to training of judges, by omitting references to facilitating extradition, and by conferring an express power to settle conflicts of jurisdiction. The current powers in Article 31(1) appear to be non-exhaustive ('…shall include'), but no equivalent phrase appears expressly in Article III-270(1);
e) as regards harmonization of national criminal procedural law cooperation, Article III-270(2) of the Constitutional Treaty would confer more precise powers than Article 31(1)(c) of the EU Treaty presently confers. Again it should be observed that the current powers conferred by Article 31(1) EU appear to be exhaustive, while Article III-270(2) appears to confer power only regarding three specific matters (unless the

Council takes a decision conferring further powers upon the EU), moreover subject to a differently worded condition governing the exercise of the powers;

f) as regards substantive criminal law cooperation, Article III-271 of the Constitutional Treaty would alter Article 31(1)(e) of the EU Treaty by referring expressly to powers to harmonize specific crimes, along with an express power to harmonize criminal law, whereas the current EU powers are not expressly limited to certain crimes (although certain specific crimes are listed in Articles 29 and 31(1)(e) EU);
g) Article III-272 of the Constitutional Treaty would create a new express power over crime prevention measures; and
h) finally, Article III-273 of the Constitutional Treaty, as compared to Article 31(2) EU, would strengthen the express powers relating to Eurojust.

However, the provisions on cross-border operations by law enforcement officers are identical in the current EU Treaty and the Constitutional Treaty (Articles 32 and III-277 respectively).

Taken as a whole, the Constitutional Treaty would modestly amend the current provisions relating to Europol and police cooperation, but would make broader changes relating to criminal law, in particular as regards the powers of Eurojust and the creation of a European Public Prosecutor and greatly clarifying the EU's powers to harmonize national criminal substantive law and procedure. Whether the latter provisions would widen or narrow the EU's current criminal law powers is debatable, because the scope of EU powers in this area at present is a matter of considerable controversy.

DECISION-MAKING

The Constitutional Treaty provides for qualified majority vote in the Council and the normal legislative procedure (today known in practice as the co-decision procedure) as the rule for policing and criminal law matters. Exceptions are provided for as regards the adoption of measures concerning the European Public Prosecutor, cross-border police operations and the harmonization of law concerning police operational activity (Articles III-274, 275(3) and 277).

Furthermore, the process of qualified majority voting with co-decision would be subject to the so-called 'emergency brake' procedure as regards measures harmonizing national criminal procedural law or substantive criminal law (Articles III-270(3) and III-271(3)). This would permit Member States to object to the adoption of proposed measures in these areas on specified grounds, halting the decision-making process at any stage. The proposed measure would then be discussed by EU leaders, and if the objecting Member State retains its objections, the proposal could still be adopted eventually by the other Member States who do not share those objections.

In contrast, Article 42 EU permits the Council to decide upon the 'voting conditions' to which policing and criminal law will be subjected. The exercise of this power does not appear to be constrained by Article 42, so the Council has full discretion as to how to use it. The Council could decide that all measures will remain subject to unanimous voting with consultation of the EP (the present rule), or that all measures will be subject to qualified majority voting and the co-decision procedure. It could also provide that some or all of the measures will be subject to an 'emergency brake' procedure. Furthermore, it could provide for the Council to act by qualified majority vote with consultation of the EP (or by unanimous vote with EP co-decision or assent).

Finally, the Council could delay in full or part any changes to the voting rules to a future date after the entry into force of the Article 42 decision. This date could be fixed in the Article 42 decision itself (for example, requiring a change in voting rules two years after the decision

enters into force, or on a specific date such as 1 January 2010). Or it could be left to the Council to act to change the voting rules at a specified or unspecified future date, or it could be provided that the rules would change following the fulfilment of certain conditions (such as the adoption of basic instruments in a field, or a change in the institutional framework such as the reweighting of Council votes). A combination of these approaches could be applied.

It should be recalled that the Constitutional Treaty would also alter the voting weights of Member States in Council, as from November 2009 (Article I-25). This will not happen unless the Constitutional Treaty, or an alternative treaty amending the current Treaties, is ratified.

As for the Commission, it appears unlikely that the power to establish the 'voting conditions' following the transfer of the third pillar to the first pillar can extend to the issue of the role of the Commission, as the phrase 'voting conditions' appears to refer to the conditions for the adoption of a measure, not the conditions of proposing it. Also, as set out above, Article 42 states exhaustively which powers are conferred upon the Council.

If this interpretation is correct, it would follow that the Commission would obtain its normal Community law right (or monopoly) of initiative following the application of a *passerelle* decision, because it has enjoyed that monopoly over Title IV of the EC Treaty since the transitional period relating to Title IV expired on 1 May 2004. This compares to the Constitutional Treaty, which provides that the Commission must share the power of initiative over policing and criminal law matters with a group of Member States (Article III-264).

