



HOUSE OF LORDS

European Union Committee

42nd Report of Session 2005–06

**The Criminal Law
Competence of the
European
Community**

Report with Evidence

Ordered to be printed 18 July and published 28 July 2006

Published by the Authority of the House of Lords
London: The Stationery Office Limited
£price

HL Paper 227

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FOREWORD—what this Report is about

This Report describes two significant developments relating to the respective competences of the Member States and the European Community in relation to criminal law.

First, we examine the implications of Case C–176/03 *Commission v Council* and how far the European Court of Justice in its decision on 13 September 2005 has gone in attributing competence in criminal law to the Community. Is the power under the EC Treaty to require criminal sanctions restricted to environmental protection measures? How far can the Community go in defining criminal offences and stipulating penalties? That the Community has competence, albeit possibly quite limited, to require Member States to impose criminal sanctions came as a surprise to many. The reach of the Court’s judgment is controversial, at least as between Member States and the Commission, and clarification is needed.

Second, the Report looks at the Commission’s suggestion published on 10 May 2006 that the *passerelle* (bridge) provision contained in Article 42 of the Treaty on European Union be used to enable police and judicial cooperation in criminal matters to be dealt with under the EC Treaty, with consequentially increased roles for the Commission, the European Parliament and the Court of Justice. There may be benefits to be had in terms of greater coherence of European legislation, democratic legitimacy and accountability. But at stake are national vetoes over these matters. The suggestion to use the *passerelle* has also given rise to complaints of “cherry picking” from the Constitutional Treaty while its future is uncertain.

The European Council has most recently (15/16 June 2006) agreed that “best use be made of the possibilities offered by the existing treaties in order to deliver the concrete results that citizens expect”. The Finnish Presidency has been asked to “explore, in close collaboration with the Commission, the possibilities of improving decision-making and action in the area of Freedom, Security and Justice” (*i.e.* by using the *passerelle*).

The purpose of this Report is to draw the House’s attention to these two developments, both of which have constitutional significance for Member States and for the Union, and to identify the possible consequences for future domestic and Union law-making. We hope that by so doing we will assist the further consideration and discussion of these matters in the coming months both in this Parliament and elsewhere.

The Criminal Law Competence of the European Community

CHAPTER 1: SETTING THE SCENE

Introduction

1. Criminal law has an important role in protecting the physical and economic well-being of society and the individual. Taking action against organised crime or securing compliance with legislation aimed, for example, at protecting the environment from major contamination or degradation may require a response at both national and international level. It is well established that the European Union has an important role to play as crime, like many other matters in a global society, pays no regard to the territorial boundaries of States. The need for cooperation between police and prosecution authorities, for example in tackling people trafficking or in dealing with football hooliganism, is now undisputed. The Union has responded to the growing international dimension of crime with the establishment of bodies such as Europol and Eurojust, the creation of common rules on such matters as corruption and money laundering, and the setting up of common procedures by which evidence and information can be obtained across borders.
2. Taking some of these measures at EU level has been highly controversial, as in the case of the European Arrest Warrant. A number of measures, such as the proposed Framework Decision on procedural rights in criminal proceedings, are now stalled as Member States seek to decide the appropriate way forward, respecting the differences in national criminal laws and procedures (methods of investigation, rules of evidence and modes of trial) which exist. Member States and their governments may be faced with conflicting pressures and a difficult choice between protecting national powers and prerogatives and securing effective action across Europe, and possibly further afield, against terrorism and other serious crime.

Criminal law and the Treaties

3. Until September 2005 it was commonly understood that the Treaty establishing the European Community (the EC Treaty or TEC) conferred no power to define criminal offences or prescribe criminal sanctions. The extent of the European Union's legislative competence in relation to criminal law and procedure was generally considered to be limited to Title VI (Provisions on Police and Judicial Cooperation in Criminal Matters, commonly referred to as the "Third Pillar") of the Treaty on European Union (TEU). That Member States, or at least a majority of them, had seemingly been labouring under a misapprehension as to what they had agreed in the Treaties, and on what basis they had recently settled the text of the Constitutional Treaty, was revealed when, on 13 September 2005, the European Court of Justice (the Court) handed down its judgment in Case C-176/03 *Commission v Council*.¹

¹ [2005] ECR I-7879.

Case C–176/03 *Commission v Council*

4. In Case C–176/03, the Court struck down a Framework Decision on criminal sanctions applying to environmental protection which had been adopted by the Council on a Third Pillar legal base. While the Court confirmed that, as a general rule, criminal law and criminal procedures are matters which do not fall within the scope of the EC Treaty, that did not “prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective”.²

EC and national criminal law

5. This is not the first case in which the Court has had to consider the relationship between Community law and the criminal law of Member States. It is well established that Community law may overrule national laws including national criminal laws where that law is incompatible with the Treaty and rules made under the Treaty.³ It is also clear that the effect of the doctrine of equivalence, in particular that protection of the rights under Community law must be ensured by Member States in a way no less favourable than those relating to similar national rules, may lead to a requirement to give effect to Community law by providing criminal sanctions.⁴
6. Case C–176/03 is, however, novel in identifying a criminal law competence for the Community.⁵ As we explain below, the extent of that competence is by no means clear. How far this may give rise to legal/political rather than practical problems is also uncertain. In January 2006, the Government said that in practical terms the judgment may not be too far-reaching insofar as many Member States, including the United Kingdom, already choose to criminalise certain non-compliance with Community law.⁶ However, we believed the potential legal and political significance of the case merited a brief inquiry.

Case C–440/05—Ship source pollution

7. Case C–176/03 is only one of a number of instances of disagreement among the institutions—the Commission, the Council and the European Parliament—as to whether particular action falls within one Pillar or another.

² Judgment of 13 September 2005, at para 48.

³ For example, Case C–348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I–11. EC rules on free movement of persons and freedom to provide services held to override national rules providing for expulsion for life automatically following a criminal conviction.

⁴ For example, Case C–68/88 *Commission v Greece* [1989] ECR 2965.

⁵ See, however, an opinion of Advocate General Jacobs in Case C–240/90 *Germany v Commission* [1992] ECR I–5383, at p 5408: “Certainly, then, Community law in its present state does not confer on the Commission (or on the Court of First Instance or the Court of Justice) the function of a criminal tribunal. It should be noted however that that would not in itself preclude the Community from exercising, for example, powers to harmonise the criminal laws of Member States, if that were necessary to attain one of the objectives of the Community.”

⁶ Explanatory Memorandum on Doc 15444/05 submitted by the Home Office on 16 January 2005 and signed by Fiona Mactaggart MP, then Parliamentary Under Secretary of State.

Increasingly disputes over legal/Treaty base are making their way to the Court in Luxembourg. In Case C–440/05 *Commission v Council* (Ship source pollution), the Commission seeks a declaration from the Court that Council Framework Decision 2005/667/JHA of 12 July 2005⁷ is unlawful and should be annulled. It is generally agreed that this case is important because it provides an opportunity for the Court to clarify a number of issues raised by Case C–176/03, in particular to resolve some of the ambiguity relating to the extent of the Community’s power to legislate with regard to criminal law, and to make clear whether EC legislation can define criminal offences and stipulate penalties or merely identify areas of behaviour in respect of which Member States must impose criminal sanctions (*i.e.* leaving it to the individual Member State to define the offence and fix the penalty).

Other inter-Pillar litigation

8. In Cases C–317 and 318/04⁸ the Court was called on to rule on issues relating to protection of personal data of airline passengers where such data were transferred to US authorities in order to combat terrorism. The Court struck down measures taken under Article 95 TEC (internal market—the legal base for the existing Data Protection Directive⁹) holding that that Article (and the Directive) was inadequate as a legal base for measures concerning the processing of personal data for public security and criminal law enforcement purposes. This judgment may impact upon another case pending before the Court. In Case 301/06 Ireland has challenged the legality of the Directive on Data Retention¹⁰ which, though first introduced as a Framework Decision under the TEU, was, at the insistence of the Commission and the Parliament, also adopted as a First Pillar measure under Article 95 TEC.
9. Disputes are not limited to First/Third Pillar matters. In Case C–91/05¹¹ the Commission is seeking the annulment for lack of competence of a Council Decision implementing a Joint Action under the Common Foreign and Security Policy (CFSP) concerning an EU contribution to ECOWAS (the Economic Community of West African States) in the framework of the Moratorium on Small Arms and Light Weapons. The Commission argues that the measure should not have been made under Part V of the EU Treaty but as development aid under the EC Treaty.

Our inquiry widens

10. Shortly after we began considering the implications of Case C–176/03 reports appeared in the media that consideration was being given to using the

⁷ Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship source pollution. [2005] OJ L 255/164.

⁸ Cases C–317 and 318/04, *Parliament v Council* and *Parliament v Commission*. Judgment of 30 May 2006.

⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data. [1995] OJ L 281/31.

¹⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communication networks and amending Directive 2002/58/EC. [2006] OJ L 105/54.

¹¹ Case C–91/05 *Commission v Council*. A summary of the Commission’s arguments can be found at [2005] OJ C 115/10.

passerelle (bridge) in Article 42 TEU.¹² The French Government proposed the use of Article 42 TEU as part of a number of measures designed to improve institutional arrangements under the present Treaties.¹³ The Finns indicated their interest in bringing forward such a proposal during their Presidency (July–December 2006). Soon afterwards, the Commission, in its Communication, ‘A Citizens’ Agenda—Delivering Results for Europe’,¹⁴ suggested that use might be made of the *passerelle* to transfer policing and judicial cooperation criminal matters from the Third Pillar (intergovernmental) to the First Pillar (Community). On 8 May Commission President José Manuel Barroso explained this move: “people are asking for ‘more Europe’ in order to combat terrorism and organised crime. It is our duty to respond to this appeal, with or without a Constitution”.¹⁵ Such a transfer, the Commission argue, would improve decision-taking and accountability. We decided to widen our inquiry to look at the issues raised by Article 42 TEU.

The *passerelle*—Article 42 TEU

11. Article 42 TEU was introduced by the Amsterdam Treaty and enables the Council to transfer matters now referred to in Article 29 TEU into Title IV of the EC Treaty. Those matters are closer cooperation between police, customs and other competent authorities, closer cooperation between judicial authorities (including prosecutors and Eurojust) and approximation of “rules on criminal matters in the Member States”. Agreement to effect such a transfer requires the unanimous backing of Member States. Further, Article 42 provides that the Council “shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements”.
12. Moving policing and criminal law into the EC Treaty would *prima facie* increase the roles of the European Parliament and the Court. QMV could replace unanimity in the Council. At stake, therefore, are national vetoes and national control over certain policing and criminal law matters. The suggestion that the *passerelle* be used has also given rise to complaints of “cherry picking” from the Constitutional Treaty while its future is uncertain.

EU or EC

13. The distinction between the EU and the EC in this context is of fundamental importance for both constitutional and institutional reasons. Criminal laws and procedures lie at the heart of the legal traditions of States and, within the European Union, divergences in Member States’ laws (and even between different jurisdictions within a Member State such as the United Kingdom) reflect fundamental historical, political and constitutional differences. Member States have therefore guarded their criminal jurisdiction as a key part of their sovereignty and have acted on the basis that they had conferred

¹² UK hints it might lift EU veto on police matters, *Financial Times* 5 May 2006. Brussels in hot pursuit of new law-and-order powers, *The Times* 9 May 2006. Move to shift crime-busting into EC’s remit, *Europolitics* 9 May 2006.

¹³ Institutional improvement based on the framework provided by existing Treaties. French Contribution. 24 April 2006.

¹⁴ COM(2006) 211 final. Brussels, 10.5.2006.

¹⁵ *Europolitics*, 9 May 2002. No 30181. Page 12.

competence over criminal matters to the EU for the first time at Maastricht and then only limited competence within the scope of the Third Pillar.

14. As a subject of EU rather than EC law different legislative forms (framework decisions as opposed to directives) and procedures (intergovernmental as opposed to “the Community method”) apply in relation to criminal law and procedure. The legal effects of framework decisions are different from those of directives. The jurisdiction of the Court to interpret framework decisions is limited. Decisions to adopt EU legislation on criminal law and procedure are taken by unanimity in the Council of Ministers. By contrast, EC directives are commonly adopted by co-decision of the Council and the European Parliament and qualified majority voting frequently applies in the Council. The Commission cannot take Member States to the Court for failure to implement a framework decision.

The European Council

15. When it met on 15/16 June 2006, the European Council agreed:
- “In the context of the review of the Hague Programme, the European Council calls upon the incoming Finnish Presidency to explore, in close collaboration with the Commission, the possibilities of improving decision-making and action in the area of Freedom, Security and Justice on the basis of the existing treaties.”

This is a reference, *inter alia*, to Article 42 TEU and the *passerelle*. The Finnish Presidency has announced its intention to take this work forward. But the Presidency is very much alive to the political sensitivity surrounding use of the *passerelle*. Speaking to us about the Presidency’s priorities, HE Mr Jaakko Laajava, Finnish Ambassador to the UK said: “I think the key word is really to ‘explore’”. The Presidency was studying with the Commission and the Member States the different options available under Article 42 TEU.¹⁶

Review of the Hague Programme

16. In November 2004, the Hague Programme, “Strengthening Freedom, Security and Justice in the European Union”, was adopted by the European Council. This fixed the priorities of the Commission in the area of freedom, security and justice for the following five years.¹⁷ Since then the Member States and the EU Institutions have worked to ensure the implementation of the programme in accordance with the Council and Commission Action Plan adopted in June 2005. In response to a request made by the European Council (December 2004) to report in 2006 “to the European Council on the progress made and to propose the necessary additions to the Hague Programme” in 2006, the Commission has most recently adopted four Communications:
1. “Report on the implementation of the Hague Programme for 2005” (the so-called ‘scoreboard plus’);¹⁸

¹⁶ Evidence of HE Mr Jaakko Laajava and Mrs Päivi Pohjanheimo to the Select Committee on 4 July 2006. Finnish Presidency. Q 5.

¹⁷ We scrutinised the Programme in some detail: see *The Hague Programme: a five year agenda for EU justice and home affairs*, 10th Report 2004–05. HL Paper 84.

¹⁸ COM(2006) 333 final. Brussels 28 June 2006.

2. "Evaluation of the policies on Freedom, Security and Justice";¹⁹
3. "Implementing The Hague Programme: the way forward";²⁰ and
4. "Adaptation of the provisions of Title IV establishing the European Community relating to the powers of the Court of Justice with a view to ensuring effective judicial protection".²¹

The third is particularly relevant in the immediate context.

Scope of this Report

17. This Report therefore describes two developments affecting the division of competence in criminal law matters between the Member States and the European Community. The first is the judgment in Case C-176/03. In Chapter 2 we examine the uncertainties surrounding the judgment and the need for clarification, which the Court may provide in the Ship source pollution case. Chapter 3 looks at the reactions of the Institutions and Member States to Case C-176/03 and practical difficulties facing the Union's legislature pending that clarification.
18. The second development is the proposal to transfer criminal law-making powers to the Community under existing arrangements in the Treaties. In Chapter 4 we explain and consider the scope and procedure of Article 42 TEU and explore more fully the implications of the use of the *passerelle*. Although we will scrutinise all the Commission Communications listed above, we take the opportunity in this Report to point out the main elements of the Commission's proposal for the *passerelle*. As will be seen, use of the *passerelle* raises a number of constitutional and political issues.

Action in national parliaments

19. We are not the only national EU parliamentary committee to examine this subject. The Court's decision in Case C-176/03 attracted considerable attention in Denmark and gave rise to a hearing with the Minister of Justice in the European Committee of the Danish Parliament (Folketing).²² The French *Assemblée Nationale* has produced a *rapport d'information* on the case²³ and a committee of the French Sénat held a hearing with Judge Puissochet and Advocate General Léger, both of the Court of Justice, at which the case was discussed.²⁴ The reports of these deliberations have been both informative and helpful.

Conduct of the inquiry

20. Our object has been to produce a Report speedily which will inform the House of the issues raised by Case C-176/03 and the *passerelle*. As regards the latter, we have looked in some detail at the position of Denmark, and of

¹⁹ COM(2006) 332 final. Brussels 28 June 2006.

²⁰ COM(2006) 331 final. Brussels 28 June 2006.

²¹ COM(2006) 346 final. Brussels 28 June 2006.

²² Q 116.

²³ No 2829 Rapport d'information déposé par la Délégation de l'Assemblée Nationale pour l'Union Européenne sur les conséquences de l'arrêt de la Cour de justice du septembre 2005 sur les compétences pénales de la Communauté européenne (COM(2005) 583 final/no E 3022).

²⁴ Réunion de la délégation pour l'Union européenne du mercredi 22 février 2006.

Ireland and the United Kingdom who, because of their respective opt out/ins, stand in a special position in relation to Title IV TEC.

21. We had the benefit of oral evidence from Mr Richard Plender QC;²⁵ Professor Steven Peers; Mr Per Lachmann and Mr Christian Thorning from the Danish Ministry for Foreign Affairs; Mr Michael McDowell TD, Minister for Justice, Equality and Law Reform, Ireland; and Mr Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Home Office. We received a number of written submissions for which we are also most grateful. All the evidence, written and oral, is printed with this Report.
22. **We make this Report for the information of the House and as a basis for further consideration and discussion of these issues.**

²⁵ Richard Plender QC was advocate for the UK in Case C-176/03. He gave his evidence, written and oral, in a personal capacity.

CHAPTER 2: CASE C-176/03

Extent of Community competence

23. Case C-176/03 raised an important question relating to the extent of Community competence: how far can the Community require the imposition of criminal laws and penalties by Member States in furtherance of Community actions and objectives? The case arose following the Council's adoption, as a Framework Decision under the TEU, of an environmental protection measure originally proposed by the Commission as an EC Directive. The Commission challenged the legality of the Framework Decision before the Court.

Choice of instrument: Framework Decision v EC Directive

24. The Council's Framework Decision on the protection of the environment through criminal law²⁶ provides that certain conduct detrimental to the environment is to be made criminal by Member States. Its terms follow closely those of a draft Directive proposed by the Commission²⁷ which was rejected by Member States, or a substantial majority of them, on the grounds that Article 175 TEC, the legal base proposed by the Commission, was inappropriate and Article 34 TEU was to be preferred. The text of the proposed Directive was therefore transposed into the Framework Decision. On 27 January 2003 the instrument was adopted by the Council as an aspect of police and judicial cooperation between governments in criminal matters (*i.e.* under the Third Pillar).
25. The Framework Decision acknowledges the need, as originally expressed in the Commission's draft Directive, for Member States to respond in a concerted way to the increase in offences posing a threat to the environment. The Framework Decision accordingly specifies a number of offences (based on existing Community environmental measures). It requires the prescription of criminal penalties and leaves to Member States the choice of the criminal penalties to apply, though they must be "effective, proportionate and dissuasive". However, those penalties should include "at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition".²⁸ The Decision also contains rules relating to jurisdiction and for dealing with prosecutions brought by a Member State which does not extradite its own nationals (Articles 8 and 9).

The Framework Decision under attack: the Commission's challenge

26. In April 2003 the Commission brought proceedings in the Court seeking the annulment of the Framework Decision.²⁹ The Commission's main argument was that the aim and content of the Framework Decision were within the scope of the EC Treaty and its powers to legislate on the environment. Article 47 TEU accords primacy to Community provisions. Accordingly, the

²⁶ Council Framework Decision 2003/80/JHA of 27 January 2003.

²⁷ Proposal for a Directive of the European Parliament and the Council on the protection of the environment through criminal law. [2001] OJ C 180/238.

²⁸ Article 5(1).

²⁹ A summary of the application can be found at [2003] OJ C 135/31.

Framework Decision could not be adopted on the basis of provisions in the TEU concerning police and judicial cooperation in criminal matters as there was Community competence (Article 175 TEC) to do so. It should be noted that the Commission did not claim that the whole Framework Decision fell within Article 175 TEC. It accepted that certain provisions were rightly the subject of the Framework Decision, namely those provisions relating to jurisdiction, extradition and prosecutions.

27. The European Parliament intervened in the proceedings in support of the Commission.

The Council's position

28. The Council argued that the EC Treaty contained no power in relation to criminal sanctions and that, given the significance of criminal law for the sovereignty of Member States, there were no grounds for accepting that that power had been implicitly transferred to the Community. The Council drew attention to the fact that the TEU contained a specific Part devoted to judicial cooperation in criminal matters (Part VI TEU), that the Court had not previously held that the Community was competent to harmonise criminal laws and that the legislative practice of the Council had been to detach criminal aspects of Community proposals and put them into framework decisions (the "dual text approach"). In the present case, the Framework Decision supplemented Community law on environmental protection.
29. Eleven³⁰ of the then fifteen Member States that adopted the Framework Decision, including the UK, intervened in support of the Council.

The Advocate General's Opinion

30. Advocate General Ruiz-Jarabo Colomer delivered his Opinion in the case on 26 May 2005. He proposed that the Court should uphold the action for annulment brought by the Commission, taking the view that the Community legislature could require Member States to impose criminal sanctions as an "effective, proportionate and dissuasive" response to conduct seriously affecting the environment. In so opining, the Advocate General drew attention to the well-established competence of the Community in environmental matters and to the widely recognised international importance of environmental protection measures. He concluded that "the choice of the criminal law response to serious offences against the environment is the responsibility of the Community". The Framework Decision (Articles 1–7) should therefore be annulled, except to the extent that it provided specific punishments (*e.g.* deprivation of liberty giving rise to extradition): the latter was outside the competence of the Community. The Advocate General did not deal with Articles 8 (jurisdiction) and 9 (extradition and prosecution), in respect of which the Commission had not argued the Framework Decision should be annulled.

³⁰ Denmark, Germany, Greece, Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden and the United Kingdom.

The Court's judgment

31. The Court noted that protection of the environment constitutes one of the essential objectives of the Community and that environmental protection requirements must be integrated into the definition and implementation of the Community's policies and activities. The Court looked at both the aim and content of the Framework Decision and found that its main purpose was the protection of the environment and that the majority of its provisions could have been properly adopted under the EC Treaty. The Court reiterated an earlier ruling that, as a general rule, neither criminal law nor rules of criminal procedure fall within the Community's competence. However, that did not "prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective".³¹

The Treaty context

32. Before considering the areas of uncertainty arising from the Court's judgment, we observe that the Court did not seem to pay any great regard to the history and scheme set out in the Treaties. It is, we believe, significant that the EC Treaty contains no express power for the Community to adopt measures of criminal law or procedure and indeed contains provisions (in Articles 135 (Customs cooperation) and 280(4) (fraud affecting the Community's finances)) which expressly exclude the possibility of Community legislation concerning "the application of criminal law". But in the Court's view, "it is not possible to infer from those provisions that, for the purpose of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law".³²
33. The Court makes no reference to and apparently draws no inference from the fact that law-making powers and detailed rules for policing and criminal law, with special institutional consequences, have been set out within the TEU as a result of the agreements reached between Member States at Maastricht and at Amsterdam. Article 42 TEU (the *passerelle*—which we examine in detail in Chapter 4) is also most relevant: as stated, Article 42 TEU provides for the transfer, among other things, of measures for the approximation of rules on criminal matters (including definition of certain offences) from Part VI TEU to Part IV TEC (*i.e.* from the Third to the First (Community) Pillar). The Treaties thus contain the means to enable action in relation to criminal law to be "communitarised", expressly subject to national constitutional safeguards.

³¹ Judgment, at para 48.

³² Judgment, at para 52.

The Constitutional Treaty

34. It is perhaps not surprising that the Court did not refer to the provisions on criminal law contained in the Treaty establishing a Constitution for Europe. Its future is uncertain. The Constitutional Treaty does, however, show the Member States' understanding of the position (in 2004) and the proposed future position of criminal law under the Treaties.
35. Those closely concerned (in the Convention and its Praesidium) with the preparation of the new Treaty appear to have been working under the assumption that the present Treaties contained only a limited power to harmonise criminal laws and procedure and that that power was contained in Part VI TEU. In proposing the inclusion in the new Treaty of a provision to enable the approximation of the constituent elements and penalties in certain sectors of substantive and procedural criminal law, there is no recognition or suggestion that any such power might currently exist under the EC Treaty.³³ Article III-271(2) of the Constitutional Treaty provides: "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". The question of how far the Court's judgment renders this provision redundant may merit further consideration in the light of the Court's emerging jurisprudence.

Criminal law competence—areas of uncertainty

36. The judgment has met with comment³⁴ and considerable criticism, including from Richard Plender QC and a number of other witnesses. Professor Peers, University of Essex, commented: "Given that the Member States argued that this was not what they wanted to give to the Community as competence, it is surprising that the Court felt that it was. Nevertheless, from a purely legal point of view, there are reasonable grounds to support the Court's conclusion that the Community has some form of criminal law competence" (Q 47). The question is: just how far has the Court gone?