In fact, the Commission's communication on the future of the Hague programme clearly assumes that the Commission would obtain its full monopoly of initiative if an Article 42 Decision is adopted (COM (2006) 331).

In conclusion, as compared to the Constitutional Treaty:

a) it is open to the Council, when adopting a *passerelle* decision, to apply the co-decision procedure and qualified majority voting more widely, or more narrowly, than provided for under the Constitutional Treaty for policing and criminal law matters;
b) the Council may also place temporal or substantive conditions on the extension of qualified majority voting and co-decision, or permit wider use of qualified majority voting with *consultation* of the EP only than the Constitutional Treaty provides for;
c) the Council may take a wider or narrower approach to the application of the so-called 'emergency brake' clause than the Constitutional Treaty provides for;
d) the use of an Article 42 Decision would apparently entail greater powers for the Commission than the Constitutional Treaty provides for.

LEGAL INSTRUMENTS

The effect of applying the *passerelle* would be that Community measures (Directives, Regulations and EC Decisions), as set out in Article 249 EC, would apply in place of Framework Decisions, third pillar Decisions, Conventions and Protocols, and Common Positions (as set out in Article 34 EU).

This effect would be the same as the Constitutional Treaty, which equally would not provide for any distinctive measures to be adopted as regards policing and criminal law (see Article I-42). But it should be recalled that the Constitutional Treaty would also rename the Union's legal acts (Article I-33); the use of the *passerelle* would not have the same effect.

JURISDICTION OF THE COURT OF JUSTICE

Following the analysis above, the Article 42 decision cannot regulate the jurisdiction of the Court of Justice. The Court's jurisdiction over policing and criminal law matters will be identical to the special rules governing its jurisdiction over other 'Title IV' matters, as set out in Article 68 EC.

At present Article 68(1) EC provides that only that the final courts of Member States must refer questions on the validity or interpretation of EC acts, or the interpretation of Title IV of the Treaty, to the Court of Justice. Article 68(2) provides that the Court has no jurisdiction over acts adopted pursuant to Article 62(1), which concerns internal border controls, which relates to the maintenance of law and order and the safeguarding of internal security. Finally, Article 68(3) provides that the Commission, the Council or a Member State can request the Court to interpret an act adopted pursuant to Title IV, or Title IV itself.

These rules differ from the normal rules on the Court's jurisdiction in that Article 234 EC permits *lower* courts and tribunals an option to send to the Court preliminary rulings concerning questions on the validity or interpretation of EC acts, or the interpretation of the Treaty. However, other aspects of the Court's normal EC Treaty jurisdiction, in particular the rules on infringement actions (Articles 226-228) and annulment actions (Article 230 EC), apply fully to Title IV.

These rules also differ from the rules currently governing the Court's jurisdiction over policing and criminal law measures, as set out in Article 35 EU. Article 35 gives Member States an *option* to accept the Court's jurisdiction over preliminary rulings over these matters, and eleven Member States (the UK, Ireland, Denmark, the Baltic States, Poland, Slovakia, Slovenia, Cyprus and Malta) have not taken up that option. Of the fourteen Member States which have taken up the option, two (Spain and Hungary) have taken up the further option and limited the power to refer questions to the Court of Justice to final courts only. Furthermore, it is up to national law to determine whether the final courts in any Member State opting in to the Court's jurisdiction are obliged to refer questions or not. In any event, the Court's jurisdiction over preliminary rulings does not apply to EU common positions.

As for annulment actions, Article 35(6) EU permits only the Commission or a Member State (not the European Parliament, or natural or legal persons) to bring proceedings. There is no provision for infringement actions, but rather the possibility of dispute settlement between Member States, or (in the case of Conventions) between Member States and the Commission (Article 35(7)).

There is also an exclusion from the Court's jurisdiction as regards the validity or proportionality of actions carried out by national law enforcement services, or the exercise of Member States' responsibilities as regards the maintenance of law and order and the safeguarding of internal security (Article 35(5)).

This position compares to the Constitutional Treaty, which would apply the full normal rules on the Court's jurisdiction to all Justice and Home Affairs matters, with the sole exception of retaining the limit on jurisdiction concerning the validity or proportionality of actions carried out by national law enforcement services, or the exercise of Member States' responsibilities as regards the maintenance of law and order and the safeguarding of internal security (Article III-377).

However, the current rules on the Court's jurisdiction over Title IV matters are subject to amendment by the Council pursuant to Article 67(2) EC, which required the Council to adapt these rules following the end of the five-year transitional period applicable to Title IV (which ended on 1 May 2004). The Council has failed to adapt these rules to date; this failure could

be the subject of a 'failure to act' action brought by the European Parliament ,the Commission or a Member State pursuant to Article 232 EC (see Case C-13/83 *European Parliament* v *Council* [1985] ECR 1583). In the meantime, the Commission proposed in June 2006 that the Council act pursuant to Article 67(2) in order to apply the normal rules on the jurisdiction of the Court to Title IV matters (COM (2006) 346, 28 June 2006). If the Council adopts this proposal (it must act unanimously) then the normal rules on the Court's jurisdiction will apply to criminal law and policing matters, if those issues are transferred to Title IV by means of an Article 42 Decision.