No general criminal law competence

37. It is important to note at the outset that the Court regards the Community's competence in the criminal field as exceptional. The Court stated that "As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence".³⁵ It is clear therefore that there is no general competence in criminal law under the TEC. But, as the detailed evidence of our witnesses revealed, the exception established in Case C-

³³ Final Report of Working Group X "Freedom, Security and Justice" CONV 426/02, Note on the plenary meeting—Brussels, 6 and 7 June 2002 CONV 97/02, Summary Report on the plenary session—Brussels, 5 and 6 December 2002 CONV 449/02, Summary Report on the plenary session—Brussels 30 and 31 May 2003 CONV 783/03.

³⁴ See, for example, Simone White, 'Harmonisation of criminal law under the first pillar' (2006) 31 E.L.Rev. 81; Martin Hedemann-Robinson, 'The European Union and environmental criminal liability' [2005] 6 Env. Liability 149; Paul Grotorex and Natasha Peter, 'Gloves off: *Commission v Council*' (2005) 155 N.L.J. 1706; Natasha Peter, 'The rise and rise of criminal environmental penalties' (2005) 155 N.L.J. 1708; Michael Renouf, 'The Euro battle to legislate' (2005) 102 L.S. Gaz. 15.

³⁵ Judgment, at para 47.

176/03 needs clarification both as to the extent of Community legislative power and its scope of application.

Scope of application: limited to environmental protection?

38. The effect of the judgment is to annul one particular measure, a Framework Decision on criminal sanctions applying to environmental protection. A first question to ask is whether the Court's reasoning is necessarily limited to matters concerning the protection of the environment. Might it extend to other areas of Community action and if so which?

The arguments

39. Both Richard Plender QC and Professor Peers doubted whether Community criminal law competence was limited to environmental protection (Q 48). Professor Peers was "quite sure there are at least some areas, and perhaps even all areas of Community law, where the Community has, in principle, a substantive criminal law competence". The internal market (Article 95 TEC) and illegal immigration (Article 63 TEC) were, he thought, cases in point (QQ 48–9). We ourselves note the fact that the Court did not expressly limit its judgment, that it described the environmental protection as "one of the essential objectives of the Community",³⁶ and that the reasoning applied by the Court to the environment would seem to be equally well capable of application to other areas of Community policy and action if they met the test of being "essential objectives".
40. However, it is also noteworthy that the judgment of the Court is carefully worded. Each statement of principle expressly refers to environmental protection though, as Richard Plender QC acknowledged, the Court does not do this to the same extent and in the same way as the Advocate General in the case (QQ 28–29). Advocate General Ruiz-Jarabo Colomer more clearly treated environmental protection as a special case, drawing attention to the globalisation of environmental policy. It is interesting to note that at a meeting between Judge Puissochet and Advocate General Léger and the European Committee of the French Senate the judge suggested that the judgment should be so construed.³⁷

The Commission's standpoint

41. Certainly there is no agreement among the Council, Commission and Parliament as to the scope of application of the Court's ruling, as became apparent when in November 2005 the Commission published its Communication on the implications of the Court's judgment.³⁸ We look at the Communication and the reception it has received in Chapter 3.
42. The Commission takes the view that the judgment has a wide application. In its Communication, the Commission describes the judgment as laying down

³⁶ Judgment, at para 41.

³⁷ Réunion de la délégation pour l'Union européenne du mercredi 22 février 2006: "En premier lieu, contrairement à ce qui a été dit parfois, et sans trahir le secret du délibéré, mon sentiment est que l'arrêt est strictement cantonné à la protection de l'environnement et se fonde expressément sur la spécificité de cette matière".

³⁸ 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) Brussels, 24.11.2005. COM(2005) 583 final/2.

principles which “go far beyond the case in question” and which may apply to other Community policies and to the free movement of persons, goods, services and capital. The Commission acknowledges, however, that criminal law as such is not a Community policy and concludes that “appropriate measures of criminal law can be adopted on a Community basis only at sectoral level and only on condition that there is clear need to combat serious shortcomings in the implementation of the Community’s objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom”. Hence the Communication put forward a proposal for a “quick and easy solution” to deal with eight particular measures. Some of them relate to environmental protection (*e.g.* Ship source pollution). Others clearly do not (for example, those relating to corruption and to money laundering).

The European Parliament’s position

43. In its recent Resolution on the implications of Case C–176/03³⁹ the European Parliament questions the Commission’s position and states that “there appear to be no grounds for an automatic presumption in favour of a broad interpretation of the judgment”. However, the Parliament supports the Commission taking remedial action in relation to other Third Pillar measures or proposals. By implication therefore, the Parliament takes the view that Community competence in criminal law is not limited to environmental protection.

Views of Member States

44. That a large number of Member States favour Case C–176/03 being given a narrow construction can be seen both in their response to the Commission’s Communication and their participation in the Ship source pollution case. In the latter case it appears that the Council, supported by a large number of Member States including Denmark, Ireland and the UK, is arguing that criminal law competence is limited to environmental measures. The Minister said that the Government are “providing a robust support of the Council’s defence to the Commission’s challenge” (Q 205). Mr Per Lachmann, Chief Adviser EU Law and Constitutional Law, Danish Ministry of Foreign Affairs, said that Denmark would argue in the Ship source pollution case that Case C–176/03 “deals exclusively with environmental matters and can only apply to environmental matters” (Q 117).
45. Even if the rationale of the judgment has to be read across to other Community policy areas it may not, in the Government’s view, extend to all areas of Community policy and action. The Government do not exclude the argument that the scope of Community competence in criminal matters may extend to “those areas of policy that are equally fundamental to Community aims and objectives”, though, save for the condition that there should be some cross-border element, they were not clear as to what those areas might be (p 57, Q 211). While the Ship source pollution case continues, neither the Irish nor the UK Government would concede that Community competence extends beyond the environment (QQ 167–9, 209).

³⁹ European Parliament Resolution on the consequences of the judgment of the Court of 13 September 2005 (C–176/03 Commission v Council) (2006/207(INI)), at preambular para L. See also Report on the consequences of the judgment of the Court of 13 September 2005 (C–176/03 Commission/Council). Final A6–0172/2006: the “Gargani Report”, at para 16.

Comment

46. There is no doubt that the Community's competence in respect of criminal law is limited. The Court was quick to underline that the basic position, that there is no general Community competence, remained. Whether the principles and approach set out in the Court's judgment are limited to environmental protection is far from clear for the reasons we have set out above. As the Government indicated, the extent of Community competence in criminal law can only be resolved finally by the Court. Some clarification may be provided by the Ship source pollution case, but how much is not certain—the Directive⁴⁰ in issue in the case, though adopted under Article 80(2) TEC (*i.e.* a transport article of the Treaty), is concerned with “maritime safety policy which is aimed at a high level of safety and environmental protection”.⁴¹ In any event we will have to wait for some time, at least a year our witnesses agreed, for a ruling in this case.

Extent of legislative power

47. A second element of uncertainty is whether Community competence extends to the prescription of actual penalties and the definition of the criminal offences which result in such penalties. Or does the judgment simply constitute a broader statement by the Court that the Community may say that criminal sanctions, of some kind and level decided by the Member States, are necessary in order to provide an effective, proportionate and dissuasive sanction?

The Commission's view

48. The Commission has adopted an expansive stance: “When for a given sector, the Commission considers that criminal law measures are required in order to ensure that Community law is fully effective, these measures may, depending on the needs of the sector in question, include the actual principle of resorting to criminal penalties, 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”.⁴²

The position of the European Parliament

49. The European Parliament has substantially endorsed the Commission's approach. The Parliament takes the view that while “Community law in the form of directives can only lay down minimum rules for criminal penalties to be applied by the Member States ... in certain cases it is appropriate to further define the action taken by Member States by expressly specifying (a) the type of conduct that should constitute a criminal offence, and/or (b) the

⁴⁰ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements. [2005] OJ L 255/11.

⁴¹ The Directive was adopted by the Commission in March 2003 in response to the *Prestige* oil pollution incident in November 2002.

⁴² 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*). Brussels, 24.11.2005. COM(2005) 583 final/2.

type of penalty that should be applied, and/or (c) other measures relating to criminal law which are applicable in the relevant context”.⁴³

Member States

50. The Minister said that “As regards penalties, there is a consensus in the Council that, even if there were Community competence to adopt detailed penalty provisions, the Third Pillar norm of setting ranges for minimum maximum penalties should be continued in the First Pillar and then only where this level of detail is necessary to achieve the Community policy objective. The Intellectual Property Directive⁴⁴ adopts this language. The Government support this approach and will be quick to reject any proposals that would constrain judicial discretion” (p 58).
51. The Government do not accept that there is Community competence to set out the detail on penalties when formulating EC legislation: “it should only be necessary to identify conduct that should be met by a criminal sanction. It will then be for Member States to decide upon the detail of the nature and quantum of sanctions subject to the requirement that the penalties must be effective, proportionate and dissuasive. The Government have not yet accepted that there is Community competence to set out the detail on penalties when formulating EC legislation” (p 57).

Defining offences—the arguments

52. Richard Plender QC accepted that according to the Court’s judgment the Community could stipulate the means (*i.e.* to decide that there must be criminal, as opposed to administrative or fiscal, sanctions) of guarding against pollution, but he thought that the Commission went too far in stating that the Court considered the EC Treaty confers on the Council power to define offences and prescribe penalties (Q 1, 16–17). He argued that were the Court to be asked to focus on the extent of Community power it should follow the approach of Advocate General Ruiz-Jarabo Colomer. Richard Plender said: “The power to define offences is so intimately linked with national criminal law that it can best be achieved at the national level. Likewise, the power to prescribe penalties is intimately linked to the treatment of offenders, which is a matter for national law and procedures”. Further, “If the Community legislature is to define offences, it can only do so in terms of sufficient breadth to be applicable in the legal systems of 25 Member States, but it is vital from the perspective of civil rights to establish the maximum possible degree of certainty in relation to the definition of criminal offences” (Q 1).
53. Professor Peers, on the other hand, considered that the Community “must at least have the power to define what criminal offences must be prosecuted by Member States” (Q 52). He referred to 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

⁴³ European Parliament Resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 Commission v Council) (2006/207(INI)), at para 16. See also Report on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 Commission/Council). Final A6-0172/2006. The Gargani Report.

⁴⁴ The Commission has brought forward a proposal for a Directive on enforcement of intellectual property rights. This is discussed at paras 77–80 below.

should ban” (Q 58). Richard Plender, when pressed on the point, remained more cautious. He accepted that “Under paragraph 48, the Community legislature can decide that criminal penalties for a certain genus of activity are essential. It must therefore have a competence to state that there is a certain area in which criminal penalties must be prescribed but within that area the definition rested on the Member States” (Q 21). He acknowledged that “to describe an area within which there must be criminal sanctions is to take the first step towards definition” (Q 23).

Prescribing penalties—the arguments

54. In Professor Peers’ view uncertainty arose in determining how far the Community could go beyond defining offences and, in particular, whether it could prescribe the particular penalties that have to be attached or, in addition, could address issues like jurisdiction or procedural issues or matters such as extradition or joint investigation teams. He said: “The further you get out from that core question of defining the offence, the less likely it is that on this judgment you could justify Community action, particularly because of paragraph 49 of the judgment, which does seem to lay some stress on the fact that the Framework Decision does not specify the exact criminal penalties which must be applied. That decision seems to suggest the Community cannot do that, and that is an important point, because nearly every Framework Decision that deals with substantive criminal law, all but two, this one and the Framework Decision on credit card and debit card fraud, in fact specify penalties, the minimum maximum penalty which Member States have to apply in order to enforce the criminal offence” (Q 52).
55. Richard Plender QC opined that the Court did not consider whether the Council had the power to prescribe penalties because on its reasoning the issue did not arise. The Court had concluded that the entire Framework Decision, being indivisible, infringes Article 47 EU. The Court was therefore spared the problem, addressed by the Advocate General, of considering separately Article 5 of the Framework Decision, which prescribes, at least in outline, the penalties to be imposed for environmental offences (including deprivation of liberty which can give rise to extradition). Richard Plender considered that it would be inapt to confer on the Community legislature the power to prescribe the maximum, minimum or guideline sentences for offences: the more so as the nature and duration of any sentence is intimately linked to the treatment of offenders, which is a matter for national law and procedure (p 7).

Extradition, jurisdiction and prosecutions

56. In Case C–176/03 the Commission itself did not claim that there was Community competence to include provisions dealing with extradition, and prosecutions. But, as mentioned, the Commission’s Communication takes a wide view of the extent of Community criminal law competence. It also appears that in the Ship source pollution case the Commission is also taking a more expansive view of the Community’s powers than in Case C–176/03. Mr Lachmann, for Denmark, said: “I think the appetite of the Commission has obviously grown in the second law suit against the Council as compared to the first” (Q 119).

57. The Government do not agree with the Commission. They believe that matters such as jurisdiction, prosecution policy and the use of joint investigation teams should continue to be proposed in Third Pillar Framework Decisions (pp 57–58). The Danes also believe that matters such as extradition and prosecutions are outside the scope of the First Pillar (Q 118).
58. The Law Society of England and Wales (Law Society) did not accept that the Court had addressed the issue of whether a Community instrument could include rules on such matters as extradition, jurisdiction and prosecutions. The Law Society pointed out: “In Case C–176/03 the Court decided to annul the entire Framework Decision because it was indivisible and because it encroached on Article 47 TEU. The Court did not examine in detail the arguments of the Commission that only parts of the Framework Decision should be annulled. Neither did it examine the extent to which measures could be adopted under the First Pillar”. This had to be contrasted with the position taken by the Advocate General (p 75).

Comment

59. It seems difficult to exclude the possibility of Community legislation defining offences with some degree of particularity. In Case C–176/03, both the Advocate General and the Court held that a Community instrument could require Member States to establish that certain polluting activities be constituted criminal offences. We know, however, from our experience in scrutinising measures where ‘offences’ are prescribed or certain conduct condemned, that there are problems of definition and drafting resulting in part from the different approaches taken by Member States’ criminal laws and rules of evidence and procedure.
60. The practice, where framework decisions have included provisions on penalties, has been for EU legislation to specify a so-called minimum maximum penalty, *i.e.* to require Member States to fix a level of custodial sentence with the maximum being not less than that stipulated in the framework decision. Framework decisions have eschewed the fixing of precise penalties or a minimum level of penalty.⁴⁵
61. **It is essential that the Court takes the opportunity in the Ship source pollution case to clarify the position on the extent of the now identified Community competence and that it do so as soon as possible.**

⁴⁵ The practical effect of Declaration 8 to the Treaty of Amsterdam has been to preclude this; “The Conference agrees that the provisions of Article 31(e) of the Treaty on European Union shall not have the consequences of obliging a Member State whose legal system does not provide for minimum sentences to adopt them”.

CHAPTER 3: THE COMMISSION'S COMMUNICATION— SORTING OUT THE PROBLEM

Annulment of Framework Decision

62. The effect of the Court's judgment in Case C-176/03 is that the Framework Decision on criminal sanctions applying to environmental protection⁴⁶ is annulled and the initiative now lies with the Commission to present a new proposal on the protection of the environment through criminal law. Further, insofar as the Court's ruling is not limited to environmental protection and is capable of wider application, a question mark hangs over the status of a number of other measures (at least seven) where the Council has proceeded by way of an EU Framework Decision rather than by EC Directive. These measures cover such subjects as counterfeiting of the euro, money laundering and combating fraud in the private sector.
63. We consider below the Commission's reaction to Case C-176/03 as set out in its Communication of 23 November 2005.⁴⁷ We look in turn at the responses of the European Parliament and of the Member States to the way forward proposed by the Commission.

The Commission's Communication

64. In November 2005 the Commission published a Communication setting out its view of the Court's ruling in Case C-176/03 and its proposed policy following the Court judgment. As already mentioned, the Commission describes the judgment as laying down principles which "go far beyond the case in question" and which may apply to Community policies other than environmental protection as well as to the free movement of persons, goods, services and capital. The Commission accepts two limitations, in the shape of the principles of necessity and consistency. As regards the former, the Commission says that any use of measures of criminal law must be justified by the need to make Community policy effective, that in principle responsibility for the proper application of Community law rests with the Member States, but that in some cases it is necessary to direct the action of the Member States by specifying the type of behaviour which constitutes a criminal offence and the type of penalty to be applied. As regards consistency, the Commission says that criminal law measures must also respect "the overall consistency of the Union system of criminal law" so as to ensure that criminal provisions do not become "fragmented and ill-matched".

The quick and easy solution

65. In an annex to the Communication the Commission lists the Framework Decisions which it considers to be "entirely or partly incorrect" since some or all of their provisions "were adopted on the wrong legal basis". The Commission offers a "quick and easy solution" for correcting the problem of appropriate legal base. This would consist of the adoption of measures

⁴⁶ Council Framework Decision 2003/80/JHA of 27 January 2003.

⁴⁷ 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). Brussels, 24.11.2005. COM(2005) 583 final/2.

containing the same substantive provisions, but adopted under the EC Treaty. The Commission acknowledges that this solution would work “only if Parliament and Council agree not to open discussions of substance during this special procedure”. If this approach were acceptable, the Commission would drop its challenge of the Framework Decision on the enforcement of the law against ship-source pollution, where similar *vires* issues arise.⁴⁸

66. As we explain below, this “solution” has received short shrift from both the Member States and the European Parliament though for different reasons.

Scrutiny of the Communication

67. We examined the Commission’s Communication as part of our regular scrutiny of EU documents. We noted that both the judgment and the subsequent Communication raised issues of concern as identified in the Explanatory Memorandum provided to Parliament by Fiona Mactaggart MP, then Parliamentary Under Secretary of State at the Home Office. We agreed with the Government’s cautious approach in this matter and noted their clear lack of enthusiasm and support for the Commission’s proposed “quick and easy solution”. We concluded that at the very least it seemed necessary to examine the aims and objectives of each of the Framework Decisions listed in the Communication in order to see whether the imposition of criminal laws and/or sanctions by the Community was essential in order to achieve the aims and objectives of the particular proposal.⁴⁹

The European Parliament’s position

68. As mentioned, the European Parliament intervened on the side of the Commission in Case C–176/63. They have therefore, not surprisingly, welcomed the judgment of the Court as it would accord them a far greater say and influence in future law-making. In a number of respects the Parliament also agrees with the Commission’s Communication, in particular “on the need to withdraw or amend pending legislative proposals whose legal basis should be regarded as incorrect” and “to find a new legal basis in the EC Treaty for pieces of legislation that have already been adopted under the Third Pillar and that, in the light of the judgment in Case C–176/03, must be regarded as unlawful”. However, the Parliament urges a case-by-case approach: any review should not deprive Parliament “of its inalienable role as co-legislator and thus sacrificing the democratic input provided by Parliament, the elected body representing European citizens, in the process of European integration”.⁵⁰ The Parliament therefore opposes any “undifferentiated, across-the-board approach”.

Reactions of Member States

69. As already mentioned, eleven Member States, including the United Kingdom, intervened in the proceedings before the Court in support of the

⁴⁸ Case C–440/05 *Commission v Council*, pending in the ECJ.

⁴⁹ Letter of 2 February 2006 from Lord Grenfell to Fiona Mactaggart MP.

⁵⁰ European Parliament Resolution on the consequences of the judgment of the Court of 13 September 2005 (C–176/03 *Commission v Council*) (2006/207(INI)), at paras 8–11. See also Report on the consequences of the judgment of the Court of 13 September 2005 (C–176/03 *Commission/Council*). Final A6–0172/2006. The Gargani Report.

Council. It is therefore not surprising that the Court's judgment has not been met with rapturous applause from a large number of Member States.

70. The case was discussed at the informal Justice and Home Affairs Council (JHA) in Vienna on January 13, 2006. Andy Burnham MP, then Parliamentary Under Secretary of State, Home Office, giving evidence on 18 January to the Committee in the context of the European Arrest Warrant, said: "the majority of Member States, I understand, supported a restrictive interpretation of the EC judgment on environmental crime seeking to limit criminal law measures to be agreed under the First Pillar and opposing the Commission's proposal to move Third Pillar measures to First Pillar legal basis. The European Parliament also argued where First Pillar instruments replaced Third Pillar ones then full co-decision with the EP was required. The Commission recognised that it needed to be more flexible in its position and agreed to look again at the proposals in its Communication".⁵¹
71. We asked Gerry Sutcliffe MP, now Parliamentary Under Secretary of State, Home Office, (the Minister), whether the position had changed. He confirmed that the majority of Member States, including the UK, have concerns about the wide interpretation relied on by the Commission in its Communication and that these concerns had been reiterated at the JHA meeting on 21 February 2006. Many Member States favoured a more restricted interpretation of the Court's ruling (p 56).
72. The Minister also told us that the Commission's proposed fast-track scheme of transferring already adopted Third Pillar instruments into the First Pillar had been heavily criticised and rejected by Member States (p 56). The Commission has conceded that its suggested approach, the "quick and easy solution", is not the best way forward and has accepted that a case-by-case appraisal would be the best approach (Q 205). Mr Lachmann, for Denmark, described the quick and easy solution as "outdated and not accepted and no longer relevant" (Q 120).

New Council Procedure

73. Some progress in addressing Member States' concerns has been made (p 56). At the JHA on 21 February 2006 the Council agreed new procedures to ensure that any new First Pillar legislative proposals containing criminal law provisions would be referred to the Article 36 Committee⁵² via COREPER and if necessary the text would be examined in detail at the JHA expert working group level. The aim is to have a mechanism which allows for the immediate identification of any provisions on criminal law in Commission initiatives and for Member State JHA experts to start analysis of those provisions as early as possible in the negotiation.⁵³ It is to be noted that the new procedure is not intended to resolve any dispute as to where competence lies (Q 221).

⁵¹ *European Arrest Warrant—Recent Developments*, 30th Report 2005–6, HL Paper 156. Evidence p 18, Q 75.

⁵² The Coordinating Committee consisting of senior officials established by Article 36 TEU (formerly Article K.4) of the TEU to prepare the ground for Council deliberations on police cooperation and judicial cooperation in civil matters. The committee had been in existence *de facto* since the Rhodes European Council in December 1988. Under the Constitutional Treaty the work of the Committee in the future would focus on coordinating operational cooperation rather than becoming involved in the Council's legislative work—see Article III–261.

⁵³ See Written Ministerial Statement, Tony McNulty MP, Minister of State for the Home Office, House of Commons Hansard, 3 March 2006 WS 44.

74. We asked the Minister what practical experience of the new procedure there had been. The Minister explained that a proposal for a directive on the control of the acquisition and possession of weapons⁵⁴ had been referred to COREPER and thence to the multidisciplinary group under the new arrangements. It was too early to say with what result. But Mr Macauley, for the Home Office, said: “The point is that having agreed this procedure it was encouraging to see that when a new proposal in the First Pillar came forward, the Presidency immediately referred it to COREPER in line with these proposals in order to ensure that the proposal was scrutinised by JHA experts where necessary” (Q 220).
75. We also asked what the effect of the new procedure would be in relation to the formation of the Council involved. For example, if the Commission reintroduces its proposal for a proposal for a directive on the protection of the environment through criminal law measures, would it be considered by Ministers in the Environment Council or the Justice and Home Affairs Council? The Minister replied: “Such an instrument would be ultimately considered by the Environment Council but during the negotiations the proposal will be referred to the JHA elements of the Council’s legislature where it will, if necessary, be subject to close scrutiny at expert level and any necessary amendments made”. Such a system requires Member States to ensure that capitals have effective liaison in place to ensure that the relevant Ministries are aware of developments. The Minister believed that the UK has a good record in this regard (p 59).

The Commission marches on

76. At the Justice and Home Affairs Council on 21 February 2006 the Commission confirmed its intention to bring forward new proposals for directives on environmental crime, enforcement of intellectual property rights, and ship source pollution. The Law Society drew attention to the fact that the Commission is also considering the use of criminal sanctions in other First Pillar areas, such as consumer protection.⁵⁵ As mentioned, the proposed Directive on the control of the acquisition and possession of weapons (a Single Market measure) includes criminal law provisions.

A case study: enforcement of intellectual property rights

77. One of the first proposals adopted by the Commission on the strength of the Court’s judgment in Case C-176/03 is for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (the IP Directive). It is currently subject to Parliamentary scrutiny.⁵⁶
78. The proposal aims to ensure enforcement of intellectual property rights (IPRs) by introducing criminal measures and strengthening the criminal law

⁵⁴ Doc 7258/06. 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. The proposal is currently held under scrutiny by Sub-Committee E (Law and Institutions).

⁵⁵ See the public consultation of the Commission’s DG for Health and Consumer Affairs on the review of the Timeshare Directive, published 2 June 2006.

⁵⁶ Doc 8866/06 Proposal for a European Parliament and Council Directive on Criminal Measures aimed at ensuring the enforcement of Intellectual Property Rights. Held under scrutiny by Sub-Committee E (Law and Institutions). The Committee will seek to ensure that there is a need for the Community to act, that it is acting within its powers and that what is being proposed is justifiable on the merits and workable in practice.

framework in Member States to prosecute offences. It would make “all intentional infringements of intellectual property rights on a commercial scale” a criminal offence. The proposal provides a list of penalties which must be available for IP offences covered by the Directive, as well as a number of other penalties which should be available “in appropriate cases”. The level of the penalties is set as a minimum maximum (*i.e.* Member States set the maximum penalty for an offence at a certain standardised level or higher, but no lower). The penalty level is set higher for ‘aggravated’ offences, namely those committed under the aegis of a criminal organisation or carrying a health and safety risk.

79. It is noteworthy that provisions in the earlier draft Framework Decision regarding jurisdiction and coordination of proceedings have not been carried over into the amended Directive. The Commission explains that these matters will be dealt with in an overarching instrument on conflicts of jurisdiction on which they are currently consulting.⁵⁷ The IP Directive does, however, include provisions on extended powers of confiscation and joint investigation teams.
80. The Minister noted that the Commission’s text very much reflects a wide interpretation of the Court’s judgment. He reported that “most Member States accept that the Directive can identify conduct that should attract a criminal sanction but discussions so far have revealed a clear consensus among Member States in favour of leaving the detail on the specific nature and quantum of sanctions to be articulated in national law. Moreover, in response to the views of the vast majority of delegations, many of whom saw little prospect of any progress until the ECJ ruled on the Commission’s recent challenge of the maritime pollution instrument, the Chair of the [Council] working group⁵⁸ has suspended further discussion of the substantive issues in order to seek guidance from the Council as to the way forward pending the ECJ’s judgment in the maritime pollution case. The Government supports this approach” (p 56).

No quick or neat solution

81. The reality is that pending clarification from the Court and any remedial action there is no quick or neat solution to the problem of defining the extent of Community criminal law competence, no “fast track way to achieve certainty” in the words of Mr McDowell, Irish Justice Minister (Q 179). Nor, in Mr McDowell’s view, should the matter necessarily be one of urgency. Any framework decisions whose legality might be questioned following Case C-176/03 (and Mr McDowell was not prepared to concede that there were any—that was an issue in the Ship source pollution case) would have been given effect to in national law, though one could not rule out the possibility of some domestic legal or constitutional challenge (QQ 176–7). He counselled against being “bluffed into accepting the correctness of this decision on a global basis ... the quick and easy solution would in fact amount to raising the white flag on these issues” (Q 176).
82. Mr Lachmann, for Denmark, thought it unlikely there would be much progress on any proposal until the Court had given the necessary clarification

⁵⁷ Doc 5381/06 Green Paper on *ne bis in idem* and conflicts of jurisdiction, held under scrutiny by Sub-Committee E.

⁵⁸ The Substantive Criminal Law Working Group.

in the Ship source pollution case: “until that is solved and the lessons learned how the Court views matters, nothing will happen regarding the other framework decisions. Indeed, there is hardly any urgency in changing these matters before we have a solid basis for changing them” (Q 121). As Mr Macauley, for the Home Office, confirmed, there will effectively be a state of stagnation until the Court clarifies the position (Q 225).

Political guidance or strategy

83. It is likely to be at least a year before the Court hands down its judgment in the Ship source pollution case. In the meantime if the Commission insists on its wide interpretation of Case C-176/03 there may well be difficulties with taking forward proposals, as Member States’ reactions to the draft IP Directive clearly demonstrate. The Minister believed that no further progress can be made without guidance at the political level, pending the outcome of the Ship source pollution case. He said that it is up to the Council for the time being to provide guidance on the way forward until such time as a firm legal position is forthcoming from the Court (pp 57–58).
84. But upon examination it appears that the Government have no clear vision as to what such guidance might be. Indeed, pending the outcome of the Ship source pollution case, they would continue to assert that Case C-176/03 is limited to environmental protection. Mr Macauley, for the Home Office, said: “So to that extent it must be recognised therefore that the scope for political agreement to proceed in a way that is any further than the *status quo* at the moment would be very difficult indeed” (Q 224).
85. The European Parliament has also recognised that a political solution is needed if there is not to be stalemate until the Court has given judgment in the Ship source pollution case. The Parliament “takes the view that, pending [use of the *passerelle* in Article 42 TEU] there is an urgent need to define a coherent political strategy with regard to the application of criminal sanctions in European law”. The Parliament identifies three elements in such a strategy:
- “—very close co-operation between the Union’s institutions and between the latter and the Member States,
 - a certain flexibility in the definition of the nature and scope of the sanctions, in order to avoid penal ‘dumping’ and to foster co-operation between the judicial authorities,
 - the introduction of structured forms of co-operation between judicial authorities, of mutual evaluation and of the collection of reliable, comparable information on the impact of criminal-law provisions based on European laws.”
- The Parliament has also made clear that it opposes any inter-institutional agreement that would oblige it to abdicate the exercise of its rights.⁵⁹
86. When asked his reactions to the Parliament’s proposal, the Minister could not be specific but emphasised that the Government were building alliances with other Member States and seeking to ensure that the Commission were fully aware of their concerns (Q 223).

⁵⁹ European Parliament Resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 Commission v Council) (2006/207(INI)), at paras 5, 6 and 12.

More drastic remedial action

87. Much weight is being placed by Member States on the Court providing clarification in the Ship source pollution case which will be acceptable to Member States. The Court reversing itself—something which is not unknown but very rare—is not expected and from the viewpoint of a number of Member States, including Denmark, Ireland and the UK, the best that might be expected is that the Court will limit the scope of Community criminal law to the field of environmental protection and the extent of the legislative power to simply requiring Member States to impose criminal sanctions as a means of ensuring an “effective, proportionate and dissuasive” penalty is applied.
88. What if the Ship source pollution case does not produce a result acceptable to Member States? The Minister said: “Member States must of course accept the judgment. If, however, the Court rules against the Council and in favour of a relatively wide scope for EC competence to legislate for criminal matters supporting Community policies, we will have to seek to control the exercise of this competence” (Q 205). He did not elucidate, but we recall the remarkably bullish approach of his predecessor when commenting on the Commission Communication on Case C-176/03. In her Explanatory Memorandum to the Commission’s Communication, Fiona Mactaggart MP said: “there are a number of options open to the Council in its approach to the effects of the judgment on both future and already adopted instruments. For example it is open to the Council simply not to legislate for sanctions at all at the Community level, relying upon action at Member State level”.
89. The Irish Justice Minister, Mr McDowell, giving here a personal view only, contemplated stronger medicine: “if there were widespread dissatisfaction with the outcome and if it were generally perceived as not reflecting what Mr Plender, I think, referred to as the subjective intentions of the Treaty-makers, there is of course always the possibility that the Member States would simply adopt a corrective Treaty with one clause in it saying that the decision is not to have effect or that the Treaties are not to be interpreted in that way” (Q 165). He added: “It would not have to be a direct negative either, it could be a containment Treaty, and I just make the point that it is not the case that we are all powerless to arrest jurisprudential developments which are unwelcome” (Q 171).

Comment

90. As mentioned, we supported the Government’s stance in relation to the Commission Communication. **A case-by-case approach is to be preferred and we are pleased to see that the Commission has acknowledged this.** The Commission’s proposed quick and easy solution is a dead letter.
91. We fully support the cautious approach to the IP Directive adopted by the Government. However, this case demonstrates the difficulties if Member States refuse to negotiate on any Commission text reflecting its view of the scope of the Court’s ruling in Case C-176/03.
92. If the Commission persists in bringing forward proposals and if the Council, maintaining its limited construction of Case C-176/03, adopts as a matter of course the approach we see in the IP Directive negotiations, then there will be no progress on any matter affected by the Court’s ruling.

93. **Faced with the possibility of legislative stagnation or impasse, we agree with the Government that some guidance at political level would be very helpful.** But will such guidance be forthcoming? It is unclear who will take the initiative and how much, if at all, Member States, the European Parliament and the Commission may be prepared to compromise given the wide difference of views that presently exists among them and that many of them are engaged in litigation in the Ship source pollution case.
94. **The Commission should therefore look critically at the suggested urgency and necessity of bringing forward proposals under the EC Treaty which would replace existing TEU framework decisions or include criminal law provisions. Where there is no urgency the Commission would be better advised to wait and see what clarification the Ship source pollution case brings.**

A short remedial Treaty

95. As to what should happen if the Court does not accept the Council's argument in the Ship source pollution case, and the suggestion that there might be a short remedial Treaty, we are not tempted to gaze into this particular crystal ball. However, we recall that the opportunity was taken at the time of the Maastricht Treaty to limit the temporal effect of the Court's judgment in the *Barber* case⁶⁰—the so-called Barber Protocol.

The *passerelle*

96. The *passerelle* (the detail of which we discuss in the next Chapter) would not solve the problem of the uncertainty raised by Case C-176/03: it would not help in defining the scope of criminal law competence under the present EC Treaty. What the *passerelle* would do would be to increase generally law-making powers under the EC Treaty to include policing and criminal law matters transferred from the Third Pillar. This would not necessarily mean an end to disputes over competence or *vires* (with the consequent implications for the respective roles of the institutions and such matters as voting requirements). But the focus of any such dispute would change: any dispute over *vires* on a particular proposal would no longer be *inter*-Pillar (TEC v TEU) but *intra*-TEC (*e.g.*, in an environmental matter, Title IV v Article 175 TEC). An environmental protection measure imposing criminal sanctions under Title IV would not necessarily be subject to QMV, co-decision and the jurisdiction of the Court as it would be if it could be made under Article 175.

⁶⁰ Case C-262/88 *Barber* [1990] ECR I-1889. The Court found different pensionable ages for men and women in occupational pension schemes to be incompatible with Article 141 TEC (equal pay). As Professor Arnall points out, the practical implications for the UK and other Member States were immense. See Anthony Arnall, *The European Union and its Court of Justice* (Oxford 2nd edition, 2006) at pp 548–58.

CHAPTER 4: CROSSING THE BRIDGE

The *passerelle*—Article 42 TEU

97. In this chapter we consider the implications of the use of the *passerelle* in Article 42 TEU. This Article states:
- “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.”
98. Article 42 TEU accordingly envisages four procedural steps:
- (a) a proposal from the Commission or a Member State;
 - (b) consultation of the European Parliament;
 - (c) unanimous decision of Member States in the Council; and
 - (d) adoption of the decision by the Member States in accordance with national constitutional requirements.
99. The practical effect of the *passerelle* would be that some or all of the policing and criminal law measures which are at present taken under the Third Pillar, as framework decisions, would in future be made under the First Pillar, as Community regulations or directives.

Relationship with Case C–176/03

100. To the extent that there is, following the Court’s judgment in Case C–176/03, already criminal law competence under the EC Treaty then that will not be affected by a transfer under Article 42 TEU. We can conclude from our examination in Chapter 2 of the issues raised by Case C–176/03 that:
- (1) there is no general criminal law competence;
 - (2) there is, however, some criminal law competence and the extent of such competence is certainly limited, but exactly where and how awaits to be seen; and
 - (3) there clearly remain a substantial number of matters which are Third Pillar and could therefore form the subject matter of a *passerelle* decision.
101. While the uncertainty surrounding the Court’s judgment may, as we describe in Chapter 3, have a stagnating effect on certain First Pillar measures, mainstream Third Pillar matters remain unaffected. Mr Macauley, for the Home Office, said: “For example, measures that address organised crime or terrorism are rightly to be agreed in the Third Pillar, and they will continue to be so” (Q 234).

The Commission takes the lead

A Citizens' Agenda—Delivering results for Europe

102. Prior to the European Summit in June 2006 the Commission published a Communication⁶¹ setting out its ideas for taking matters forward under existing Treaty powers during the period of reflection on the Constitutional Treaty. A section of the Communication is directed at “Freedom, Security and Justice”. The Commission says:

“The EU must act further. For example, it needs:

—...to focus on respect and promotion of fundamental rights for all people and to develop the concept of EU citizenship;

—stronger anti-terrorism policy, stepping up co-operation between law enforcement and judicial authorities by removing barriers to accessing and sharing information while fully respecting privacy and data protection; ...

—more police and judicial co-operation based on mutual recognition to make national judgments and decisions enforceable throughout the EU for all those who move, live and work across the EU ...”

103. The Commission refers to action and accountability in some areas being “hindered by the current decision making arrangements, which lead to deadlock and lack of proper democratic scrutiny”. The *passerelle* in Article 42 TEU would allow for changes that would “improve decision-taking in the Council and allow democratic scrutiny by the European Parliament; and the enhancement of the role of the Court of Justice”.

Implementing the Hague Programme

104. In its Communication of June 2006, “Implementing The Hague Programme: the way forward” the Commission has taken these ideas one step further. In the context of its report to the Council of progress in implementing the Hague Programme the Commission draws attention to some of the difficulties that can arise in adopting measures under the Third Pillar. It highlights, for example, the time taken to agree the European Evidence Warrant and the failure to make progress on the Framework Decision on procedural rights in criminal proceedings.

105. The Commission takes the view that the first review of the implementation of the Hague Programme is an opportune moment *inter alia* to reactivate and stimulate consideration of how to better shape decision-making in the area of Freedom, Security and Justice. The Commission believes that the *passerelles* (translated as “bridging clauses”) contained in Articles 42 TEU and 67(2) TEC⁶² provide the appropriate tool to achieve this goal. In the Commission’s view, there would be “real added value” in using the Article 42 TEU *passerelle* to apply the Community method to all policies in policing and judicial cooperation in criminal matters so as to ensure more efficiency, more transparency and more accountability. The Communication identifies clear advantages flowing from the Community method:

⁶¹ COM(2006) 211 final. Brussels 10.5.2006.

⁶² Article 67(2) TEC provides for asylum, immigration and civil law cooperation measures to be taken by QMV.

- generalising the Community legislative instruments (Regulations, Directives, Decisions under the current treaties);
- acknowledging the legislative co-decision power to the democratically elected representatives of EU citizens through the European Parliament; and
- favouring both consensus and high standard achievements through the qualified majority vote.

The Commission also draws attention to the implications there would be for the jurisdiction of the Court: making the preliminary ruling mechanism generally available would ensure a proper judicial dialogue with national courts; the infringement procedure would provide a way of monitoring implementation by Member States. Poor implementation by Member States of measures agreed in Council is an area of particular concern highlighted by the Commission.

Next steps

106. The Communication makes clear that following discussion during the current Finnish Presidency the Commission stands ready to bring forward proposals under Article 42 TEU and 67(2) TEC. The Communication does not itself set out what the detail of the *passerelle* might comprise. Nor has the Commission yet done this elsewhere. The Commission intends, on the basis of its assessment of the state of implementation of the Hague Programme and in collaboration with the Finnish Presidency, to launch a discussion in partnership with the other EU institutions and the Member States on how to take forward the policy agenda in Freedom, Security and Justice in a way to address the expectations of EU citizens and to improve the functioning of the area of Freedom, Security and Justice.

Reactions from Member States

107. At least two Member States have indicated their possible support for use of the *passerelle*. In May 2006 it was reported that the Finnish Presidency would bring forward an initiative to remove the need for unanimity and have QMV in criminal law matters.⁶³ Finland has most recently stated that it will be an objective of its Presidency to “explore ways of reinforcing decision-making on criminal law and cooperation”.⁶⁴ The Presidency is under no misapprehension as to the potential difficulties ahead. The Finnish Prime Minister has said: “The EU’s citizens expect effective action from the Union to combat international crime, human trafficking and terrorism. During Finland’s Presidency, the Member States will face a test of their political will and their commitment to more effective decision-making, particularly with regard to police and criminal matters”.⁶⁵ As mentioned above, in their recent paper “Institutional Improvement based on the framework provided by the existing Treaties” the French Government have suggested that Article 42 TEU should be implemented. This, they say, would enable European action in the area of security and justice (including

⁶³ *Financial Times*, 5 May 2006.

⁶⁴ Press Release 228, 30 June 2006. The emphasis may be on the word ‘explore’—see para 15 above.

⁶⁵ Address of Finnish Prime Minister Matti Vanhanen at the plenary session of the European Parliament on 5 July 2006.

combating terrorism and organised crime) to be made more effective. The French National Assembly has also advocated use of the *passerelle*.⁶⁶

108. But not all Member States may be enthusiastic. For example, Germany has traditionally opposed surrendering its veto on police and judicial matters⁶⁷ and considers the use of the *passerelle* to be “cherry-picking”.⁶⁸ It has been reported that Germany, backed by Ireland, is opposed to the suggestion that at the present time the *passerelle* might be invoked to transfer Third Pillar to First Pillar matters.⁶⁹ Mr McDowell, Irish Justice Minister, confirmed that report. Ireland, he said, was a strong supporter of the Constitutional Treaty, including its “carefully designed provisions on police and judicial cooperation in criminal matters”, and would not favour anything which might undermine the prospects of adoption of that Treaty (Q 162–3).
109. Denmark, however, which stands in a special position because of its opt-out, would not necessarily oppose the *passerelle*, though it would present them with difficulties. We explore the Danish position in more detail below.

UK response

110. It had been reported in the press that British Government would at least consider the *passerelle*.⁷⁰ Baroness Scotland of Asthal QC, Minister of State at the Home Office, has said that the Government “would have to consider very carefully the risks and benefits and the overall impact of any proposal”.⁷¹ Our meeting with Gerry Sutcliffe MP and his officials left us with the impression that the Government were hardly enthusiastic and very far from being proactive. Their response to a number of our questions revealed an essentially reactive approach, based on waiting to see the detail of any text (QQ 205, 227, 236, 237, 241, 247). The Minister was, however, clear that the UK would “be positive in terms of trying to assist the process where it can be assisted” and that he wanted to achieve what was best for the UK (QQ 242, 247). With the exception of the need to retain the UK opt-in (which we consider below) Home Office thinking and definition of policy appeared to be at a very preliminary stage. Since our meeting with him the Minister has written to assure the Committee that the Government are actively considering the implications of the use of Article 42 TEU and are “working towards agreeing a position” to use as a basis for discussions during the Finnish Presidency (p 70).

The European Parliament

111. The European Parliament takes the view that there is an urgent need to use the *passerelle* in Article 42 TEU. In its view, the Community pillar “alone provides the conditions for adopting European provisions in full compliance with the principles of democracy and efficient decision-making and under

⁶⁶ No 2829 Rapport d’information déposé par la Délégation de l’Assemblée Nationale pour l’Union Européenne sur les conséquences de l’arrêt de la Cour de justice du septembre 2005 sur les compétences pénales de la Communauté européenne (COM (2005) 583 final/no E 3022).

⁶⁷ *European Voice*, 11–17 May 2006. Barroso sees an end to veto on anti-terror laws.

⁶⁸ *Financial Times*, 28 June 2006: Drive to give European courts a role in settling asylum cases. www.ft.com.

⁶⁹ *EUOBSERVER*, 8 June 2006. EU leaders set to bury Brussels veto reduction plan.

⁷⁰ *Financial Times*, 5 May 2006. UK hints it might lift EU veto on police matters.

⁷¹ Hansard, House of Lords Vol 683. No. 170. WA 159: *EU: National Veto*.

appropriate judicial control”.⁷² This response is hardly surprising. Transferring criminal law matters into the First Pillar could greatly enhance the role of the Parliament if as a result measures became subject to co-decision.

“Cherry picking” from the Constitutional Treaty

112. Use of the *passerelle* has been characterised as “cherry picking” and as such is objected to by both those who, like the Irish Government, support the Constitutional Treaty and by those who do not. The latter argue that use of the *passerelle* would be implementing the Treaty by the back door.
113. Whether use of the *passerelle* is “cherry-picking” is contestable. First, the *passerelle* is, of course, already part of the *acquis*, *i.e.* the agreed body of European law and regulation, and is provided for under the existing EU Treaty. Second, it is by no means clear that the *passerelle* could be used to achieve the same scheme for criminal law as is contained in the Constitutional Treaty.
114. Article III–270⁷³ of the Constitutional Treaty would enable the making of European laws and framework laws (the Treaty’s equivalent of EC regulations and directives) in relation to judicial cooperation in criminal matters and the making of framework laws to establish minimum rules necessary to facilitate mutual recognition of judgment and police and judicial cooperation. Article 271 contains a power to approximate criminal law, namely to “establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension”. Decisions on such laws and framework laws would be taken by QMV. However, Articles 270 and 271 each contain an “emergency brake” procedure which provides an important safeguard for Member States. By pulling the brake a Member State may in effect opt out of a particular proposal where it would “affect fundamental aspects of its criminal justice system” while allowing other Member States (a third or more) to proceed with the measure as enhanced cooperation without all the preliminary procedures such cooperation would usually require. Mr Lachmann, for Denmark, thus described it, as “a brake with an accelerator” (Q 144).
115. As we shall describe below, there are doubts about exactly what Article 42 TEU allows by way of conditions attached to any transfer of competence (for example, could it include an “emergency brake” procedure?) and it is far from certain whether the *passerelle* could be used to create what the Irish Justice Minister, Mr McDowell, called “an architecture for police and judicial cooperation in criminal matters as acceptable as that contained in the Constitutional Treaty” (Q 162).
116. In the following paragraphs we examine key questions relating to the *passerelle*.

⁷² European Parliament Resolution on the consequences of the judgment of the Court of 13 September 2005 (C–176/03 Commission v Council) (2006/207(INI)), at para 4. See also the recent Report (the Gargani Report) of the Legal Affairs Committee of the European Parliament, Report on the consequences of the judgment of the Court of 13 September 2005 (C–176/03 Commission/Council). Final A6–0172/2006.

⁷³ Article III–270 would replace Articles 61(e) TEC and 31(1) and 34 TEU.

The *passerelle*—extent of any transfer

117. Article 42 TEU would permit a transfer of some or all of the Third Pillar into Title IV TEC. The Article simply refers to “action in areas referred to in Article 29”: in its most recent Communication, the Commission uses the phrase “the fight against terrorism and crime through actions in the field of law enforcement and criminal matters”.⁷⁴
118. JUSTICE advocated the transfer of all policing and criminal law matters into the First Pillar and a uniform legislative procedure: “Only one voting procedure should apply to all Third Pillar instruments and this should be the one provided for in Title IV TEC. This would limit the scope for fruitless and disruptive litigation over the exact nature of a European criminal law and justice measure”. JUSTICE noted the increasing resort to annulment actions before the Court because the dividing line between the two Pillars was not always clear. Transferring only part or making different voting and other procedural rules (considered further below) might only serve to create a new opportunity for dissatisfied Member States to challenge measures in the Court (pp 71–73).
119. The Law Society considered that “the full incorporation of the Justice and Home Affairs pillar into the Community structure offers the best guarantees that rights and freedoms that are in the interests of individuals will be balanced against the security concerns of the Member States” (p 75).
120. The Commission is, however, very much alive to the political sensitivity surrounding the use of the *passerelle* and the importance placed by some, if not all, Member States on the integrity of their criminal justice systems. In response to questions in the European Parliament on the possibility of using the *passerelle* on a case-by-case basis, Mr Franco Frattini, the Justice and Home Affairs Commissioner, said; “I am not talking about the entire space of criminal justice and police co-operation. It seems to me more appropriate to move step by step ... If you have problems envisaging the entire space under my responsibility, I will be ready to co-operate on the basis of field by field”.⁷⁵

Voting—QMV or unanimity

121. At first glance the primary purpose of the *passerelle* would seem to be to enable a change of the legislative procedure for policing and criminal law matters away from unanimity in the Council and consultation of the European Parliament towards QMV and co-decision with the Parliament. Attention has understandably instantly focussed on this in the media.⁷⁶ As JUSTICE said, the most crucial aspect of the use of the *passerelle* is the choice of the voting procedure and thus whether Member States retain veto powers (p 72).
122. But, as mentioned, Article 42 TEU permits flexibility. Professor Peers said: “It would seem to be open to the Council to determine all sorts of possible

⁷⁴ *Implementing The Hague Programme: the way forward*, at para 3.2.

⁷⁵ Interview with the TheParliament.com <http://www.eupolitix.com/EN/Interviews/200606/a184e59a-d93f-4e07-9ba4-fa070dbc5e4e.htm>. See also, *European Voice* 22–28 June 2006, Frattini gears up to end veto over EU justice laws.