But it is possible that the Council will reject the Commission's proposal, or accept it in part only. It is also possible that the Council would interpret Article 67(2) to permit it to maintain a different set of rules on the Court's jurisdiction as regards criminal law and policing matters after the transfer of these matters to Title IV. If the Council takes this view, it could be challenged for breaching the general principles of law underpinning the Community legal order, particularly if access to the Court regarding annulment actions and preliminary rulings continues to be precluded altogether for the EP and natural or legal persons on the one hands, and for litigants in some Member States on the other.

In conclusion, as compared to the Constitutional Treaty:

a) the use of the *passerelle* without any amendment to the current rules governing the Court's jurisdiction over Title IV matters would result in a restricted jurisdiction for the Court of Justice as compared to the Constitutional Treaty (references from final courts only), although the limit on the Court's jurisdiction relating to national law enforcement services and the protection of internal security would not apply;
b) the use of the *passerelle* along with the adoption of the Commission's proposal to amend the jurisdictional rules relating to Title IV would result in a situation nearly identical to the jurisdiction provided for the Court of Justice as regards policing and criminal law in the Constitutional Treaty. The only difference would be the lack of the limit on the Court's jurisdiction relating to national law enforcement services and the protection of internal security;
c) it is alternatively open to the Council to adopt different rules for the Court's jurisdiction as regards policing and criminal law (regardless of what the Council decides as regards the Court's jurisdiction over immigration and asylum law, et al), which might match the Constitutional Treaty completely or establish a different regime. Arguably, however, there are restraints implicit in the Treaty on the Council's power to limit the Court's jurisdiction, in particular as regards preliminary rulings and annulment actions, which could be enforced if necessary by a challenge by the Commission or the EP to the validity of a Council Decision on this matter.

PARTICIPATION OF MEMBER STATES

Although the issue is not mentioned in the Commission's communication on the future of the Hague programme, the transfer of third pillar matters into Title IV of the EC Treaty would mean that the current opt-outs of the UK, Ireland and Denmark relating to Title IV of the EC Treaty would apply.

This would entail that the UK and Ireland would have the opportunity to decide whether to opt in to a policing and criminal law proposal. If they do not opt in, the other Member States would continue discussing the proposal without them. If they opt in, then they are full participants in the discussion, but if they hold up the adoption of the measure, then again the other Member States can go ahead without them. If a measure is adopted without the participation of the UK or Ireland, then they can apply at a later date for the permission of the Commission to participate in the measure nonetheless.

This compares to the Constitutional Treaty, which does not provide for opt-outs for these Member States over policing and criminal law matters, except as regards tax matters.

As for Denmark, it is excluded from opting in to any Title IV measures (except for certain visa matters, which are obviously outside the scope of policing and criminal law). It can participate in a limited way in matters building upon the Schengen acquis, which are binding upon Denmark as a matter of international law. In several cases (asylum responsibility, service of documents, civil and criminal jurisdiction), the EC and Denmark have negotiated international treaties to enable Danish participation in Community acts.

The Constitutional Treaty provides that this extensive mandatory opt-out for Denmark would *prima facie* apply to policing and criminal law matters. However, Denmark could decide to apply the British and Irish version of the opt-out, which would enable it to opt in on a case-by-case basis to proposals. This possibility would not be open to Denmark if the *passerelle* were used. However, in either case it would be open to Denmark to renounce its opt-out entirely. Furthermore, following the existing precedent, it would presumably be open to the Community and Denmark to negotiate international treaties to enable Danish participation in Community acts concerning policing and criminal law.

In conclusion, as compared to the Constitutional Treaty, if the *passerelle* were applied:

a) the UK and Ireland would enjoy their Title IV opt-out over criminal law and policing matters;
b) Denmark would be mandatorily excluded from policing and criminal law measures, except for the capacity to apply measures building on the Schengen *acquis*, which would be binding in international law; there would be no possibility for Denmark to apply the British and Irish version of the opt-out instead.

CONCLUSIONS

Adopting a *passerelle* decision, as compared to the Constitutional Treaty, would:

a) confer less precise powers on the EU as regards criminal law, and lesser powers in relation to Eurojust and the European Public Prosecutor;
b) possibly have a different impact as regards decision-making in the Council and the European Parliament, depending on the Council's discretion;
c) apparently confer stronger powers upon the Commission;
d) have an identical impact in effect as regards the types of instruments to be used;
e) possibly have a different impact as regards the jurisdiction of the Court of Justice, depending on the Council's discretion when adopting the passerelle decision and the proposal to amend the Court's Title IV jurisdiction;
f) result in a fully-fledged opt-out for the UK and Ireland over participation in policing and criminal law matters, and a *prima facie* exclusion of Denmark from participation in the adoption of such matters.