⁷⁶ Hence such headlines as the above and, in the UK press, Brussels in hot pursuit of new law-and-order powers. *The Times*, 9 May 2006.

options as to how much qualified majority voting will happen and when” (Q 78). It does not follow from Article 42 TEU that the voting procedure would have to be QMV. Geoff Hoon MP, Minister for Europe, has said that it is “likely, *although not inevitable*” that QMV and co-decision would replace unanimity in the Council.⁷⁷

123. Article 42 TEU specifically refers to the Council *passerelle* decision determining the “relevant voting conditions”. Such a reference would seem to have been necessary because of the varying and changeable nature of the procedures and voting regimes applicable to matters in Title IV TEC—many are now subject to QMV but some remain subject to unanimity, for example “aspects relating to family law” (Article 67 TEC). From the emphasis given in the Commission’s Communications to improving decision-taking we assume that they would propose QMV for the matters being transferred. Indeed, as Mr Lachmann, for Denmark, said, it would make little sense to move matters from the Third to the First Pillar and then retain unanimity (Q 136).
124. Most witnesses were in favour of applying QMV to transferred matters. Professor Peers described QMV as being “more efficient than unanimity” and capable of producing “a higher level of ambition”. Unanimity led to the “lowest common denominator” (Q 77). On the other hand it could, as JUSTICE and the Law Society pointed out, make easier the adoption of ill-conceived, repressive or draconian legislation (pp 72, 76). For this reason it was strongly argued by a number of witnesses that QMV should be accompanied by co-decision, as is the general rule under the First Pillar. The European Parliament would thus be able to act as a check and add democratic legitimacy. Professor Peers spoke of “a trade-off against legitimacy, especially national level legitimacy, because qualified majority voting means Member States losing their vetoes” (Q 77). We return to this issue of co-decision and democratic legitimacy below.
125. But, in the light of past experience, it may be difficult for Member States to accept QMV across the board or to agree on exactly what procedures should apply. Mr Lachmann, for Denmark, thought that the Constitutional Treaty might provide a guide: the Treaty “neatly describes areas of QMV with emergency brakes, areas of QMV without emergency brakes, areas where there is unanimity, so that would be a natural starting point” (Q 136).

Co-decision

126. Professor Peers believed that under Article 42 TEU the Council would be free to decide how much co-decision should apply to the issues of policing and criminal law. “Obviously, the European Parliament would say it should follow the normal rule, which is that you almost always have co-decision in conjunction with a qualified majority vote on legislative matters, but the Council might decide otherwise; it might decide to have only a consultation” (Q 80).
127. The importance of the involvement of the European Parliament was stressed by a number of witnesses: co-decision would operate to restore some democratic legitimacy, via the European Parliament, where Member States (their governments and parliaments) may be outvoted under QMV.

⁷⁷ Hansard. House of Commons, 5 July 2006 1155W. Emphasis added.

128. Both JUSTICE and the Law Society of Scotland considered that, where qualified majority voting is introduced, it should be accompanied by the co-decision procedure in the European Parliament. JUSTICE said that the abolition of the Member State's veto "would have to occur in tandem with the extension of the European Parliament's current Title IV TEC co-decision powers" (p 72). The Law Society of Scotland said: "In an area of law of such central importance to EU citizens, it is essential to ensure proper democratic input through the Parliament, especially where there is no right of national veto" (p 78). The Law Society said: "it is important that developments in European Justice and Home Affairs policy that affect individuals and their fundamental rights are properly debated and seen to be based on more than political compromises sealed behind closed doors" (p 77).
129. The Minister broadly supported the introduction of co-decision but at the same time he wanted "to protect the UK's position in terms of how we apply, how we develop, our policies and our laws" (QQ 248–9). Mr McDowell, for Ireland, also did not reject the notion of greater Parliamentary involvement. But he queried whether the European Parliament, as opposed to a national parliament, was best placed to perform the democratic function in relation to criminal law. It depended on the subject matter: "If you are dealing with something like sexual crime then individual Member States may feel that they are the best judges of where the balance should be struck in relation to any particular issue, and their legislatures might feel very strongly that the European Parliament would not strike the same balance as they might do domestically" (Q 192).
130. Even among those witnesses who strongly supported use of the *passerelle* there was a note of caution in this regard. JUSTICE said: "Great harm could be done by measures taken at EC level that, while regulating or harmonising certain specific aspects of Member States' criminal justice systems, do not pay sufficient attention to the effects these measures might have on national legal systems' internal coherence ... Council and Parliament will have to legislate with the utmost circumspection, mindful of the special nature of the criminal law and the unintended effects an EC measure may have on respective national criminal justice systems" (p 73). The Law Society observed: "The creation of an area of freedom, security and justice is an ambitious project, one that must be developed step-by-step and with an acute awareness of the different legal traditions and jurisprudential heritage of each and every Member State". They emphasised the need for the principles of subsidiary and proportionality to be paramount in all actions concerning police and judicial cooperation in criminal matters (p 77).

An emergency brake

131. How flexible is Article 42 TEU? Professor Peers did not exclude the possibility of the *passerelle* including an emergency brake procedure similar to that contained in the Constitutional Treaty (Q 78). He thought that an emergency brake would go some way to reconcile the tension between legitimacy and efficiency. QMV could bring efficiency while an emergency brake which would allow Member States to say, if there is a fundamental principle of their criminal law or perception of human rights being threatened, that discussions must be stopped. The other Member States, if a solution cannot be found, could then go ahead and adopt measures without the Member States who maintain misgivings (Q 82). He envisaged national

parliaments being involved in the exercise (pulling) of the emergency brake (Q 83).

132. There would appear to be some support for the inclusion of an emergency brake and the Commission has indicated that it would not be hostile to the idea. Commissioner Frattini has said: “I cannot exclude discussing an emergency brake. I can live with an emergency brake because we have already approved it in the context of the European constitution”.⁷⁸
133. However, it is not clear what scope there is in Article 42 TEU for the insertion of an emergency brake procedure in the *passerelle*. The argument turns in part on the structure and wording of the first sentence of Article 42 which contemplates the Council deciding which Third Pillar matter is to be transferred and, at the same time, determining “the relevant voting conditions” relating to it. Is the reference to “the relevant voting conditions” exhaustive as regards what conditions can be applied in any use of the *passerelle* and, if it is, how widely can this phrase be construed?
134. As to whether, as a matter of law, an emergency brake could be included under the *passerelle*, both Mr Lachmann, for Denmark, and Mr Norris, for the Home Office, adopted a politically pragmatic stance. Mr Lachmann said that it might very much depend on the wishes of the Member States rather than theoretical argument. He thought that as Denmark had agreed to such a mechanism in the Constitutional Treaty it could accept it in a *passerelle* (QQ 138, 142). Mr Norris said: “For it to be achieved we would have to describe it as relating to part of the relevant voting conditions and I would say it is probably a grey area whether that could be achieved. I can imagine it is the kind of thing that if it is what Member States were insisting upon before exercising the *passerelle* sufficient legal flexibility would be found to allow the decision to provide for initiatives by Member States” (Q 251). Ms Fielder, for the Home Office, was more confident: “We think it is pretty certain that you could interpret voting conditions flexibly enough to include a brake, but whether other Member States would also want that sort of mechanism remains to be seen” (Q 262).
135. Mr McDowell, the Irish Justice Minister, on the other hand, had substantial doubts about whether Article 42 was sufficient to comprehend an emergency brake clause: “one of the things I would be concerned about is that ... we will only find out if the European Court of Justice decision tells us it is not, and that will be a total disaster” (Q 187). He regarded the emergency brake as the most important safeguard in the Constitutional Treaty for the integrity of the Irish criminal justice system (Q 162).

Right of initiative

136. Would Member States lose the right to present legislative proposals on matters transferred to the Community Pillar by the *passerelle*? At the present time Member States have and in practice exercise (quite often when they hold the Presidency) the right of initiative. Under the Constitutional Treaty Member States would retain a right of initiative, though limited to the extent that any proposal must be brought collectively by a quarter (*i.e.* at least 7 as at present) of the Member States (Articles I-42 and III-264).

⁷⁸ Interview with TheParliament.com: <http://www.eupolitix.com/EN/Interviews/200606/a184e59a-d93f-4e07-9ba4-fa070dbc5e4e.htm>.

137. Witnesses emphasised the importance attached to the right of initiative. It would appear that Member States may be reluctant to give this up. Mr Macauley, for the Home Office said: “The position is that a straight transfer from Title VI into Title IV would in fact result in [a] sole right of initiative [lying] with the Commission, so if there is to be a right of initiative for Member States there would have to be an exception to that, a special provision would have to be included. This is likely to be one of the issues that forms a major part of the debate over the proposals” (Q 250). The Irish Justice Minister, Mr McDowell, was opposed to the Commission having the sole right of initiative in the area of criminal justice: “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” (Q 193).
138. Other witnesses were divided on this issue. Both Law Societies strongly favoured the Commission having the monopoly. The Scots said: “this should provide the basis for more coherent decision-making as it would ensure that Member States cannot be able to bring forward proposals for legislation based only on specific domestic issues” (p 78). The English also spoke of the advantage of putting “an end to proposals based on purely domestic priorities and prevent knee jerk political reactions to the latest justice crises” (p 76).
139. JUSTICE took a contrary view: “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”. They recognised that the apparent restriction in Article 42 (to specifying “relevant voting conditions”) might not permit the inclusion of such a right for Member States (p 73).
140. If, as already mentioned, “relevant voting conditions” in Article 42 TEU is to be narrowly construed then this would seem to exclude Member States retaining a legislative initiative. Mr Norris, for the Home Office, described this as a grey area. But both he and Mr Lachmann, for Denmark, took the view that if it was necessary to retain a right of initiative in order to secure political agreement on the use of the *passerelle* then “sufficient legal flexibility” would be found (QQ 138, 251).

Supremacy and direct effect

141. Policing and criminal law measures made under the EC Treaty would likely have different legal effect to those made under the Third Pillar. Article 34(2)(b) TEU expressly provides that framework decisions “shall not entail direct effect”. As Professor Peers pointed out, as Community law such measures would be capable of having direct effect and supremacy over national law and national constitutions (Q 89).
142. The doctrine of primacy (some prefer “supremacy”) of Community law is long established.⁷⁹ Moving police and judicial cooperation in criminal matters into the First Pillar would not change that doctrine. The question is

⁷⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585.

the extent to which, as a matter of law, a *directive* on a particular matter would be regarded and treated differently from a *framework decision* on the same subject. There are those who argue that Third Pillar measures already have primacy over national law.⁸⁰ We last looked at the extent of application of the doctrine of primacy (its potential application beyond the First Pillar into the Second and Third Pillars) as part of our scrutiny of the Constitutional Treaty.⁸¹ That revealed that the meaning and extent (including the relationship between primacy and direct effect) of the doctrine of primacy is controversial and raises both legal and political issues.⁸²

143. We note that the Court's jurisprudence on this subject is a developing one. For example, as the Court's 2005 judgment in *Pupino*⁸³ shows, it is now established that the principle that national law must be interpreted in conformity with European law applies in the area of police and judicial cooperation in criminal matters.

The jurisdiction of the ECJ

144. Another consequence of exercising the *passerelle* would be to increase the jurisdiction of the Court. Under current arrangements the Court only has jurisdiction to interpret Union criminal law where Member States have made a declaration under Article 35 TEU enabling it to do so. Fourteen Member States, but not the UK, have made such a declaration. Article 35(5) TEU also contains a bar on the Court reviewing the validity or proportionality of police/law enforcement operations.
145. The Law Society said: "Enhancing the role of the European Court of Justice should facilitate consistency, clarity and legal certainty" (p 77). The Law Society of Scotland considered that the Court having jurisdiction "can only be a positive development" (p 79). Both Societies emphasised the importance of the Commission's role as "guardian of the Treaties" and its ability to commence infringement proceedings should Member States fail in their obligations or commitments (pp 76, 79). JUSTICE also drew attention to the competence to pronounce on whether a Member State had implemented a measure correctly. Such jurisdiction would have the effect of ensuring that procedural safeguards for individuals (such as those in the European Arrest Warrant) could be more effectively controlled. "The ECJ could thus play a significantly greater role in safeguarding fundamental rights in the context of EU police and judicial cooperation, which JUSTICE would warmly welcome" (p 73). The Law Society pointed to the delays and differences in the implementation of the European Arrest Warrant which had led to "a two-tier extradition system for over a year" (p 76).
146. Moving police and criminal law into the Title IV TEC would not, however, give the Court its fullest jurisdiction. These matters would be in the same

⁸⁰ See, for example, Lenaerts and Corthout, *Of birds and hedges: the role of primacy in invoking norms of EU law*. (2006) 31 E.L.Rev. 287.

⁸¹ See *The Future Role of the European Court of Justice*, 6th Report 2003-04 HL Paper 7. See, in particular Chapter 3(2): Does the draft Treaty merely codify the principle of Community law?

⁸² See also *The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence*, 3rd Report 2005-06, HL Paper 15.

⁸³ Case C-105/03, *Pupino*. [2005] ECR I-5285. Judgment of 16 June 2005. The Court ruled that Italian criminal procedure law had to be construed in conformity with Council Framework Decision on the standing of victims in criminal proceedings so as to permit the testimony of young children under appropriate protective arrangements.

position as visas, immigration, asylum and civil law measures made under that part of the Treaty. Only senior (final) courts⁸⁴ in Member States would be able to make references to the Court. Professor Peers pointed out that the Council, acting unanimously, could amend these rules, perhaps differentiating further between immigration, asylum and civil law on the one hand and criminal law on the other. Professor Peers expected the Commission to propose that the normal jurisdiction should apply to the whole area of justice and home affairs. He thought that would be the best solution. He noted that Member States had in the context of the Constitutional Treaty signed up to that subject to an exception for questions relating to the validity or proportionality of policing action (QQ 91–2).

147. Among the Communications adopted by the Commission on 28 June is one entitled “Communication on the adaptation of the provisions of Title IV relating to the powers of the Court of Justice”. As Professor Peers envisaged, the Commission have taken the opportunity to open the debate on enlarging the Court’s jurisdiction over Title IV matters. The Commission argues that the current derogation has a significant impact on individuals as those affected by Title IV measures often do not have the resources to exhaust all domestic remedies. The Commission has proposed that under the Finnish Presidency discussion begin in the Council and in the Parliament to give the Court the same jurisdiction over Title IV matters as it currently has over other matters falling under the EC Treaty.
148. There are practical considerations that would arise were policing and criminal law to be transferred to Title IV. The procedures of the Community Courts are not fast and though priority may be given to preliminary references from national courts there may still be a long wait (perhaps up to two years) before the Court gives the necessary answer and guidance to the national judge. The Government are alive to the potential problems if criminal proceedings become protracted and individuals are held in custody awaiting a ruling from the Court in Luxembourg. Mr Norris, for the Home Office, said “obviously we are going to have to think of fast track measures to get the issue before the Court of Justice and get decisions very quickly” (Q 257).

The UK and Irish opt-ins

149. It is sometimes said that the UK has an “opt-out” from Title IV TEC (currently visas, immigration, asylum and civil law matters). Strictly speaking it has an “opt-in”. The Government has three months from the presentation of a proposal or initiative to the Council to decide whether it “wishes to take part in the adoption and application of any such proposed measure”.⁸⁵ 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, though the other Member States can proceed without the UK where the measure cannot be adopted with the UK taking part (*i.e.* the UK voting against a measure does not necessarily block it for other Member States).

⁸⁴ Article 68 TEC—references are only possible from “a court or tribunal of a Member State against whose decision there is no judicial remedy under national law”.

⁸⁵ Treaty of Amsterdam. Protocol on the position of the United Kingdom and Ireland. Article 3.

150. The position of Ireland is similar to that of the UK, namely that it has an opt-in to proposals brought forward under Title IV TEC.
151. By contrast, because they are subject to unanimity, the UK and Ireland, like all other Member States, have a veto on measures under the Third Pillar (police and criminal law). The Freedom Association emphasised the importance, in terms of national sovereignty, of not giving up this veto (p 71).
152. The Government's working assumption seems to be that moving policing and criminal law into Title IV would not affect the UK opt-in. So the UK would be able to choose whether to participate in a particular measure. The argument would appear to turn on whether the reference in the Protocol to Title IV TEC (Title IIIA, as it then was) is ambulatory, *i.e.* whether the reference is to Title IV as composed at the time of the Protocol or as it was and might be at any time. Given the purpose of the Protocol and the existence at the time of the agreement of the Protocol of Article 42 TEU (enabling future enlargement of Title IV) then there is, we believe, a good argument that the opt-in will survive the *passerelle* and apply to criminal law measures in the same way as it applies to immigration, asylum etc at the moment.
153. As the Law Society of Scotland observed, the issue of the national veto would be less crucial if the opt-in is retained (p 78). And, as Professor Peers indicated, if the "voting requirements" laid down by the *passerelle* included an emergency brake procedure, the UK would have a very advantageous position: "We could opt out at the beginning or we can opt in and then pull the emergency brake, having decided we do not like the way the discussions have gone, and then they would go ahead without us, and so you still have two bites at opting out" (Q 103).

The Danish opt-out

154. Denmark also stands in a special position in relation to Title IV TEC. It has a general opt-out: while Denmark participates in Third Pillar measures it is not party to any instrument under Title IV TEC. It does not have and cannot take the same selective approach as the UK and Ireland. Transferring policing and criminal law into the First Pillar would therefore have the effect of potentially excluding Denmark from participating in an important area of Union business. Mr Lachmann explained: "the result will be that those new decisions taken will not be applicable to Denmark. It also means that Denmark will thereby gradually have to leave the co-operation on criminal law and police matters, and that is a prospect that is grave for the Danish government because we consider that co-operation very important, in particular regarding anti-terrorism, organised crime, trafficking in women, and so on" (Q 129).
155. On the other hand accepting policing and criminal law as a matter of Community law would involve a transfer of legislative power which the very existence of the Danish opt-out demonstrates is something to which the Danish people have not yet agreed. It will be recalled that the origin of the Danish opt-out lies in the Danish "no" to the Maastricht Treaty. Mr Lachmann recounted: "under the Maastricht Treaty, justice and home affairs were placed in the Third Pillar, intergovernmental co-operation. That was not objected to in Denmark, so our opt-out did not relate to the Third Pillar co-operation; it related to, or was based on, the fear that the *passerelle*,

as it was then, would be used to switch things from the Third Pillar to the First Pillar. Therefore the opt-out clause, as it was then, simply stated: Denmark participates in justice and home affairs on the basis of the EU Treaty rather than the EC Treaty. The *passerelle*, of course, was never used but in the Amsterdam Treaty a good part of Pillar Three was moved to Pillar One. The Danish opt-out materialised in the way that Denmark was granted a protocol saying we do not participate in, nor are we bound by, measures adopted under Title IV of the First Pillar, that is where the justice and home affairs matters were placed” (Q 129).

156. Denmark reconsidered its position at the time of the negotiation of the Constitutional Treaty (Q 132). It secured an amended Protocol, putting Denmark in a position similar to that of the UK and Ireland of having a selective opt-in. As regards the *passerelle* in Article 42 TEU the Danish Prime Minister has made clear that speeding up proposals in the fight against terrorism and organised crime in Europe was important and Denmark would not stand in the way of other Member States if they wanted to transfer policing and criminal matters into Title IV TEC (QQ 133, 160).
157. Mr Lachmann explained that ideally Denmark would like a Protocol similar to that agreed in the context of the Constitutional Treaty. He recognised that that was not possible under Article 42 TEU but, depending on the outcome of the period of reflection, he looked to the possibility of securing such a Protocol in the next two or three years either by entry into force of the Constitutional Treaty or by way of a “mini Treaty” (Q 154).

External competence

158. Another consequence of moving policing and criminal law into the First Pillar is that if the Community were to act internally (for example, by adopting a Directive on a particular subject) then the Member States would lose competence, in favour of the Community, to conclude treaties or other agreements with third States on that subject. Even if the Community rules are only a partial harmonisation, Member States’ freedom would be restricted. They would share competence with the Community. Consequently, as Professor Peers pointed out, “almost any future negotiations, certainly at a multilateral level within the Council of Europe, for instance, on international criminal treaties, would involve both the Community and the Member States”. He thought that there might be some areas where the Community would have exclusive competence, for example, arising from the European Arrest Warrant in relation to competing extradition requests. But he concluded that there would only be a handful of areas where exclusive competence of the Community would apply therefore leaving Member States the capacity to exercise their competence in international negotiations (Q 110).
159. Mr Lachmann, for Denmark, regarded exclusive Community external competence as a fact of life: “Sometimes it comes in very handy, sometimes it comes in in very bad situations, and I do not see that you can do anything about it”. Sometimes it may be a straitjacket for Member States and at other times it provides tremendous strength to Member States working together (QQ 150–1).
160. By contrast, the implications for losing external competence were of great importance to Ireland. Mr McDowell was not sure how the UK/Irish opt-in would affect the position. He queried whether it was certain that if the UK or

Ireland did not opt in to a measure transferred via the *passerelle* into the First Pillar, the right to negotiate unilaterally in an area of EU competence would be retained: “Can competence for a Member State to engage in bilateral agreements be retrieved by simply not opting into an area? That is not clear to me at this stage”. The issue might be of great importance, for example, in relation to the conclusion of a bilateral extradition agreement with the US (QQ 182, 186 and 199). Mr McDowell also expressed concern that Article 10 TEC (duty of cooperation) might operate to preclude Ireland from negotiating an agreement with a third State in relation to a matter where there was a relevant Community instrument to which Ireland had not opted in or the Community had an agreement on the same matter with that third State (pp 54–55).

161. The Government are aware that Member States could find themselves no longer able, for example, to enter into extradition arrangements where there was a Community agreement which purported to be exhaustive. Mr Norris, for the Home Office, acknowledged that the Government “would certainly have to take into account that there might be less flexibility if the *passerelle* clause is exercised” (Q 263).
162. Potential loss of external competence is a factor we have considered previously in the context of the exercise of the UK opt-in in relation to civil law measures under Title IV TEC. In our scrutiny of a number of proposals aimed at harmonising rules of private international law we have raised with the Government the implications of the adoption of EC rules for the UK’s continued participation in the Hague Conference on Private International Law.⁸⁶ On at least one occasion the Government have chosen not to opt in to a Title IV measure, a draft Regulation on maintenance obligations,⁸⁷ because the Government accord priority to being able to participate in parallel work currently being undertaken in the Hague Conference.
163. The Government take the view that not opting in to a Title IV measure leaves them free to negotiate in the international forum. In principle it does not seem that a different conclusion should be reached merely because the proposal under Title IV is criminal rather than civil in nature or because the subject of a particular proposal is one that formerly would have been dealt with under the Third Pillar. The duty of loyal cooperation might operate in such a case to restrain the denigration of the Community position but not from prosecution of the Member State’s own views.

National constitutional requirements

164. Article 42 requires the agreement of Member States at two stages. First, there must be unanimous agreement in the Council of the decision to transfer areas of action from the Third to the First Pillar. Second, that decision would have to be adopted (*i.e.* ratified) by all Member States according to their constitutional requirements. Professor Peers did not rule out the possibility that some Member States might need to amend their constitutions (Q 71). Any Member State (or its people, where the constitutional requirements require a referendum) may block the measure.

⁸⁶ The issue arose recently in the context of our scrutiny of Doc 15835/05 Proposed Council Decision on the accession of the European Community to the Hague Conference on private international law.

⁸⁷ Doc 5199/06 Draft Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

165. Mr Lachmann did not believe that the *passerelle* would require a referendum in Denmark. Because of the Danish opt-out (see above) there would be no transfer of legislative power. He thought it most likely there would be approval by the Folketing (the Danish Parliament), via a fairly simple procedure (Q 153). But Denmark would need a referendum (to be held in the context of ratification of the Constitutional Treaty or of a mini Treaty, or of a mix between the Constitutional and a mini Treaty) if it secured a Protocol switching from the opt-out to an opt-in (Q 154).
166. In Ireland there might need to be a referendum. Mr McDowell explained the position: “the Supreme Court in Ireland has developed a very consistent line of jurisprudence that any development in the European Treaties ... which constitutes a ‘quantum leap’ in transference of competence from the Irish Parliament to the European institutions, requires a further referendum in Ireland. So not every Treaty would fall into that category. Something that was of such significance that Ireland was now surrendering its veto, albeit in a way which was envisaged by the Treaty in principle, would raise a constitutional issue. If it were the view of the Supreme Court in Ireland that since Ireland had signed up to the *passerelle* in the first place it had conferred on its domestic legal institutions and on its government the right to vote for a *passerelle* resolution there is a second line of defence, and that is that Ireland has written into its own Constitution that where it exercises an option or discretion under the European Treaties that that cannot be done unless both Houses of the Oireachtas, which is our Parliament, concur ... So in relation to the *passerelle* there are two issues. Number one, there would be a live issue as to whether it was of such fundamental importance that it required a referendum; and even if the court were to hold ‘Ireland has signed up to Article 42 and therefore the people surrendered the right to be consulted on that issue to their own democratic institutions’, at the very least, under existing practice in Ireland, it would require parliamentary resolutions of both Houses in favour, and they would be, I would imagine in present circumstances, highly controversial” (Q 200).
167. We asked the Minister what the words “in accordance with their constitutional requirements” would mean in the case of the UK? The preliminary view of the Home Office was that primary legislation would likely be needed to implement the *passerelle*. It seems likely that it would require a Bill amending the European Communities Act 1972 (Q 266).

Comment

168. The uncertain future of the Constitutional Treaty and the continuing period of reflection has prompted discussion of ways in which institutional improvements can be made under the existing Treaties.
169. In relation to the area of Freedom, Security and Justice the Commission has drawn attention to the delays and difficulties resulting from the need to secure unanimity in decision-making on the Third Pillar (policing and criminal law) instruments. They cite as examples the time taken to agree the European Evidence Warrant and failure to make progress on the Framework Decision on procedural rights in criminal proceedings. Both of these proposals have been subject to scrutiny by the Committee. We can attest to the genuineness of the concerns raised by the Commission.
170. There is no doubt that the Union has an important role to play in the fight against terrorism and organised crime. It has shown that through, for

example, bodies such as Europol and Eurojust, value can be added by facilitating and improving cooperation between police and prosecutors at Union level.

171. On the other hand, as we have said at the outset of this Report, criminal law and procedures are matters which lie at the heart of national legal traditions and the substantial divergences in Member States' laws reflect fundamental historical, political and constitutional differences. To date Union measures on these matters have required unanimity and progress has inevitably been slower.
172. **The proposal to use the *passerelle* in Article 42 TEU is an important and challenging one. It has already attracted a substantial amount of media attention. Giving up the national veto is a subject on which instant opinions can easily be formed. We believe that the proposal deserves careful examination and caution against any knee-jerk reactions resulting from media coverage.**
173. What is clear is that Article 42 TEU permits a large measure of flexibility in relation to some matters. Use of the *passerelle* does not require everything in the Third Pillar to be transferred on the first occasion. It appears that the Commission are prepared to consider a "field by field" approach, considering that a gradual transfer might be more acceptable to the Member States. This approach merits exploration.
174. Further, though a prime purpose of Article 42 TEU is to make policing criminal law subject to the so-called "Community method" (the Commission having the right of initiative, qualified majority voting in the Council of Ministers, and legislation being adopted by co-decision of the Council and the European Parliament) it does not follow from Article 42 TEU that the voting procedure need be QMV in all cases or that co-decision should be obligatory. There are matters in the current Title IV TEC that, because of their sensitivity, remain subject to unanimity. The *passerelle* decision need not require QMV to apply across the board or with immediate effect.
175. It has been suggested that moving police and judicial cooperation to Title IV could go beyond what is provided for in the Constitutional Treaty. For example, there are cross-border limitations written into the new Treaty criminal law provisions. There is also the "emergency brake". Consideration should be given to whether such limitations and safeguards can be incorporated into any *passerelle*. Here the scope of Article 42 TEU is less clear.
176. We express no view at this time as to which, if any, of these options is to be preferred. Our purpose in this Report has been to identify and describe the issues. We note however, that the view has been expressed that the UK, with an opt-in and the possibility of pulling an emergency brake, could be in a better position than under the Constitutional Treaty.
177. The jurisdiction of the Court of Justice is another issue with important political and practical dimensions. The Commission would acquire the power to bring infringement proceedings against Member States for their implementation of EC criminal measures. Greater certainty in legal drafting may be needed if questions of substantive criminal law are not to be left to be determined by the Court.

178. The question whether and to what extent the opt-in survives the use of the *passerelle* is crucial to any decision on the part of the UK on the terms of the *passerelle*. Because of the requirement for unanimity in Article 42 TEU, the UK's consent is needed to enable a decision to be adopted under the *passerelle*. However, if the opt-in remains good for an enlarged Title IV and, as a result, the UK would not have to participate in proposals brought forward, the Government will need to consider carefully whether the UK should stand in the way of other Member States deciding to transfer criminal law competence to the Community.
179. Loss of external competence is also a matter to which close regard will need to be had. External competence has important political and practical implications. A common EU policy on exporting suspected terrorists or serious criminals on a common basis to third States could have advantages over bilateral arrangements. On the other hand the ability to conclude extradition agreements with third States is something which Member States might not want to give up quickly.
180. **The extension of the period of reflection for the Constitutional Treaty cannot be an excuse for wider inactivity or stagnation. The *passerelle* raises serious questions whose answers have long-term implications not least for the security and sovereignty of Member States. We urge Ministers to engage themselves in a detailed examination of the issues which use of the *passerelle* raises for the Union and the UK.**

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Borrie
Lord Brown of Eaton-under-Heywood (Chairman)
Lord Clinton-Davis
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Lucas
Lord Mance (co-opted for this inquiry)
Lord Neill of Bladen
Lord Norton of Louth
Lord Tyler

*A full list of Members' interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>*

Lord Lester of Herne Hill has drawn particular attention to the following interest which is relevant to this inquiry:

Member of the Council, JUSTICE

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

The Freedom Association

JUSTICE

- * Mr Per Lachmann, Chief Adviser EU Law and Constitutional Law, Danish Ministry of Foreign Affairs

The Law Society of England and Wales

The Law Society of Scotland

- * Mr Michael McDowell TD, Minister for Justice, Equality and Law Reform, Ireland

Mrs Anne Palmer

- * Professor Steve Peers, Department of Law, University of Essex

- * Mr Richard Plender QC

- * Mr Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Home Office

- * Mr Christian Thorning, Deputy Head of EU Legal Department, Danish Ministry of Foreign Affairs

APPENDIX 3: REPORTS

Recent Reports from the Select Committee

EU Legislation—Public Awareness of the Scrutiny Role of the House of Lords (32nd Report, Session 2005–06, HL Paper 179)

Ensuring Effective Regulation in the EU: Follow-up Report (31st Report, Session 2005–06, HL Paper 157)

Annual Report 2005 (25th Report, Session 2005–06, HL Paper 123)

The Work of the European Ombudsman (22nd Report, Session 2005–06, HL Paper 117)

Scrutiny of Subsidiarity: Follow up Report (15th Report, Session 2005–06, HL Paper 66)

Recent Reports from Sub-Committee E

European Arrest Warrant—Recent Developments (30th Report, Session 2005–06, HL Paper 156)

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

The Hague Programme: a five year agenda for EU Justice and Home Affairs (10th Report, Session 2004–05, HL Paper 84)—*Joint Report with Sub-Committee F (Home Affairs)*

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

WEDNESDAY 3 MAY 2006

Present	Borrie, L	Neill of Bladen, L (Chairman)
	Clinton-Davis, L	Tyler, Lord
	Lester of Herne Hill, L	

Memorandum by Mr Richard Plender QC, LLD¹

INTRODUCTION

1. In its judgment of 13th September 2005 in Case C-176/03, *Commission v Council*, the European Court of Justice held that the Council had acted unlawfully when adopting, on the basis of the Treaty on European Union, Framework Decision 2003/80/JHA of 27th January 2003 on the protection of the environment through criminal law.
2. The contested Decision was adopted on the basis of Article 34 of the EU Treaty which authorises the adoption of Framework Decisions for “judicial cooperation on criminal matters”. The Framework Decision provided that each Member State should take the necessary measures to criminalise certain acts injurious to the environment.
3. The Court held that the Framework Decision was invalid since it could have been adopted as a Directive based on Articles 174 to 176 of the EC Treaty. Those articles provide, so far as is material, that
“The Council . . . shall decide what action is to be taken by the Community in order to achieve the objectives [of] preserving, protecting and improving the quality of the environment”.
4. The lay reader of the judgment might be forgiven for thinking that it is of no more than technical significance to determine whether a measure should be adopted on the basis of one European treaty rather than another. That would be to take a mistaken view.
5. The judgment is the first in which the Court of Justice has held that the Community institutions have the power under the EC Treaty to determine that certain acts shall be criminal. It has never previously gone quite so far; although in Case 68/88, *Commission v Greece*² it stated:
“where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law”.
6. Indeed in its seminal judgment in the Amsterdam Bulb case the Court of Justice stated:
“that in the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them appropriate.”³
7. Moreover some important practical consequences follow from the conclusion the EC Treaty confers on the Council the power to determine that certain acts shall be criminal. These consequences can be illustrated by a comparison of the procedural and substantive rules governing framework decisions, on the one hand, and environmental directives on the other.
— Framework decisions require unanimity on the part of the Member States;⁴ whereas with immaterial exceptions the Council can make environmental directives by qualified majority.⁵

¹ Since the witness appeared as counsel for the United Kingdom in the case, he emphasises that the views expressed in this evidence are his alone and do not necessarily represent those of Her Majesty’s Government or of any department thereof.

² [1989] ECR 2979 paragraph 23.

³ Case 5076, *Amsterdam Bulb BV v Produktschap voor Siergewassen*, [1977] ECR 137 paragraph 33.

⁴ Article 34(2) EU.

⁵ Articles 175(1) and 251(2) EC. The qualified majority is defined by Article 205(2) EC, as amended by Article 3 of the Protocol on the Enlargement of the European Union. Essentially it requires in the case of an environmental Directive 169 votes, out of a total of 237, comprising a majority of the members. The immaterial exceptions contemplated by Article 174 EC are for measures primarily of a fiscal nature, those concerning town and country planning and those significantly affecting a Member State’s choice between different energy sources.

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- Framework decisions can be adopted not only on the initiative of the Commission but also on the initiative of Member States.⁶ Environmental directives are made on the basis of Commission proposals.⁷
- Framework decisions do not entail formal consultation with the European Parliament (although the Presidency is required to consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and to ensure that the views of the European Parliament are duly taken into consideration).⁸ Environmental directives are made by the Council on co-decision with the European Parliament.⁹
- Framework Decisions produce no direct effects on which individuals can rely in national courts.¹⁰ Directives are capable of producing direct effects in relations between an individuals and Member States.¹¹
- The Court of Justice can give preliminary rulings on framework decisions only when a Member State has made a declaration to that effect; and in the case of framework decisions the Court of Justice cannot review the validity or proportionality of operations carried out by national authorities for the maintenance of law and order and the safeguarding of internal security.¹² The Court of Justice has full jurisdiction to give preliminary rulings on the interpretation and validity of Directives.¹³
- The Commission has no power to institute proceedings against a Member State for failure to fulfil its obligations under a framework decision. It does have such a power in the case of a directive.¹⁴

8. Accordingly the judgment in Case C-176/03, *Commission v Council* produces the following consequences, among others:

- Community measures establishing criminal penalties, which fall within the scope of the judgment, may be adopted more easily than the Member States thought, when adopting the contested Framework Decision; since unanimity is not required.
- The legislative roles of the Commission and of the European Parliament are greater than the Member States thought, when adopting the contested Framework Decision; since in the case of environmental Directives the Commission has the monopoly of initiative and the Parliament is entitled to co-decision.
- The function of national courts, and of the Court of Justice, in reviewing measures that fall within the scope of the judgment are greater than the Member States thought, when adopting the contested Framework Decision.
- Measures providing for the imposition of criminal penalties may be adopted by configurations of the Council other than Justice and Home Affairs, including the “environment Council”, composed of ministers of the environment and their staff, who may be inexpert in criminal law. By contrast Framework Decisions are adopted by the JHA Council, which is expert in criminal law.

9. It is therefore a matter of considerable importance to determine the scope and effects of the judgment. To do so we must begin with an account of the submissions, the Advocate General’s Opinion and the terms of the judgment itself.

THE SUBMISSIONS OF THE PARTIES AND INTERVENERS

10. In the proceedings before the Court of Justice the Commission, as applicant, was supported by the European Parliament. The Council, as defendant, was supported by Denmark, Germany, Greece, France, Spain, Ireland, the Netherlands, Portugal, Finland, Sweden and the United Kingdom. The presence of eleven Member States in support of the Council is not unprecedented¹⁵ but the unanimity of so many intervening States is unusual.

⁶ Article 34(2) EU.

⁷ Article 251(2) EC.

⁸ Article 21 EU.

⁹ The procedure is prescribed by Article 251 EC.

¹⁰ Article 34(2) EU.

¹¹ Case 41/74 *Van Duyn*, [1974] ECR1337, paragraph 12.

¹² Article 35(3) and (5) EU.

¹³ Article 234 EC.

¹⁴ Article 230 EC.

¹⁵ In Case C-304/02, *Commission v France* (“*Stability Pact*”) 17 states intervened. In the pending proceedings in Case C-475/03, *Banco di Cremona* there are 11 intervening States.

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11. The Commission submitted that the purpose and content of Articles 1 to 7 of the Framework Decision fall within the scope of the Community's powers on the environment, as they are stated in Article 3(1) of the EC Treaty¹⁶ and Articles 174 to 176 thereof.¹⁷ While disclaiming any submission that Community legislature has a general competence in criminal matters (which is obviously not the case) the Commission submitted that the legislature is competent to require the Member States to establish criminal penalties for infringements of Community environmental protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective. In support of its argument the Commission relied on the case-law of the Court concerning the duty of loyal cooperation and the principles of effectiveness and equivalence.¹⁸

12. The Commission did not maintain that the framework decision as a whole should have been the subject-matter of a directive. It accepted that Title VI of the Treaty on European Union was the appropriate legal basis for the provisions of the Framework Decision which deal with jurisdiction, extradition and prosecutions of persons who have committed offences.¹⁹

¹⁶ "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: . . . a policy in the sphere of the environment".

¹⁷ Article 174:

1. Community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems.

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure.

3. In preparing its policy on the environment, the Community shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Community,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Community as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Article 175:

1. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 95, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

- (a) provisions primarily of a fiscal nature;

- (b) measures affecting:

- town and country planning,
- quantitative management of water resources or affecting, directly or indirectly, the availability of those resources;
- land use, with the exception of waste management.

- (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council may, under the conditions laid down in the first subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

3. In other areas, general action programmes setting out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.

The Council, acting under the terms of paragraph 1 or paragraph 2 according to the case, shall adopt the measures necessary for the implementation of these programmes.

4. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of: temporary derogations, and/or financial support from the Cohesion Fund set up pursuant to Article 161.

Article 176:

The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.

¹⁸ See, *inter alia* Case 50/76 *Amsterdam Bulb*, [1977] ECR 137, paragraph 33, Case C-186/98 *Nunes and de Matos*, [1999] ECR I-4883, paragraphs 12 and 14, and the order of 13 July 1990 in Case C-2/88 *IMM Zwartveld and Others*, [1990] ECR I-3365, paragraph 17.

¹⁹ The Commission also argued that the choice of an instrument under Title VI of the Treaty was based on considerations of expediency, since there had not been a sufficient majority within the Council for the adoption of the measure as a Directive in accordance with the Commission's proposal. Presumably the Commission reasoned that following the judgment of the Court of Justice a qualified majority would become available.

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13. Concurring with the Commission's arguments, the Parliament emphasised the distinction between Articles 1 to 7 of the contested Decision, which established and prescribed criminal penalties and could (according to the Parliament) have been adopted on the basis of Article 175 of the EC Treaty; and the remainder of the contested Decision, which could have been adopted only on the basis of the EU Treaty.

14. The Council and the majority of the Member States submitted that the European Community (as opposed to the European Union) did not have power to require the Member States to impose criminal penalties. It argued that since the decision to impose criminal penalties is of special significance for the sovereignty of the Member States, a power to establish such penalties is not lightly to be inferred. It recalled that the Community's legislative practice had been to leave it to Member States to determine whether criminal penalties are appropriate for the discouragement of conduct inconsistent with the objectives pursued at the European level. Only on rare occasions had Community legislature contemplated the prescription of criminal penalties by Member States. On such occasions, all Member States already had in force relevant criminal provisions, which were to be subjected to minor adaptations to meet the objective of Community legislation; or the Community legislation expressly left it open to the Member States to bring criminal or administrative proceedings as they thought fit.²⁰

15. Two Member States made submissions adding significant arguments to those advanced by the Council and the other nine interveners.

16. The Netherlands submitted that, in exercising the powers conferred on it by the EC Treaty, the Community may require the Member States to provide for the possibility of punishing certain conduct under national criminal law, provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned. Conversely, if the proposed measure is intended essentially to bring about a general harmonisation of criminal laws, Articles 29,²¹ 31(e)²² and 34(2)(b)²³ of the EU Treaty are the correct legal basis for the measure.

17. The United Kingdom submitted that the absence of provision in the EC Treaty for the adoption of Community legislation to establish criminal penalties is underscored and emphasised by the explicit and carefully negotiated provisions on the subject in the EU Treaty. These provisions presuppose that the Community did not previously enjoy a wider competence to establish criminal penalties by implication into the EC Treaty. The United Kingdom added that since the relative dissuasive effect of criminal and administrative sanctions was liable to vary according to national laws and procedures, Member States were best placed to determine whether the imposition of criminal sanctions is appropriate.

THE ADVOCATE GENERAL'S OPINION

18. In his opinion dated 26 May 2005 Mr Ruiz Jarabo Colomer reviewed the case-law and concluded that:

“neither the Council nor those who share its view are wrong to argue that the case-law does not, explicitly, recognise any power on the part of the Community to require the Member States to

²⁰ Criminal penalties appear to be contemplated by Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ 1991 L 166, p. 77, and Articles 1 to 3 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328, p 17. The former provides that Member States shall “determine the penalties to be applied for infringement of the measures adopted pursuant to this Directive”; and the latter states that they shall “adopt appropriate sanctions” on certain persons.

²¹ “Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,
- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit (“Eurojust”), in accordance with the provisions of Articles 31 and 32,
- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).”

²² “1. Common action on judicial cooperation in criminal matters shall include . . .

- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”

²³ “2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

- adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.”

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classify as criminal offences conduct which hinders achievement of the objectives laid down in the Treaties. Taking the route of secondary Community legislation brings us to the same place.”²⁴

19. In an apparent reference to one of the United Kingdom’s arguments he acknowledged that:

“no one is in a better position to assess the feasibility, appropriateness and effectiveness of a punitive response than the national legislating authorities”.

Accordingly he accepted that where the Community institutions do not have the necessary information at their disposal, the task of determining whether criminal sanctions are to be applied falls to the national legislatures.

20. However he stated that where there are self-evident criteria for determining the effective, proportionate and dissuasive penalty, there is no substantive reason preventing the Commission from making the decision.²⁵ That was the case in the environmental sphere since environmental concerns had achieved a universal dimension:

“environmental concern is implicitly enshrined in the European Union, whose Charter of Fundamental Rights, of 7 December 2000, after declaring in the preamble that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, includes, in the Chapter devoted to the latter, alongside employment and welfare rights, a provision explaining that its policies include and ensure a high level of environmental protection and the improvement of the quality of the environment, in accordance with the principle of sustainable development. That provision, as indicated, forms part of the Treaty establishing a Constitution for Europe.”

21. The Advocate General concluded that in view of the importance and the fragility of environmental interests, there are sufficient grounds for acknowledging the Community’s power to require from Member States a response in criminal law to certain kinds of conduct which harm the planet.²⁶ On these grounds (which, it must be noted, are based on the special character of environmental concerns) Mr Ruiz Jarabo Colomer proposed that the Court should annul the Framework Decision.

22. The Advocate General was however careful to distinguish between the power that he thought the Community enjoyed, to establish the principle that criminal sanctions must be applied to particular conduct, and the power that he thought that Member States enjoyed, to determine the appropriate penalty for such conduct. At paragraph 94 of his Opinion he stated that:

“the requirement, in Article 5(1) itself, that the most serious conduct should be punished with the deprivation of liberty, giving rise to extradition, transgresses the boundaries of the first pillar, since, within the criminal law context, it is for the State to choose the appropriate penalty.”

THE COURT’S JUDGMENT

23. Although the judgment of the Court of Justice is not short, it sets out very concisely the essential reasons for concluding that the Framework Decision must be annulled. Indeed, the essence of the Court’s reasoning is distilled into one sentence in paragraph 48. The structure of the judgment is as follows.

24. After setting out the facts of the case and the submissions of the parties and of most interveners the Court pointed out that all were agreed that protection of the environment constitutes one of the essential objectives of the Community.²⁷ The Court next recalled that Articles 174 EC to 176 EC comprise, as a general rule, the framework within which Community environmental policy must be carried out;²⁸ and stated that the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure.²⁹

25. The Court then identified the aim of the Framework Decision, and the contents of that Decision as expressed in the text itself.³⁰ It then reiterated statements in earlier judgments to the effect that:

“As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence”.³¹

²⁴ Paragraphs 38-39 of the Opinion.

²⁵ Paragraph 49 of the Opinion.

²⁶ Paragraph 69 and 75 of the Opinion.

²⁷ Paragraph 41 of the Judgment. See Case 240/83, *ADBHU*, [1985] ECR 531, paragraph 13, Case 302/86, *Commission v Denmark*, [1988] ECR 4607, paragraph 8 and Case C-213/96, *Outokumpu*, [1998] ECR I-1777, paragraph 32.

²⁸ Paragraph 43 of the Judgment.

²⁹ Paragraph 45 of the Judgment. See Case C-300/89, *Commission v Council*, [1991] ECR I-2867, “*Titanium Dioxide*”, paragraph 10, and Case C-336/00, *Huber*, [2002] ECR I-7699, paragraph 30.

³⁰ Paragraphs 46-47 of the Judgment.

³¹ Paragraph 47 of the Judgment, referring to Case 203/80, *Casati*, [1981] ECR 2595, paragraph 27, and Case C-226/97, *Lemmens*, [1998] ECR I-3711, paragraph 19).

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Thus far, the reasoning of the Court of Justice is entirely uncontroversial.

26. At paragraph 48 of its judgment the Court of Justice stated:

“However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”³²

The Court’s recourse to the test of necessity in this context appears to reflect the submissions of the Netherlands.

27. The Court then recalled that in the present case, Articles 1 to 7 of the Framework Decision leave to the Member States the choice of the criminal penalties to apply, provided that they are effective, proportionate and dissuasive. Moreover the Council itself had taken the view that criminal penalties were essential for combating serious offences against the environment.

28. At paragraph 51 the Court stated that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC. That conclusion was not affected by Articles 135³³ and 280(4)³⁴ of the EC Treaty which reserve to the Member States, in the spheres of customs cooperation and the protection of the Community’s financial interests respectively, the application of national criminal law and the administration of justice.

29. It concluded at paragraph 53 that:

“In those circumstances, the entire framework decision, being indivisible, infringes Article 47 EU³⁵ as it encroaches on the powers which Article 175 EC confers on the Community.”

THE COMMISSION’S COMMUNICATION ON THE JUDGMENT

30. On 24 November 2005 the Commission published a Communication to the European Parliament and to the Council on the implications of the judgment of the Court of Justice in Case C-176/03.³⁶ As is to be expected, the Communication welcomes the judgment on the ground that it removes “any doubts” about a question which has long been controversial.³⁷

31. Commenting that its aim in the Communication is to explain the conclusions to be drawn from the judgment³⁸ the Commission states that the Court went further than the Advocate General, who took the view that the Council is not empowered by the EC Treaty to prescribe in detail the penalties to be applied.³⁹

32. The Commission then states in the Communication that the judgment lays down principles going far beyond the case in question. Although expressed to apply to measures adopted for the protection of the environment, the arguments of the Court

“can be applied in their entirety to other common policies and to the four freedoms (freedom of movement of persons, goods, services and capital) . . . From the point of view of subject-matter, in addition to environmental protection the Court’s reasoning can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness”.⁴⁰

³² Emphasis added.

³³ “Within the scope of application of this Treaty, the Council, acting in accordance with the procedure referred to in Article 251, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission. These measures shall not concern the application of national criminal law or the national administration of justice.”

³⁴ “The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.”

³⁵ “Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.”

³⁶ COM (2005) 583 final/2.

³⁷ Paragraph 1.

³⁸ Paragraph 1.

³⁹ Paragraph 10.

⁴⁰ Paragraphs 6 and 8.

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33. As a result of the Court's judgment, the Commission considers that eight further Framework Decisions already adopted by the Council must be taken to have been adopted on the wrong basis.⁴¹ Time limits for the institution of actions permit the Commission to bring proceedings for the annulment of only the latest of these: a measure on ship-source pollution. The Commission decided on 23 November 2005 to institute proceedings in that case.⁴²

34. The Commission's Communication highlights two important areas of ambiguity in the judgment.

- The first concerns the extent of the power of the legislature. Is the legislature free, as the Commission thought it is, to define and prescribe criminal penalties? Or is Mr Ruiz Jarabo Colomer correct in maintaining that the power of the Community legislature is confined to establishing the principle that criminal sanctions must be applied to particular conduct, while the Member States alone are competent to determine the appropriate penalty for such conduct?
- The second area of ambiguity concerns the scope of the judgment. Is the Community legislature competent to prescribe criminal penalties only when adopting legislation on the environment, or on some other sub-sector of the Community's activities? Or does the judgment mean that the Community legislature can prescribe criminal penalties in any policy or area governed by the EC Treaty?

35. We must consider those issues in turn.

COMPETENCE TO DEFINE OFFENCES AND PRESCRIBE PENALTIES

36. The Commission goes too far when stating that by contrast with the Advocate General, the Court considered that the Council is empowered by the EC Treaty to define criminal offences and to prescribe penalties.⁴³ It would have been fair to observe that the Court of Justice was silent on a point addressed in the Advocate General's Opinion; but the silence of the Court does not signify dissent from the Advocate General.

37. The Court did not consider whether the Council had the power to prescribe penalties because on its reasoning that issue did not arise. The Court took the view that the entire Framework Decision, being indivisible, infringes Article 47 EU. The Court was therefore spared the problem, addressed by the Advocate General, of considering separately Article 5 of the Framework Decision, which prescribes, at least in outline, the penalties to be imposed for environmental offences (deprivation of liberty which can give rise to extradition).

38. It must be conceded that in concluding that the Community legislature has the power to require Member States to establish certain acts as criminal offences, the Court of Justice must be taken to have attributed to that legislature the power to set out in broad terms the parameters of the conduct that is to be criminal. However 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.

39. It would be equally inapt to confer on that legislature the power to prescribe the maximum, minimum or guideline sentences for offences: the more so as the nature and duration of any sentence is intimately linked to the treatment of offenders, which is a matter for national law and procedure.

40. Accordingly the suggestion that the Community legislature has the power to define and prescribe criminal penalties cannot be sustained; and should be resisted.

41. An opportunity to ventilate the issue may arise in the course of the proceedings instituted by the Commission for the annulment of Framework Decision 2005/667/JHA of 12 July 2005 on ship-source pollution. This is the companion to a Directive of 7th September 2005.⁴⁴ The Directive has as its purpose the incorporation of international standards for ship source pollution. It provides in Article 8 that Member States shall take the necessary measures to ensure that infringements are subject to effective, proportionate and dissuasive penalties which may include criminal or administrative penalties. "Definitions" of offences (in

⁴¹ These are the Framework Decisions of 29 May 2000 and 6 December 2001 on counterfeiting in connection with the Euro, OJ 2000 L140/1 and OJ 2001 L149/3; Framework Decision 2001/414/JHA combating fraud and counterfeiting of non-cash means of payment, OJ 2001; Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, OJ 2001 L182/1; Framework Decision of 28 November 2002 on unauthorised entry, transit and residence, OJ 2002 L328/17; Framework Decision 2003/568/JHA of 22 July 2003 on corruption in the private sector, OJ 2003 L192/54; Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, OJ 2005 L69/67; and Framework Decision 2005/667/JHA of 12 July 2005 on ship-source pollution, OJ 2005 L255/164.

⁴² Paragraph 15.

⁴³ Paragraph 10.

⁴⁴ Directive 2005/35 of 7 September 2005 on ship source pollution and on the introduction of penalties for infringements, OJ 2005 L255/11.

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language broader than would be found in an English criminal statute) are to be found in the Framework Decision, along with provision for penalties to be imposed upon both natural and legal persons.⁴⁵

42. A strong case can be made for the proposition that the definition of offences and the prescription of penalties are not matters for the Community legislature. The Community's challenge to that Framework Decision offers an opportunity to clarify the extent of the Community's power to define and prescribe penalties.

43. Matters are complicated by the institution in England of proceedings for judicial review of the Directive by consortium of ship-owners led by named Intertanko. Relying on arguments made in the annual Cadwallader lecture by Dr Thomas Mensah, formerly President of the International Tribunal for the Law of the Sea, the claimants maintain that the Directive of 7th September 2005 contravenes the International Convention for the Prevention of Pollution from Ships ("MARPOL") 1973.⁴⁶ It is possible that the United Kingdom will want to defend Framework Decision 2005/667/JHA from the Commission, on the ground that it is for Member States to define offences; and that the Department of Transport will want to defend it from Intertanko on the ground that it is compatible with MARPOL.

THE SCOPE OF APPLICATION OF THE JUDGMENT

44. Different considerations apply to the identification of the scope of the Court's judgment. In paragraph 48 the Court refers expressly to the Community's competences in the environmental field; but according to the Commission the Court's reasoning can be applied in its entirety to the Community's common policies.

45. The Commission's interpretation of the judgment is very wide indeed. The activities of the Community are to include (among many other matters) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect, a common commercial policy, an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; measures concerning the entry and movement of persons, a common policy in the sphere of agriculture and fisheries, a common policy in the sphere of agriculture and fisheries, a common transport policy, a system ensuring that competition in the internal market is not distorted, the approximation of the laws of Member States to the extent required for the functioning of the common market; the promotion of coordination between employment policies of the Member States, a common social policy, and the promotion of equality between men and women.⁴⁷

46. Although the Commission's interpretation of the judgment is therefore very extensive indeed, there is much to be said in its favour, strictly a matter of legal analysis.

47. Whereas the Advocate General placed great emphasis on the importance and the fragility of environmental interests, the Court of Justice did not do so. It is true that the Court referred to environmental protection as an essential object of the Community; but it characterised environmental policy as "one of" those essential objectives. There is no suggestion here that the reasoning adopted in the judgment cannot be applied also to the other essential objectives. Nor does the Court give any reason to confine to the environmental sector the power of the Community legislature to take measures relating to the criminal law of the Member States when it considers such measures necessary to ensure observance of the rules that it lays down.

48. It is not easy to discern, on the basis of the EC Treaty, a coherent principle for distinguishing between "the essential objectives of the Community" that may be promoted by Community measures prescribing criminal penalties and the other policies and activities of the Community that may not be furthered by such means.

49. In an apparent response to the argument that the Member States would not have included in the EU Treaty express but limited powers to establish criminal penalties if there were already wider but implied powers in the EC Treaty, the Court stated that "Article 47 EU provides that nothing in the Treaty on European Union is to affect the EC Treaty. That requirement is also found in the first paragraph of Article 29 EU, which introduces Title VI of the Treaty on European Union".⁴⁸

50. It would be beside the point to protest that Article 47 of the EU Treaty preserves the EC Treaty; and does not exclude an interpretation of the EC Treaty by reference to new provisions contained in a subsequent text. The Court has now ruled that the EC Treaty authorises the Community's legislature to establish criminal penalties; and those provisions must coexist with the wider powers conferred in the EU Treaty.

⁴⁵ Articles 1, 4 and 6.

⁴⁶ London, 2 November 1973.

⁴⁷ EC Treaty, Article 2.

⁴⁸ Paragraph 38 of the Judgment.

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51. The Commission's interpretation of the judgment offers a solution to the problem of such coexistence. Consistently with the Commission's interpretation, it can be argued that Title VI of the EU Treaty contains "horizontal" provisions aimed at encouraging police and judicial cooperation in the broad sense whereas provisions of criminal law required for the effective implementation of Community law are a matter for the EC Treaty.

52. The Commission's interpretation is, too however, too wide and important to go unchallenged. At the informal meeting of the Justice and Home Affairs Council in Vienna on 12 to 14 January 2006, the representatives of the Member States disputed the Commission's interpretation.⁴⁹ It may be possible to limit the scope of the judgment in the following way.

53. A distinction is to be drawn between those common policies in which it is necessary to establish a common form of deterrent (that is to say a criminal penalty) and those in which it is not. Where the conduct in question is liable to affect two or more Member States concurrently or haphazardly, the Community legislature may consider it necessary to establish a criminal penalty. That is the case with environmental offences; but it is a special case.

54. A Member State that protects its coasts by imposition of criminal penalties on persons negligently discharging oil at sea may with some justification object that its neighbour does not impose such penalties. That is so because the injury suffered by the discharge of oil may affect the former Member State as well as the latter, or the it may former alone according to accidents of wind and tide. In exceptional cases of this kind, the prescription of criminal penalties may be "necessary" for the promotion of an essential policy.

55. Conversely the prescription of criminal penalties is not necessary for the promotion of an essential policy by reason only of the fact that Member States have adopted a policy the pursuit of which entails dissuasion of certain conduct. Thus (for example) it is for the Member States and not the Community legislature to determine whether the employment of undocumented migrants from third countries is best discouraged by criminal or by administrative means.

CONCLUSIONS

56. The judgment of the Court of Justice in Case C-176/03 has provoked adverse reactions at the political level in several Member States. From the legal perspective also the judgment in Case C-176/03 is much to be regretted.

57. It attributes to the Community a power to establish acts as criminal, in circumstances in which it appears rather clear that Member States had no subjective intention of conferring such a competence. When negotiating the draft Treaty establishing a Constitution for Europe, the Member States crafted by extensive and occasionally painful compromise specific provisions authorising the Union to "establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States". Those provisions are to be found in Articles III-270-271 of the draft Treaty. The evident understanding of the negotiators was that they were envisaging the creation a new power: not a competence already subsumed within a wider competence created by the EC Treaty.

58. Indeed, the French *Conseil constitutionnel* held in 2004 that the application in France of Articles III-270-271 of the draft Treaty establishing a Constitution for Europe would require an amendment of the Constitution of the French Republic.⁵⁰ The effect of the judgment of the Court of Justice in Case C-176/03 is to declare the existence of a Community competence similar to that which would have been conferred on the Union had draft Treaty establishing a Constitution for Europe been adopted following affirmative votes in France and other Member States.

59. Moreover the judgment is ambiguous. Is it confined to the Community's environmental policy, or does it extend also to other policies and activities, and if so to which? What is the extent of the competence of the Community legislature, when pursuing one of the policies to which the judgment applies, to define the acts that are to constitute offences and to prescribe the penalties? By what criteria and subject to what limits (if any) is the legislature to determine whether it considers that a measure relating to the criminal law of the Member States is "necessary" in order to ensure that the rules which it lays down are fully effective?

60. For Member States dissatisfied with the judgment the options are limited. Although there is precedent for the reversal of a judgment of the European Court by treaty,⁵¹ that reversal occurred when negotiations were in course. A prospect of defining the respective functions of the Member States and the Community legislature

⁴⁹ The witness is informed by the Austrian Presidency that as the meeting was informal, minutes are not available.

⁵⁰ Decision 2004-205, préc., cons. 29.

⁵¹ Case C-262/88, *Berber v Guardian Royal Exchange*, [1990] ECR I-1889, reversed by Treaty of European Union, OJ 2001 C191/1.

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in respect of criminal law by a fresh treaty is likely to be presented only if the draft Treaty establishing a Constitution for Europe should be revived (as may happen in the second half of 2007).

61. The probability is that we shall have to live with the judgment. It is particularly important, therefore, to establish its parameters. There are two opportunities for doing. One has been mentioned: the pending action for the annulment of Framework Decision 2005/667/JHA of 12 July 2005 on ship-source pollution.

62. The other is the Commission's plan to replace certain existing Framework Decisions by new Community measures establishing or prescribing criminal penalties. The measures that the Commission proposes to replace include several whose subject-matter is remote from the environment. These include three on topics sufficiently remote from one another to establish a suitable spectrum: Framework Decision 2001/414/JHA combating fraud and counterfeiting of non-cash means of payment; the Framework Decision of 28 November 2002 on unauthorised entry, transit and residence; and Framework Decision 2003/568/JHA on corruption in the private sector.

63. Together with its partners in the Council, the United Kingdom should scrutinise the Commission's proposals carefully and should consent to the adoption of replacement measures only if satisfied that this is justified on the basis of the judgment in Case C-176/03. If agreement between the Commission and the Member States cannot be achieved and present indications are that the prospects of consensus are remote—it may be necessary for the Court to revert to the question of Community competence in the criminal sector, in fresh litigation between the Commission and the Council.

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Examination of Witness

Witness: MR RICHARD PLENDER QC, examined.

Q1 Chairman: The topic this afternoon is the judgment of the European Court of Justice, Case C-176/03, *Commission v Council*, in which Mr Richard Plender was counsel for the United Kingdom. You are welcome, Mr Plender. Thank you very much for coming. We are particularly grateful for the paper you have written which I think indeed answers a number of questions we have put to you. I think you are very familiar with the procedure. We are now on air and a transcript is being taken of what is said by you and the questions put to you. You will get an uncorrected copy for your perusal and correction. We do put the uncorrected version on the internet straightaway, but it is subject to a note that it is going to be corrected. My understanding is you would like to speak on your paper and I invite you to do that. Following that, we will then put questions to you.

Mr Plender: I contemplated it would be useful to give a summary of my paper, but this is less useful now that all three of your Lordships have read it in detail. I shall nevertheless give a summary of what is already prepared in writing. In its judgment of 13 September, the European Court held that the European Community's legislature has the power to determine that certain acts shall be criminal. That judgment has met with a hostile reaction at the political level in several Member States. The view I am about to give is a legal view, but it is the legal view of one who disagrees most profoundly with the judgment. The point of departure is that the Treaty on European Union in its Article 34 confers on the Council the express power to adopt common positions in the fields of police and judicial co-operation in criminal

matters. The Council used that express power when making the contested Framework Decision. The point at issue is not whether European rules relating to criminal matters may be adopted by the Council but whether the Council should act under one treaty or another. The choice of the treaty basis has, however, five very important consequences. First, it affects voting. Under the EC Treaty measures can often be made by qualified majority. Framework Decisions, on the basis of Article 34 of the Treaty on European Union, require unanimity. Secondly, it affects the power of initiative. Under the EC Treaty the Commission has the power of initiative and the Parliament has an important legislative role. Under Article 34 of the EURATOM Treaty, the initiative lies with the Member States and the power of the European Parliament is limited. Thirdly, it affects the formation of the Council responsible for the enactment measure. Under the EC Treaty the composition of the Council depends upon the chapter; in environmental matters, it is the Environmental Council consisting of the permanent representative, ambassador or minister supported by experts in the field of the environment, but in the case of measures under Article 34 of the Treaty on European Union it is the Justice and Home Affairs Council that meets and its members and supporting cast are expert on criminal law. Fourthly, it governs the legal effects of the measure. Under the EC Treaty directives may produce a direct effect; Framework Decisions do not do so. Finally, it affects the judicial review of the measure. Under the EC Treaty the Commission can bring proceedings against Member

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States in respect of implementation. Under the Treaty on European Union it cannot bring actions against Member States for failure to implement a Framework Directive. These practical considerations explain why no fewer than 11 Member States, including the United Kingdom, appeared before the Court attempting to dissuade it from taking the decision it did. In those proceedings the Commission and the Parliament were confronted with the task of explaining why there should be an implied power to adopt measures in relation to criminal actions under the EC Treaty whereas there is an explicit conferral of express power under the EU Treaty. They argued the Treaty on European Union was the appropriate basis for part of the Framework Decision, those parts dealing with jurisdiction, extradition and the prosecution of persons who committed offences, but the remaining parts of the Framework Decision requiring the adoption of criminal measures were governed by the EC Treaty. Their submissions, if accepted, would have led to the conclusion that Articles 1 to 6 of the Framework Decision were invalid but the remainder was valid. Against this, the Council and the 11 intervening Member States argued that the decision to impose criminal sanctions is of particular importance to the sovereignty of the Member States. For this reason, an implied power is not readily to be inferred. On the few previous occasions when Community legislation had referred to criminal measures, either it merely provided for minor adjustments in an area in which all Member States were already penalised by criminal sanction the relevant action, or the legislation simply provided that Member States should take dissuasive actions by criminal or administrative means as it saw fit. In his opinion, Mr Ruiz-Jarabo Colomer acknowledged that Member States are in the best position to judge whether a punitive response is the best way of dissuading injurious conduct. He accepted that, save where the answer is self-evident, it is for Member States to determine whether criminal sanctions should be imposed, but he said that environmental considerations are special. In the case of the environment, it is self-evident that criminal sanctions are appropriate. Even so, he said a distinction is to be drawn between the European Community's power to determine which actions should be criminal and the Member States' power to prescribe the appropriate penalty. Member States could adopt that power by Framework Decisions. The Court, in its judgment, went further than it had been invited to do by the Commission and the Parliament because it held that the whole of the Framework Decision could have been adopted on the basis of the EC Treaty and, by contrast with the Advocate General, it did not say that the function of defining "offences" and prescribing penalties is a matter for the Member States. The decisive part of

the Court's judgment in paragraph 48 reads so far as is relevant as follows: "when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, [the Community legislature can take] measures . . . which it considers necessary in order to ensure that the rules which it lays down on environment protection are fully effective". The Commission has subsequently published a communication on what it takes to be the effect of the judgment. The Commission states that the judgment lays down principles going far beyond the case in question. According to the Commission, and by contrast with the Advocate General, the case is by no means confined to the environmental field. It can be applied in its entirety to other common policies and to the four freedoms: freedom of movement of persons, goods, services and capital. As a result of the Court's judgment, the Commission considers that eight further Framework Decisions previously adopted by the Council must now be annulled. Time limits for the institution of actions have expired in the cases of all but one of these measures, the Framework Decision on ship-source pollution, and in that case the Commission has decided to institute proceedings. In the cases of the other seven, the Commission proposes the adoption of new legislation providing for their repeal. It seems to me that two major issues of ambiguity in the judgment call to be resolved. The first is the extent of the power of the Community legislature. Is the Commission free, as the Commission says, to define and prescribe criminal penalties, or merely to state that certain injurious acts are to be criminal? The second area of ambiguity concerns the scope of judgment. Can the Community prescribe penalties only in relation to the environment or on some other sub-sector of the Community's powers, or does the competence extend to the whole of the subject matter of the EC Treaty? With your consent I will say something about each of those questions. First, the competence to define "offences" and prescribe penalties. It seems to me that the Commission went too far in stating that, by contrast to the Advocate General, the Court considered the EC Treaty confers on the Council the power to define "criminal offences" and to prescribe penalties. It would have been fair to say that the Court was silent on a point addressed by the Advocate General, but the Court had no need to deal with that point because, on its reading, the first six Articles of the Directive are so closely intertwined with Articles 7 to 12 that they all stood or fell together. If the first six could properly have been adopted under the EC Treaty, then there was a power to adopt the whole under the EC Treaty because they were inseparable. Were the Court to be asked to focus upon the extent of Community power, it should, in

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my view, follow the Advocate General. It would be inapt to confer on the Community legislature the power to define criminal offences or to prescribe penalties. The power to define offences is so intimately linked with national criminal law that it can best be achieved at the national level. Likewise, the power to prescribe penalties is intimately linked to the treatment of offenders, which is a matter for national law and procedures. There is—and I say this in Lord Lester’s presence particularly—also a civil rights aspect to this matter. If the Community legislature is to define offences, it can only do so in terms of sufficient breadth to be applicable in the legal systems of 25 Member States, but it is vital from the perspective of civil rights to establish the maximum possible degree of certainty in relation to the definition of criminal offences. An opportunity to test this point is likely to arise in the course of proceedings which have been initiated for the annulment of the Framework Decision on Ship-Source Pollution. It is a companion to a Directive made on the basis of the EC Treaty. In the case of that pair of instruments, definitions are contained within the Framework Decision. There is, in my view, a sound case for arguing that such provisions could not have been adopted in a Directive. Such an argument would be consistent with the opinion of the Advocate General in the case that we are considering and there is nothing inconsistent with it in the judgment of the Court. I now turn to the second matter; the scope of application of the judgment. This is more difficult. The Commission’s interpretation is indeed very wide. On its words, the Court’s reasoning can be applied to all Community policies and freedoms which involve binding legislation. Leaving aside a certain circularity in the Commission’s language, its language is certainly very broad, but strictly as a matter of legal analysis there is a lot to be said in its favour. Whereas the Advocate General placed great emphasis on the fragility of environmental interests, the Court did not base its judgment on special considerations relevant to the environment, and it is not easy to discern on the basis of the EC Treaty a coherent principle for distinguishing between the essential objectives of the Community that require protection by criminal law and other objectives which do not require the protection of the criminal law. Even so, it seems to me that the Commission’s interpretation is too broad to go unchallenged. I am aware that at an informal meeting of the Justice and Home Affairs Committee in Vienna last January the representatives of the Member States disputed the Commission’s interpretation. I offer the following possible basis for distinguishing between measures requiring protection by criminal law and measures that do not. A distinction is to be drawn between “conduct that is liable to affect two or more states concurrently or haphazardly” and “conduct that is

likely to affect states separately”. In the former case there is Community competence; in the latter case there is not. Action injurious to the environment is liable to affect two or more states concurrently or haphazardly. A Member State that protects its coasts against oil pollution by imposing criminal penalties on those who discharge oil within territorial waters may, with some justification, object if its neighbour fails to do so. Accidents of wind and tide determine where the damage shall be caused. In an exceptional case of this kind, prescription of criminal penalties may be necessary. Conversely, the prescription of criminal penalties is not necessary in cases that affect states individually, for example the employment of undocumented workers. I sum up my views as follows: the Court’s judgment of 13 September attributes to the Community a power to establish acts as criminal in circumstances in which it appears rather clear that the Member States had no subjective common intention of conferring such a power. Moreover, the judgment has two important areas of ambiguity; first, as to its extent and, second, as to its scope. Nevertheless, we have to live with the judgment. It is particularly important therefore to establish its parameters. There are two opportunities for doing so. One I have identified. That is the pending action for the annulment of the Framework Decision on Ship-Source Pollution. The other is the Commission’s plan to replace certain existing Framework Decisions by new Community measures. In my view, the United Kingdom, together with its partners in the Council, should scrutinise the Commission’s proposals carefully and should consent to the adoption of replacement measures only if satisfied that this is justified on a careful reading of the judgment of the Court. I have offered in this evidence one reading which may assist particularly the distinction between the essential interests that require protection by criminal law and those that do not. One way or another I fear that the judgment of last September is likely to be the subject of further litigation in the Court of Justice without which it will continue to be uncertain as to its effects.

Q2 Chairman: I am very grateful for that statement which has been recorded. We have been joined while you were speaking by Lord Clinton-Davis and by Lord Tyler so we now have five of us to put questions to you, which is very satisfactory. I am going to start off with a few. I know Lord Lester has got some questions he wants to come in with. As a matter of general education to help me a little bit on this—and I should know the answers to the questions I am going to be asking; they are elementary—it is really about the Framework Decision structure. When we started with the Rome Treaty for many years of its application we had Directives and as you well recall that it was by the action of the decision-making

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power of the ECJ that the Directives were held to have direct effect and conferred benefits on potential claimants and so on. That was not in the Treaty, I think, but was by the Court. We then moved to a stage where the EU treaties come into being and we get a new concept of the Framework Decision where it is expressly stated in the Treaty that it is not to confer direct effect. Can you just give me a bit on the history of why did they move to a Framework Decision and did they, as I would guess, put in as provision “no direct effect” in effect to block the European Court of Justice from moving in that direction?

Mr Plender: Under the Treaty establishing the European Community there is, as Lord Neill says, express provision for three types of legislation: Regulations, Directives and Decisions. It was in *Van Duyn* in 1974 that the Court of Justice first decided that Directives are capable of producing direct effect and subsequently the case of *Reyners* established that it may produce such direct effects only between an individual and the state. The Treaty on European Union was the outcome of negotiations for the enlargement of the Community’s competence particularly in the fields of justice and home affairs. There was to be a new competence but a competence outside the European Community. The so-called third pillar was confined within a separate treaty, the Treaty on European Union. Under the Treaty on European Union, Member States were to act collaboratively but in their capacities as Member States and were to align their policies in relation to justice and home affairs outside the sphere of competence of the Community but within the Council. The expression used was “the Member States meeting in council”, separately from the Council itself. Framework Decisions are therefore decisions made by the Member States in their sovereign capacities but acting unanimously in order to further the defined objects of the Treaty on European Union, one of which is the creation of an area of justice. The full phrase does not come to my mind at the moment.

Q3 Chairman: I think you have said that the Commission has no power to take enforcement action in relation to Framework Decisions.

Mr Plender: Yes.

Q4 Chairman: There is a treaty obligation of co-operation and good faith furtherance of the aims of instruments made by the Community legislature.

Mr Plender: There is.

Q5 Chairman: What is the sanction though if the Member State simply fails to take the necessary steps?

Mr Plender: The sanction is political in the case of Framework Decisions under the Treaty on European Union.

Q6 Chairman: I am sorry, I did not quite hear that.

Mr Plender: In the case of the Treaty on European Union the sanction is political.

Q7 Chairman: Has that proved satisfactory so far? Have there been such cases?

Mr Plender: No there has been rather little legislation outside the Schengen arrangements, to which the UK is only very partially a party, within the justice and home affairs chapter of the Treaty on European Union.

Q8 Chairman: This brings me on to a related question. You refer in your paper, paragraph 41, and you have mentioned it again today, to the concept of a companion Directive. You either talk about a Framework Decision being a companion to a Directive or vice versa as if they come in pairs. You give an example of that. Is that quite a common pattern that we are now getting that you have double law-making, one the Framework and one the accompanying companion Directive? Is that common?

Mr Plender: The term “companion” is simply one of my own coining in that context. I should not be surprised if others use it. As there have been only eight such decisions it is a little early to speak of a common practice emerging, but there have been a number of cases in which Framework Decisions have been made to complement Community legislation. The obvious case is the ship-source pollution case. All Member States, if I remember correctly, are parties to MARPOL, the IMO convention on marine pollution. A Directive harmonises the actions of the Member States within MARPOL to the extent that they fall within the competence of the European Community, or were taken to fall within it, and a Framework Decision aligns the policies of the Member States within MARPOL to the extent that the Member States considered that they were acting beyond the competence that the Community had in relation to that agreement.

Q9 Chairman: It strikes one at first blush as being a complicated system to have a companion set or duo like this, when you have a different legislature in each case where the opinions swaying the people who have to vote in favour may vary, as we have seen in the case that you have just been arguing where you had a different view of the Parliament to the view taken by the Member States. That could arise at the moment the legislation was brought, if you can get in one forum or another the necessary votes.

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Mr Plender: I do not dissent from that but I have two comments. The factors which influence Member States' voting are not always obvious. Denmark proposed the Framework Directive which is the subject of the proceedings of last September. It proposed it because it was very keen on ensuring common European policies in relation to the environment, particularly for the protection of its vulnerable shoreline. But at the same time, Denmark holds strongly to the view that the Community's powers under the EC Treaty are limited. Accordingly, Denmark was anxious that there should be a Framework Decision. It would have voted against a Directive although in favour of the subject matter of the Directive. My second comment is that it seems to me inevitable that you have a pair of decisions, particularly where Member States are parties to multinational treaties affecting the subject matter of the EC Treaty. It is common enough that multilateral treaties are partly within and partly outside the competence of the Community. There is very important litigation in the Court of Justice, on which judgment will be given on 30 May, affecting the United Nations Convention on the Law of the Sea. One of the issues there is the extent of Community competence in relation to the United Nations Convention on the Law of the Sea. In such a matter, it seems inevitable that to some degree there will be Community competence, so power to adopt Community legislation, and to some degree there will not be Community competence. To the extent there is not Community competence, then either Member States all act individually or they align their policies, and any alignment of policy must be by a measure outside the European Community; there is no way around that.

Chairman: I have a lot more questions, but it is only fair I should pass it out. Lord Lester, I know, is very keen to put a question and I know Lord Borrie is waiting too.

Lord Lester of Herne Hill: Mine is not so much a question as I would like to take Mr Plender, if I could, to the judgment. I have a completely different reading of the judgment to his, and since he made a very full and powerful statement to the prosecution I would like, if I may—because it is a much more efficient way of doing it than any other way I can think of—to go through the opposite part to see how much common ground there is and is not and see what the real differences are, if that is permissible.

Chairman: Certainly. Which paragraph do you want?

Lord Lester of Herne Hill: If I could start on paragraph 44, what I am going to do is refer to what he says each time and then invite Mr Plender to comment.

Chairman: I should point out to members of the Committee we have got on the table a new copy of the judgment; there was a fault in the first version. It is 44 whichever version you take.

Q10 Lord Lester of Herne Hill: Perhaps I should say, the first legal essay I ever wrote in the *International and Comparative Law Quarterly* in 1961 was on river pollution and international law, so I have a very strong interest tracing back to that period in transnational environmental degradation. I enthusiastically welcome what the Court has done in this case, just as counsel for the United Kingdom would take a different view. With that in mind, if one starts at paragraph 41, I assume that it is common ground, the Court says the “protection of the environment constitutes one of the essential objectives of the Community”, citing case law. I think that is not controversial?

Mr Plender: Not at all. I wonder what the word “essential” adds in the context of the Court's judgment as a whole. I see what it adds in the Advocate General's opinion, but I do not in the case of the Court's judgment. Of course, the protection of the environment is important and it is one of the objectives of the Community.

Q11 Lord Lester of Herne Hill: Then if one skips to paragraph 43, I take it again there is no controversy about the statement: “Articles 174 EC to 176 EC comprise, as a general rule, the framework within which Community environmental policy must be carried out”?

Mr Plender: No.

Q12 Lord Lester of Herne Hill: Then I assume there is no controversy about paragraph 45 which tells us that: “the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review including . . . the aim and content of the measure”?

Mr Plender: I think that language goes back to Case 68/80 on beef hormones and it has been repeated many times.

Q13 Lord Lester of Herne Hill: Very well. Then one comes to paragraph 47 and the last sentence says: “As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence”. I am sure you will agree with that.

Mr Plender: Yes.

Q14 Lord Lester of Herne Hill: Then one comes to paragraph 48 where it says: “when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities”—I emphasise those words—“is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective”. Am I right in saying that the principle of effectiveness is a

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general principle of Community law, for example as illustrated in a case with which we are very familiar, *Marshall II*, where you remember in the context of equal pay for women, the Court said there must be sanctions that are proportionate, effective and dissuasive so that employers pay women and men equally. That concept of effectiveness and effective sanctions is not novel, is it?

Mr Plender: No, but the use of the term “effective” here is, because what the Court has said until now has been that the Member States are free to impose such sanctions as they choose so long as they are proportionate and effective. Here the meaning is very significantly different. It is to be the Community legislature and not the Member States which determines what is necessary in order to establish an effective sanction.

Q15 *Lord Lester of Herne Hill:* Is the judgment not ambiguous because in paragraph 48 and in paragraph 49 the Court is recognising that the Member States have got a choice of means in both these paragraphs? First of all in what I have just read out and then in 49 they say, referring to the Framework Decision: “It should also be added that . . ., although Articles 1 to 7 of the Framework Decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of criminal penalties to apply”. Would a fair reading of that and the earlier paragraph not be that the Court is well aware that the choice of means, criminal sanctions, must be left to the Member States?

Mr Plender: First, I have myself focused on two points of ambiguity. Secondly, one point of ambiguity on which I focused is now the same as that on which Lord Lester focuses, that is to say whether, as the Commission maintains, the effect of the judgment is for the Community to be free to prescribe and define the penalty or, on the other hand, whether, as the Advocate General says, it is for the Member State to do so. I would rely on paragraph 49 in support of my view that it is for the Member State to do so.

Q16 *Lord Lester of Herne Hill:* So would I, and I am putting that to you because I am simply trying to get a fair reading of this. I am not concerned with the Commission’s interpretation. I agree with you that it is over-broad. It seems to me this judgment can be fairly read as confined to environmental protection and as contemplating that the Member States will have the choice of means. On that basis, it seems to me there is nothing to get worked up about about this judgment. To the contrary, it is well within the traditional principles of Community law.

Mr Plender: I do not think it can be read as Member States have the choice of means.

Q17 *Lord Lester of Herne Hill:* I mean by that, a definition in the national criminal legislation of the precise way to translate the principles that would be laid down at Community level.

Mr Plender: The choice they do not have is illustrated as follows: suppose that a Member State takes the view that under its system the most effective means of guarding against air pollution is to prescribe administrative or fiscal sanctions, not criminal sanctions, on those that produce certain pollutants. You cannot do it. The Community legislature can prescribe that the sanctions shall be criminal. That seems to me to be the advice of paragraphs 48 and 49. As I read it, there is nothing in paragraph 49 to the contrary, rather the opposite: “Member States [have] the choice of the criminal penalties to apply”. If the word “criminal” were not there, I think I would agree with Lord Lester.

Q18 *Lord Lester of Herne Hill:* We do not disagree. I think what we are both reading into this is that it decides there must be criminal sanctions, but it is up to the Member States to translate that general principle, that there must be criminal sanctions, into its domestic legal order. That is my reading of it.

Mr Plender: That is my reading of it too.

Q19 *Lord Lester of Herne Hill:* On that basis, confining it to environmental protection and subject to one further question—then I will stop, because there is a limit of how much this Committee can bear of my asking these questions—if that is right and if that is the correct interpretation rather than the Commission’s, it does not seem to me to be against the public order of Europe for a judgment of this kind to be handed down. On the contrary, it is to be welcomed but that, I suppose, is a matter of policy and not of law.

Mr Plender: Yes. I would be interested to hear, perhaps another time, the arguments that Lord Lester would advance for saying it is confined to the environmental field.

Q20 *Lord Lester of Herne Hill:* Only because, as I read the judgment, again and again they are rooting it in the environment in all the paragraphs, which I will not go back over. Can I ask one further question. You put forward the interesting criterion for deciding what should be transnational criminal, ie within EC competence, and what should not be. You suggested that if the mischief crosses frontiers like maritime pollution or air pollution, then it will be justifiable perhaps to have criminal sanctions, whereas if the mischief was confined within one State, it would not be so. I am not putting it in a very refined way, but go back to my example of equal pay for women; a multinational employer discriminating against women in pay would be committing a transnational

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wrong with an offence beyond one State. I simply question whether your ingenious attempt to produce a rational criterion based upon whether it is transnational or not can easily work in practice as a legal standard.

Mr Plender: I think I may need to press my argument to see whether it would work. I am not sure that the example Lord Lester gives of a transnational employer discriminating in relation to pay would destroy my example. After all, the discrimination exists in a number of Member States whereas the injurious act done in an environmental field is entirely haphazard in its repercussions, but if Lord Lester is right in saying the whole judgment can be confined to the environmental area, then it is much less concerning. It is obviously not the Commission's view, and the body of legislation that the Commission proposes to repeal and replace goes way beyond the environment, for example counterfeiting and fraud.

Q21 Lord Borrie: Mr Plender, I would be very interested to listen to the discussion between you and Lord Lester, particularly homing in on paragraphs 48 and 49 of the judgment. As I understood it, when there was a certain agreement between the two of you it was to this extent: that if the Community legislature decides that "the application of effective, proportionate and dissuasive criminal penalties by . . . national authorities is an essential measure for combating serious environmental offences"—that, of course, is a quote from paragraph 48—then I understand you agree that it is not permissible for a Member State to determine that administrative measures and other measures, not criminal measures, would be appropriate, so the choice to that extent is restricted. Then I wonder whether you would agree on this or not or certainly I wonder what your view is: if the Community legislature determines that particular carefully defined matters should be criminal, then the national legislature has no choice on that, and if the Community legislature determines on what the penalty should be then again the national Member State has no choice in the matter. I am not sure whether you are agreed as to that but I would certainly like to hear your views.

Mr Plender: I understood Lord Lester to agree with the view that I have expressed but my view, in any event, contrary to the Commission, is that the Court's judgment does not support the proposition that the Community legislature has the authority to define criminal offences or to prescribe the penalties. In the phrase from paragraph 48 that Lord Borrie quoted, the word that requires emphasis is "application". When the Community legislature concludes that the application of criminal penalties is essential then it can so determine. What it must determine is that it is essential that the Member States

should apply criminal penalties in a certain area. Before leaving the subject, I should acknowledge that there is inevitably a degree of ambiguity in saying that the Community legislature cannot define penalties. Under paragraph 48, the Community legislature can decide that criminal penalties for a certain genus of activity are essential. It must therefore have a competence to state that there is a certain area in which criminal penalties must be prescribed but within that area the definition rested on the Member States.

Q22 Lord Borrie: Can I ask one other question relating to the matter which you did not dwell quite so much on with Lord Lester which is the scope of the judgment as to whether it applies only to environmental matters or something rather broader, and that of course brings in the Commission's interpretation which I noted Lord Lester was not attracted by. The Commission expounded in some detail, and I think in your summary this afternoon you did, on a number of areas, where if the Commission is right, this judgment would be applicable outside the narrower area of environmental matters. I found it very useful reading your evidence that you separated out the Advocate General's opinion, the judgment, and then the Commission's view after the event. It was interesting to contrast the Advocate General's opinion and the judgment, but am I correct in thinking that although the Advocate General concentrated on environmental matters and used that term "the fragility of the environment" as justifying what he was saying, nonetheless, he did not say that his approach was confined or should in the future be confined to environmental matters, rather that that was the subject in front of him. Is there necessarily any disagreement between the Advocate General's opinion and the judgment of the Court on whether it is applicable beyond environmental matters?

Mr Plender: There is a very discernable difference in emphasis between the Advocate General and the Court. The Advocate General had much more to say about the environmental dimension of the case than the Court had. He even, and not for the first time, refers to the Charter of Rights which would form the first chapter of the Constitution for Europe in support of the proposition that environmental factors merit particular attention. That would separate them from other aspects of Community policies. This is not to be found in the Court's judgment. It is true, as Lord Lester says, that the Court uses the word "environmental" on several occasions but it is bound to do so; that is the context in which the dispute arose. Reading the judgment, there is a certain amount to be said for the Commission's view expressed in its communication that the judgment is not confined to the environment,

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and that the reasoning that the Court gives, particularly in paragraph 48, would apply equally well to other areas. The only distinguishing word here is “essential” but I find it unattractive to distinguish between the Community’s essential objectives and its inessential objectives. There must be some way, some objective criterion, for focusing upon those objectives which require prescription of criminal penalties and those which do not. I refer to a controversial area and that is control of migration, an area in which there are currently strongly held differences of views between Member States as to the wisdom of, for example, imposing criminal penalties on employers of undocumented migrants. All of us would agree that this is an important area of policy. All would agree that it is a common policy of the European Community. I look for the standard by reference to which we are to determine whether this is an essential objective so that the Community can prescribe penalties.

Lord Borrie: Thank you.

Chairman: Lord Tyler, have you got any questions at this stage that you want to raise?

Lord Tyler: No.

Q23 Chairman: I want to go back to this definitional element. If it is permissible for the Community legislature to say there must be effective, proportional and dissuasive criminal penalties here for what we are writing about, the Framework Decision, is that not necessarily to some extent definitional because what is it that has to have this criminal sanction attached to it? It must be some language—maybe broad language—in some instrument that is before the Court. Why is that not a form of definition?

Mr Plender: I conceded that point in reply to one of Lord Borrie’s questions a moment ago. Suppose the Council were to decide that all Member States must apply effective, dissuasive and proportionate penalties for the discharge of pollutants at sea liable to cause harm to the shore of a Member State. That still leaves quite a lot of decisions open to the draftsmen of the national legislation. Is it to be confined to negligent or reckless action? Must the harm be foreseeable? Is it to be confined to a certain list of pollutants? Within which area of the sea is the prohibition to apply? and so forth. Having said that, I acknowledge that to describe an area within which there must be criminal sanctions is to take the first step towards definition.

Q24 Chairman: So there the argument is about the precision and the detail into which they could descend. They would be getting very rapidly into the problem of trying to legislate in the field where they have not got the basic information, exactly what happens when there is pollution of oil, the sorts of

perils, what you need to do, what a Member State would know from having had to tackle an oil disaster and spillage. The state would know that; it would be difficult for the ECJ to have that sort of information. I suppose it could get it but it is not obviously there; it is for a Member State.

Mr Plender: I accept that it is a practical matter. In the course of negotiations between 25 Member States there is bound to be a degree of generality and Member States need to be much more precise in order to prescribe penalties.

Q25 Chairman: One last matter before it is Lord Lester’s turn again. You mentioned the reference to the Charter. That is surely no longer theoretical in any way? There have been a number of opinions from Advocates General which have made reference to the Charter. It is a puzzle of course in the part of the Constitution which is now in limbo but it is there as a document. There are references at the highest level, falling short of the Court, to date, but I might be out-of-date. Is that right?

Mr Plender: It is. You are going beyond the subject of the case but I am very happy to—

Q26 Chairman: Is the point not environmental? He picks up the Charter to get environmental out of it.

Mr Plender: He does and it is certainly not the first time that this has appeared in opinions of the Advocate General. The proper controversy, I think, lies over the question of what is the role of the Charter of Fundamental Rights as an aid to the determination of rules of Community law. It is not the same as the European Convention on Human Rights. The Convention is a perfected act, a ratified convention. The Charter has been solemnly declared, as Advocate General Ruiz-Jarabo is keen to say, by the heads of government and of state but not ratified as a legal act. It has a powerful declaratory value. It can therefore be used as a point of reference for determination of common values. I have no difficulty in acknowledging that a point of common values is an aid to the interpretation of an ambiguous provision. It would be otherwise, however, if it were to be given a value akin to a source of law. On 1 October there is to come into force part of the new generation of Community legislation governing treatment of asylum seekers. Asylum is one of the matters covered by the Declaration. Suppose that on the entry into force of the new Community legislation a question were to arise as to the validity of part of it. It seems to me that it would be wrong to determine that question by reference to the Charter but right to determine it by reference to principles common to the law of Member States as demonstrated in the European Convention on Human Rights. In summary terms I have no objection to reference to it. I applaud reference to it as an indication of common

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values. I would resist reference to it as a source of laws common to Member States.

Q27 Lord Lester of Herne Hill: To be fair to the Advocate General, it is just one of his sources that he cited. He did a rather elaborate exercise looking at other things which showed in the international field the importance of protection of rights.

Mr Plender: I have absolutely no criticism in this context. It happens to be a subject that interests me but it interests me in a field beyond the context of this opinion. I have no criticism of his opinion in this context at all.

Q28 Lord Lester of Herne Hill: Can I just do something similar about the Advocate General's opinion to what we did about the Court's judgment because I am simply trying to see what is common ground and what is not. I perfectly agree before I ask my question that the Advocate General roams much more broadly and is far more ambiguous than the Court. The Court does not follow the Advocate General precisely, as is often the case. If one looks at section B at the beginning of paragraph 30 where he reviews the case law on the Community's power to establish penalties, that section goes down to paragraph 37 where he sums up what the Court has said. Just before paragraph 38 he says: "If Community law contains no measures to ensure compliance with its provisions, the Member States have a duty to establish such measures; if it does include them, the Member States acquire a complementary role concerned with reinforcing those provisions. The choice of type of penalty lies with the national authorities, although the penalty must be comparable with that imposed for infringement of domestic law of similar nature and importance, and must in addition be effective, appropriate and dissuasive." Is that an accurate summary of the existing case law?

Mr Plender: I think so, yes.

Q29 Lord Lester of Herne Hill: Then he says in paragraph 38: "... neither the Council nor those who share its view are wrong to argue that the case law does not, explicitly, recognise any power on the part of the Community to require the Member States to classify as criminal offences conduct which hinders achievement of the objectives laid down in the Treaties". Again, you would not disagree with that?

Mr Plender: Not at all. The Advocate General there is expressing a view on submissions that I made along with others.

Q30 Lord Lester of Herne Hill: Then he says in section D, if one can skip to it: "The undefined legal concept of an 'effective, proportionate and dissuasive penalty'", and in paragraph 49: "It must be recalled

that upholding Community law is the responsibility of the Community institutions, although nothing prevents them from urging the Member States to penalise conduct which contravenes that law. It is only in so far as the most appropriate response cannot be provided—because the institutions do not have the information necessary to take a decision—that the task falls to the national legislatures. Conversely, if there are self-evident criteria for determining the 'effective, proportionate and dissuasive penalty', there is no substantive reason preventing the party which has competence in that sphere from making the decision". Again, that is not controversial, is it?

Mr Plender: No, some words require emphasis. There is "nothing that prevents [Community institutions] from urging the Member States to penalise conduct", nor anything to prevent this Committee from urging them to.

Q31 Lord Lester of Herne Hill: Quite, that is why I referred to it. Then he says in paragraph 51: "The next step, therefore, is to ascertain whether environmental protection . . . requires the shield of criminal law", and then the rest of the opinion is looking at the environmental context. My question is, what is there in the opinion with which you would disagree?

Mr Plender: I think the point with which I would disagree is a narrow one which ultimately has a lot of importance. That is, the Advocate General takes it to be self-evident that in the environmental sector the importance of the measure requires criminal penalties. I do not think it is self-evident. It is self-evident that there must be effective, dissuasive measures, but it is not self-evident that that which is effective and dissuasive will always be criminal.

Q32 Lord Lester of Herne Hill: Looking at H, paragraph 71 onwards: "The criminal law response to serious offences against the environment", so he is concerned about serious offences. He goes through his reasoning upon that. He does not say you cannot have administrative measures or fiscal measures. What he says is that for serious offences, serious wrongdoing, there must be dissuasive criminal penalties. Is that not the very reasoning that then follows?

Mr Plender: I think it is. One has to put aside the circularity of the word "offence".

Lord Lester of Herne Hill: Wrongdoing?

Lord Borrie: It does beg the question.

Q33 Lord Lester of Herne Hill: Serious pollution, serious environmental degradation, social mischief but leave out any pre-judging words like "offence". He is saying that the social mischief of serious

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environmental degradation requires a criminal sanction.

Mr Plender: That may or may not be right depending on, among other things, the role and efficacy of criminal law in the state concerned. Where an oil tanker is so navigated as to cause serious pollution, the imposition on the company and crew of the obligation to make good the damage may be more effectively and easily policed and more persuasive than a criminal penalty, which is likely to require a higher standard of proof and may provide means of retribution which are less effective at dealing with the harm than the civil penalty. What the Member State has to ask is, what is most effective? The Member State may come to the conclusion under its system that which is most effective for a serious environmental episode of degradation is civil.

Q34 Lord Lester of Herne Hill: Can I just ask one more question. You did say earlier though, did you not, that you could understand that one Member State being polluted by a source in another Member State might reasonably want a common set of sanctions that could be applied across the board, the choice of means being for the Member State? Taking what you just said, there is nothing to stop Member States from using civil sanctions of the kinds you put forward as well as criminal sanctions, but is there not a very powerful case made by the Advocate General for the need for effective, proportionate and dissuasive sanctions that can have transnational standardisation?

Mr Plender: What I proposed earlier was a means of making sense of the judgment in a way not to leave it to be too broad. What I was suggesting was this: in the case of harm which is transnational, the states get together and try to agree upon a common means of dissuading the conduct, and the common means on which they might agree would be criminal. It then becomes immaterial to ask whether under the laws of one of the parties it would have been more effective to do something civil, because the states have got together to agree on something common and that which is common will not always be most effective under the laws of each one separately. That is a case in which, it seems to me they might say, "we in common decide there shall be criminal penalties". That is one way, it seems to me, one can make sense of it.

Q35 Chairman: There are 25 different Member States. In France, for example, I believe I am right in saying criminal penalties have civil action tagged on at the end of a criminal prosecution.

Mr Plender: You will have noticed in my written paper that I drew attention to a particular constitutional difficulty confronting France as a result of this judgment and although I do teach in

France I am not enough of a French lawyer to see the solution to that problem.

Q36 Chairman: Have they already changed their constitution or are planning to?

Mr Plender: No.

Q37 Chairman: Resisting it?

Mr Plender: Had the referendum gone in favour of the Treaty on the Constitution for Europe, the matter would have been dealt with, but, as we know, the referendum went the other way and there is not going to be a new referendum on this matter in France before the next Presidential election.

Q38 Chairman: That seems right. We have put a lot of questions to you. Are there any other areas? We have covered most of the ground, I believe. Is there anything you want to add arising out of your earlier answers or points you would like to stress?

Mr Plender: No, I do not think so.

Q39 Chairman: I think your position would be that the UK Government should take up the challenge in this single case that is on its way already to the European Court of Justice and should be arguing for the interpretation which you favour and should—I think I have got it right—resist the automatic adoption of new legislation by a quickie process in relation to the other circumstances.

Mr Plender: Yes, although I did not know it at the time when I wrote my written advice, it is now my understanding that the Member States are going to act in the way in which I said I thought they should.

Q40 Chairman: Good. One final question from me. You mention a pending judicial review case here. What impact is that going to have on this field? Will it be put on ice until the ECJ has decided or is it moving forward? Are you involved in it?

Mr Plender: I am not. I mentioned it only because it is going to complicate the first case. The issue taken on judicial review, as I understand it, is that the Directive on Ship-Source Pollution is invalid because it prescribes criminal penalties in circumstances in which they are not envisaged by MARPOL. That was the view expressed by Dr Mensah, the former legal adviser to the IMO and President of the International Tribunal for the Law of the Sea, in last year's Cadwallader Lecture. If he is right then under traditional views of European Community law the Directive would be invalid. The invalidity of the Directive, however, would turn upon a point of public international law, so the matter would have to be referred by an English court, probably the administrative court, to the Court of Justice for preliminary ruling. Concurrently there would be on its way to the Court of Justice quite separate

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proceedings for the annulment of the companion Framework Directive on the ground that it ought to have been adopted under the EC Treaty.

Q41 Chairman: The answer might be consolidation of two sets of proceedings. Is that not possible?

Mr Plender: I do not believe it is technically possible but the Court could simply hear the two on the same day. It complicates the point, however, because you have the public international law argument leading to the proposition that the Directive is outside the EC Treaty and the Commission's argument leading to the conclusion that it could be adopted only under the EC treaty.

Lord Lester of Herne Hill: Could I ask one more.

Chairman: One more and then we must finish.

Q42 Lord Lester of Herne Hill: I am very grateful. While you have been giving your evidence I have been thinking about the European arrest warrant and the way in which—and I am going to use the terrible F-word “federal” for a second—in a sense the European arrest warrant system is based on the notion that there are certain crimes that are federal in the sense that they are so serious that there should be a European arrest warrant mechanism for making

sure that the alleged wrongdoer can be apprehended and tried in one of the Member States. Is not your very interesting approach to serious wrong-doing that might justify criminal law making at the European level a similar attempt to latch on to some kind of wrong-doing so serious or so trans-national that European intervention is justified as distinct from others where you leave it to the states, and is there not some kind of analogy between the European arrest warrant argument and this one?

Mr Plender: I do not think it is a close analogy. In the case of the European arrest warrant it is the seriousness rather than the trans-national nature of the offence that acts as the criterion. The drafting proceeds on much the same basis as an extradition treaty. It is commonplace for there to be either a series of criteria or a list of offences which are extraditable and the European arrest warrant adopts a similar sort of test; is it serious enough for the arrest warrant to apply? The distinction that I had proposed is not on grounds of seriousness but on the trans-national character of the effect of the offence. The analogy is not close.

Chairman: We must release you, Mr Plender. Thank you very much indeed for the very interesting discussion we have had. You will get the transcript. Thank you so much.

WEDNESDAY 24 MAY 2006

Present	Borrie, L Brown of Eaton-under- Heywood (Chairman) Clinton-Davis, L	Lester of Herne Hill, L Neill of Bladen, L Norton of Louth, L
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Memorandum by 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 emphasised, 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 to 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.

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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 a 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 acts 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.

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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 matters, 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;

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- (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 14 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*

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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 harmonised 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 emphasised 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*.

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3.7 *Opt outs*

Since the Article 42 Decision cannot alter the rules relating to 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).

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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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Examination of Witness

Witness: PROFESSOR STEVE PEERS, University of Essex, examined.

Q43 Chairman: Professor Peers, welcome. We are very grateful to you for coming, as you know. You have given evidence, I think, on a number of occasions before. You know our procedures, you know that this is broadcast on the internet and you will get a copy of the transcript, which you will have an opportunity to correct, although, I gather, it will, in fact, be available, subject to subsequent correction, on the web. If I can summarise your own position, you have been, I think, at Essex University for 14 years, now as the Professor of Law. You have written extensively on EU law, not least Third Pillar justice and home affairs matters. I think you have recently been appointed as special adviser to Sub-committee F for its next inquiry into the Schengen Information System and, of course, you are also engaged in Statewatch, an NGO which specialises, amongst other things, in justice and home affairs matters. You have prepared a paper for publication on the Statewatch website on the *passerelle*, which is an enormously helpful background to today's meeting. As you know, the Committee has already embarked on this inquiry, which began principally by reference to the consideration of the European Court's decision, case C-176/2003 Commission v Council, but we have now thought it wise to expand the inquiry to include the proposed use of the *passerelle* in Article 42 and, of course, it is on this latter question that we, in particular, are looking to and gratefully anticipate your assistance. I suspect you have already had an opportunity to read Richard Plender's written submission, he having, of course, been counsel for the UK Government in that particular case, and also the oral evidence that he gave. Have you had that opportunity?

Professor Peers: I have read that, yes.

Q44 Chairman: Therefore you know some of the ground that we have already covered, but can we just have your view also in relation to that matter without

reference, therefore, to the possible implication of Article 42, the likely consequences and impact of the decision 176/03. You have, I think, a list of the proposed questions, and we start with something of an overview, asking first, was that the first time the Court has had to rule on the relationship between the EC Treaty and national criminal laws?

Professor Peers: This was the first time the Court has dealt with the slightly more narrow point, which is does the Community have the power to harmonise national criminal law in terms of substance? It is the first time they have answered that question and they have answered, "Yes", but it is in a specific field to this specific extent. There have been a number of other judgments on a slightly broader question as to how Community law interacts with national criminal law, indicating that Member States cannot criminalise certain acts if to do so would block, for instance, the free movement of goods, and indicating that Member States cannot automatically deport someone or refuse them entry because of a prior criminal conviction. Those are all prior examples of the interaction but not dealing with this very specific point about Community competence.

Q45 Chairman: Because those are really preventing national criminal law from inhibiting Community objectives?

Professor Peers: Yes.

Q46 Chairman: Whereas this is a rather different question, as to how far the Community can require the imposition of criminal laws and penalties by Member States in furtherance of Community actions and objectives. Is that right?

Professor Peers: Yes, it is an essentially different point, Community competence.

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Q47 Chairman: Essentially, how far do you find yourself in agreement with Richard Plender?

Professor Peers: I would have expected that the Court would have given the opposing conclusion, and I would have thought that the opposing conclusion, that the Community does not have criminal competence, is probably the better view, but I am probably not as critical of the judgment as he was. I do not think it was quite so outrageous to reach the view that the Community has criminal competence. Given that the Member States argued that this was not what they wanted to give to the Community as competence, it is surprising that the Court felt that it was. Nevertheless, from a purely legal point of view, there are reasonable grounds to support the Court's conclusion that the Community has some form of criminal law competence.

Q48 Chairman: That is, in a sense, the decision taken, and we are not going to be able, I suspect, to go behind that. The next question is: just how far has the Court gone and, again, how far do you agree with Richard Plender's views as to that?

Professor Peers: First of all, I would agree with him that the scope of this judgment almost certainly goes beyond environmental law. It is not perhaps clear quite how far beyond environmental law and what sort of grounds you have to show to demonstrate the existence of Community criminal competence in other areas of Community law, but I feel quite sure there are at least some areas, and perhaps even all areas of Community law, where the community has, in principle, a substantive criminal law competence.

Q49 Chairman: There are two areas of uncertainty or ambiguity as to how far the Court's judgment reaches. One is that to which you have just alluded, whether it is confined only to competence in the environmental sphere, Article 175 particularly, or extends to other, and if so what, Community objectives; and the other is just how far has the Court gone in saying that the Commission has power to, so to speak, define offences and prescribe penalties, as opposed to, in more general terms, merely saying these matters must be attended by a criminal sanction?

Professor Peers: To answer the first question, I think, at the very least, Community criminal competence must encompass the internal market as well, and that is based on the way that the Court talks about the environment being one of the essential objectives of the Community. Surely, the internal market is equally or even more so an essential objective. There is also a point at which the Court talks about a particular paragraph in Article 175 restricting environmental powers, and perhaps there might be implications from that. Equally, there is a paragraph of Article 95 that restricts clearly internal market

competence and makes no exclusion for criminal law, and so you could equally derive an assumption from that that the Community has a competence there which would in practice cover many of the cases in which the Commission has sought in the past to argue for Community legislation imposing criminal sanctions. Another area which, I think, quite obviously would be subject to the Community's criminal competence is illegal immigration. The only point in the Treaty at which the word "illegal" is used is Article 63 of the EC Treaty, The Community has specific powers to combat illegal immigration, and that, of course, suggests that a competence exists there in relation to criminal law, not necessarily, but there is a strong suggestion, I think, from that. Those would be the two main areas and, I think, arguably there are others as well, but certainly those.

Q50 Chairman: Just before we move to the second question, I think Mr Plender sought to draw a rather different distinction. I am looking now at paragraph 53 of his written submission, but he addressed it also in his oral evidence. What he suggested was that one could draw a distinction between those common policies in which it was necessary to establish a common form of deterrent, that is to say a criminal penalty, and those in which it is not. Where the conduct in question is liable to affect two or more Member States concurrently or haphazardly, the Community legislature may consider it necessary to establish a criminal penalty. That is the case with environmental offences, but it is a special case. Do you yourself find that a convincing or persuasive distinction and a likely basis upon which this judgment can sensibly be applied and restricted?

Professor Peers: I do not see anything in the judgment which seems to articulate a test like those that he suggested, and on that second test in particular, the principle of subsidiarity seemed to suggest that the Community can act outside its exclusive competence if an issue affects more than one Member State sufficiently. That is the principle justifying all Community actions, so to say it justifies criminal law does not necessarily restrict the criminal competence of the Community at all. That would be my answer to that. If we are going to try and find a restriction, it is not clear from the judgment what it would be.

Q51 Chairman: It looks to be a wider application than Mr Plender was there envisaging?

Professor Peers: Possibly. It is not perfectly clear from the judgment where we could draw a conclusion.

Q52 Chairman: You were about to turn to the other area of ambiguity or uncertainty?

Professor Peers: I think the Community must at least have the power to define what criminal offences must be prosecuted by Member States. It is not so clear

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from the judgment whether they can go beyond that all, first of all, to prescribe the particular penalties that have to be attached or, in addition, to address issues like jurisdiction or procedural issues or things like extradition or joint investigation teams, as the Commission has done in an intellectual property directive proposal recently. The further you get out from that core question of defining the offence, the less likely it is that on this judgment you could justify Community action, particularly because of paragraph 49 of the judgment, which does seem to lay some stress on the fact that the Framework Decision does not specify the exact criminal penalties which must be applied. That decision seems to suggest the Community cannot do that, and that is an important point, because nearly every Framework Decision that deals with substantive criminal law, all but two, this one and the Framework Decision on credit card and debit card fraud, in fact specify penalties, the minimum maximum penalty which Member States have to apply in order to enforce the criminal offence. If that is correct, that would mean that only a couple of Framework Decisions are suspect from the point of view of Community competence, because only this one and the other one restrict themselves to defining an offence without also defining a penalty.

Q53 Lord Lester of Herne Hill: I hope my question does not shock, because it is not a question in a legalistic or lawyerly kind of way, it is a question about policy. Leaving aside interesting questions about *vires* and about the *passerelle*, which we will come to later, and focusing on public policy, what is objectionable, if anything, about the Court of Justice saying that the Community legislature, provided that it applies effective, proportionate and dissuasive criminal penalties, may do so as an essential feature for combating environmental pollution, et cetera, leaving the choice of means, whether administrative penalties or other forms of criminal penalty, to the Member State? What do you think is objectionable, if anything, about that approach as a matter of policy?

Professor Peers: I think there is a strong policy argument to say that in principle it should be for national legislatures, therefore meaning a unanimous vote in council, to define substantive criminal law in the Member States, because criminal law is an essential element of state sovereignty and it is an essential part of the relationship between the state and its citizens or subjects and, therefore, it should be essentially the national legislature which determines criminal penalties.

Q54 Lord Lester of Herne Hill: Maritime pollution, air pollution, other forms of harm, serious harm, to the citizens of Europe do not stop at national frontiers, do they?

Professor Peers: No.

Q55 Lord Lester of Herne Hill: They require, do they not, transnational co-operation and a congruence, at least, about ends, if not about choice of means, ends being strong dissuasive sanctions to ensure that the transnational problem, or the cross-border problem, can be effectively tackled. Would you say that is an important element of public policy to be considered?

Professor Peers: I think it is.

Q56 Lord Lester of Herne Hill: Apart from national sovereignty?

Professor Peers: Yes, but I think in almost every case, and the two exceptions I would make would be the Community's financial interests and the counterfeiting of the Euro, where the Community's interests, I would say, should trump the Member States, otherwise the more persuasive argument to me as a matter of policy is that national legislature should have the final word on what should be criminalised and, of course, leaving it open to the possibility of international co-operation but subject to the consent of states and to the decision of the national legislature to make a particular act criminal.

Q57 Lord Lester of Herne Hill: Why do you say that is true of the internal market, where you recognise that what I call transnational considerations have to apply, including, where necessary, criminal sanctions, but not, for example, of protecting the health, life and safety of human beings against serious environmental harm caused by gross misconduct?

Professor Peers: Of course, the Community has already, by qualified majority, adopted a lot of measures requiring Member States to prohibit the environmental infringements. The question is whether or not by a qualified majority it should require Member States to adopt criminal sanctions to that end, and that is where I draw the line, where I think in principle it should be for national legislatures to act, subject to the consent through the international system, whether at the EU Third Pillar level or the UN or Council of Europe, but essentially it should be for national legislatures to have the final say with regard to criminal law.

Q58 Chairman: Under this present decision, to what extent do you understand it as according to the Community, and possibly by a qualified majority, the ability to specify precisely what will constitute criminal offences?

Professor Peers: It is a little bit ambiguous, but I do not see anything in the judgment to rule out the Community being relatively specific in determining what precise action should be defined as a criminal offence by a Member State, although directives can

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always be elaborated upon by their very nature. 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. If you look at the money-laundering directive, for instance, if you added a provision saying you need criminal sanctions in relation to money laundering, then you have got a very tightly defined definition of money laundering which that would be attached to.

Q59 Lord Lester of Herne Hill: I think I asked this question of Mr Plender as well. If you look at paragraph 49, as you yourself said, the Court expressly makes the point there, does it not, that the Framework Decision itself leaves to the Member State the choice of the criminal alternatives to apply, although the penalties would be effective, proportionate and dissuasive. Is that not the same kind of language as they have always used in directives, for example? Are they not saying, "We note in the Framework Decision that that is the position and that is how we broadly determine the border between competence and incompetence, lack of competence." It is about the choice of ends being dissuasive and criminal in some sense, but leaving the choice of means to the Member State. Is it not fairly clear that is what the Court has in mind? I think you made the point in your opening.

Professor Peers: Yes, but I think they are making a point in relation to penalties. As I read paragraph 48, they are saying the Community may define criminal offences. In paragraph 49 they are saying, however, penalties are a means to an end which is, therefore, defined by Member States. It leaves to Member States the choice of the criminal penalties to apply.

Q60 Lord Lester of Herne Hill: If you go back to where they refer to what is in the Framework Decision in paragraph five of their judgment, those matters are all matters that anyone would regard as involving serious anti-social conduct, are they not? Are they not saying that for those kinds of matters, which are all listed there, there must be effective dissuasive sanctions but the choice remains with the Member States?

Professor Peers: Yes, but in paragraph 48 they say that the Community has the power in effect to require those acts to be punishable by criminal sanctions, which goes beyond simply saying, as the Court has said since the 1980s, that any Community prohibition should be followed up by effective measures and proportional measures, and so on. It is something again to say those measures must include criminal sanctions about the Community's competence to require that there must be criminal penalties in particular to enforce the prohibition.

Q61 Lord Lester of Herne Hill: If the Danube or the Rhine is being heavily polluted, to make up a hypothetical example, by a sufficient number of Member States to be able to veto a majority decision, on your view, because of considerations of state sovereignty, there would be no Community competence to be able to tackle it by insisting that there must be effective dissuasive criminal sanctions to stop the Rhine or the Danube from being destroyed by pollution?

Professor Peers: Are you asking me about the policy or about the law?

Q62 Lord Lester of Herne Hill: Both the policy and the law, because I think they go hand in hand?

Professor Peers: I interpret the judgment to say that the Community would have the competence to require Member States to impose criminal sanctions to define the offence but not to specify what the penalties had to be. I agree that there should be effective criminal sanctions against major environmental disruptions like that. As a matter of policy, I do not think Member States, Parliaments and governments should be overruled in almost any case as to a decision whether to make an act an offence or not.

Q63 Chairman: In the Commission's communication on the implications of the Court's judgment, professor, at paragraph 10, the Commission understand this decision to say that the Commission itself can define the offence, that is the constituent elements of the offence, and, where appropriate, the nature and level of the criminal penalties applicable. To that last phrase in the footnote there is a reference to the four levels of approximation of penalties habitually used following the conclusions of the JHA Council. Do you think that reads too much into the judgment?

Professor Peers: In the light of paragraph 49, which I have already mentioned, which seems to rule out extending the Community's power to criminal penalties as such, then, yes, that does read too much into the judgment, although the Commission now has a chance to test its argument in the follow-up case on the Shipping Pollution Framework Decision, which does specify particular criminal penalties, so we should have an answer to that question.

Q64 Chairman: But when, roughly?

Professor Peers: They brought the case last autumn, so, unless it is accelerated, it might be another year and a half before we have an answer.

Q65 Chairman: Does anybody want to ask anything further on this first leg of it, namely the scope and implications of the existing decision before moving to the *passerelle*? Then, perhaps we can move to the

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passerelle, which may or may not, so to speak, overtake the pollution case to which you have just referred. As I understand it, the Commission has already indicated that it is proposing to make a proposal under Article 42. Is that right?

Professor Peers: Yes, they produced a paper a couple of weeks ago saying that specifically.

Q66 Chairman: Do we know when that will be forthcoming?

Professor Peers: My understanding was some time in the summer. I think it was indicated some time in June or July.

Q67 Chairman: That is necessarily the initial step. The Commission propose to transfer, not necessarily all the Third Pillar but some. What are we anticipating? Do we know yet?

Professor Peers: The Commission had said it is going to propose that some Community methods apply to the Third Pillar. I am not clear whether they mean they are only going to suggest that some of the Third Pillar be transferred or, rather, whether they are going to suggest the whole thing be transferred but only some of it would be subject to qualified majority voting. I think it would be a terrible idea to transfer only some of it. If you are going to transfer, I think it should all be transferred, because it would be quite difficult to work out exactly what has been transferred and what has not, and everything that is now in the Third Pillar is quite closely connected and extracting parts of it would be like taking eggs out of an omelette, I think. You may as well do the whole thing if you are going to do it.

Q68 Chairman: That is what you understand is likely to happen?

Professor Peers: I am not absolutely certain, but I would have thought that, since it is clearly a much better idea to transfer the whole thing but just to distinguish between what is or is not subject to qualified majority voting, that would be the route that the Commission would take not, and also is more far-reaching. I think the Commission would tend to support a more far-reaching approach than a less far-reaching approach to these issues.

Q69 Chairman: You also mention in the introduction of your paper that they contemplate proposing qualified majority voting for illegal migration law, which, of course, is already First Pillar, as I understand it, not Third Pillar. Is there any interrelation, any interconnection between those two proposals?

Professor Peers: No, there is not any interconnection, and there is also a distinction in the decision-making, because the migration decision would not be subject to national parliamentary procedures of approval,

whereas the decision on the *passerelle* would be; so they would be two quite different acts.

Q70 Chairman: It is a more problematic step to get through an Article 42 decision?

Professor Peers: Yes, because it is not just the unanimity of the national governments, it is also subject to national procedures of approval, which may then block the Government's decision in exactly the same way that they have with the Constitutional Treaty.

Q71 Chairman: Looking at the questions specified, the procedure under Article 42, I think you have set out helpfully in paragraph two. There has got to be a proposal by the Commission, there has got to be a unanimous decision, that has got to be approved by the various national procedures. In this country we would have to have primary legislation and no doubt some countries would have to change their constitution, would they, and so forth?

Professor Peers: I would expect some would have to change their constitution.

Q72 Chairman: But only if all 25 agree to this and achieve this would it be effective to transfer Third to First Pillar. Is that right?

Professor Peers: That is right, yes.

Q73 Chairman: Do you have any idea at this stage of the prospects of achieving it?

Professor Peers: From various press reports, it seems like the French and the Dutch, the British Government would at least consider it, and the French have actually proposed it, the Finnish Government support it, but apparently the German government has reservations. I have not seen any indication of what other governments think. It may be clearer after this weekend, when there is an informal foreign ministers meeting, and after the summit in a few weeks time of the EU leaders, exactly what the prospects are.

Q74 Chairman: Generally speaking, does one get the impression that Member States are, in principle, more comfortable with this proposal than with the Constitutional Treaty as a whole?

Professor Peers: Certainly some Member States would prefer the Constitutional Treaty as a whole, but some Member States, either thinking it is unfeasible to go back to Constitutional Treaty, particularly those states that have rejected it or were not desiring the Constitutional Treaty in the first place, which is perhaps our Government's position, would probably prefer to go ahead with this instead. I have not seen full information on different national governments' positions in the press, so it is really quite hard to summarise the overall view.

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Q75 Chairman: Generally speaking, in terms of what one might think is the transfer of sovereignty or anything of that character, it involves less, does it, than the Constitutional Treaty?

Professor Peers: Yes, you would only be tackling the specific issue of policing and criminal law; therefore no-one would be able to argue about the word “constitution”, no-one would be able to argue about what the economic or social implications might be, as they did, particularly in the French referendum, no-one could raise concerns about foreign and defence policy, because all this would, of course, be completely unaffected, whereas the Constitutional Treaty deals with it one way or another. So, you are separating out a complete, distinct issue, and it seems that public opinion polls continually suggest, for a number of years, that there is very strong support for EU action in this area.

Q76 Chairman: For Community action?

Professor Peers: Yes, European Union action. The question put to the public is never quite so precise as: Should this issue be transferred to the First Pillar? But the general idea, leaving aside which pillar deals with it, that the EU as whole should have a lot to do with combating terrorism and organised crime, for instance, gets traditionally strong support, 80% levels of support, from the public. It might differ in each Member State but it tends to get very strong levels of support, so that is probably the assumption underlying the Commission’s idea to propose this. I think they make it explicitly clear that the European citizens expect more effective action and the Dutch and the French are behind them considering this proposal.

Q77 Chairman: The reason why, if you make the transfer, you are more likely to get effective action against terrorism and organised crime, and so forth, is principally because, what, you no longer need unanimity, you can go to qualified majority voting?

Professor Peers: Yes, it is well-established that qualified majority voting is more efficient than unanimity and more likely to get a decision more quickly and you are more likely to get a decision of a higher level of ambition, if you want to call it that, than unanimity, where you have got the lowest common denominator. Of course, if you have a trade-off against that, there is a trade-off against legitimacy, especially national level legitimacy, because qualified majority voting means Member States losing their vetoes.

Q78 Chairman: Quite, but, of course, as you point out, under the Article 42 procedure member States will determine the relevant voting conditions, and so it will not necessarily involve qualified majority

voting, or it will not necessarily do that across the board or with instant effect and all the rest of it?

Professor Peers: That is right. It would seem to be open to the Council to determine all sorts of possible options as to how much qualified majority voting will happen and when. It will be subject to an emergency brake procedure as well perhaps.

Q79 Chairman: I suppose the consequence is that the more conditions that you attach, taking it out of the routine First Pillar qualified majority voting pattern, the less effective will be the transfer in terms of achieving the objective of more efficient combating of terrorism and crime?

Professor Peers: That is true, but I think there does have to be a balance between the efficiency objective and the legitimacy objective, which you could achieve, I think, by an emergency brake and also, of course, by having co-decision of the European Parliament and changing the rules and Court’s jurisdiction and getting legitimacy through those other means as well.

Q80 Chairman: What is the impact of all this on the fact of co-decision under the First Pillar?

Professor Peers: Again, presumably the Council would be free to decide how much co-decision applies to the issues of policing and criminal law. Obviously, the European Parliament would say it should follow the normal rule, which is that you almost always have co-decision in conjunction with a qualified majority vote on legislative matters, but the Council might decide otherwise; it might decide to have only a consultation. So, it would remain to be seen what the *passerelle* decision actually sets out on the issue of co-decision.

Q81 Chairman: What is the logic of having co-decision or qualified majority voting? Is that to give some democratic legitimacy?

Professor Peers: The logic is that if you have qualified majority voting, national parliaments effectively cannot commit their government to a particular line of action any more, because the government would just be out voted. Therefore you need some other form of democratic legitimacy; therefore you have to associate co-decision with qualified majority voting so at least the European Parliament has the parliamentary role rather than national parliaments—issues like tax, unanimity applies therefore, national parliaments, have a key role on an issue like that.

Q82 Lord Lester of Herne Hill: You spoke about the tension between efficiency and legitimacy, I think. When you have very serious problems like terrorism or environmental destruction which cannot be tackled one stage at a time but require common

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action, would it be right that the more bureaucratic obstacles one puts up in the way of effective common action to tackle terrorism or environmental pollution, the less legitimate in one sense the law-makers and enforcers become, because the European citizens realise that these major problems are not being tackled properly. If that is right, and I see you nodding, is it not in the wider public interest, leaving aside concerns about precious state sovereignty for the moment, to reduce the obstacles to effective action in the areas of really serious wrongdoing that crosses boundaries?

Professor Peers: I think there is a way to bring together or reconcile the tension between legitimacy and efficiency, and the way to do that is to have an emergency brake system, as in the Constitutional Treaty, that would apply. So, you would have qualified majority voting, therefore you have got efficiency there across most of the areas of criminal law and policing, but on the other hand you should have an emergency brake there, in my view, which would allow Member States to say, if there is a fundamental principle of our criminal law, our perception of human rights, for instance, being threatened here, then we are going to stop discussions, although the other Member States, if there cannot be a solution, could then go ahead and adopt measures without that Member State, with such conditions as the Constitutional Treaty provides for. I think that is therefore a balance. You have got the efficiency of qualified majority voting with the legitimacy of saying there is that kind of fundamental state sovereignty interest which you could tie into national parliaments. You could provide in national legislation, in the European Communities Act, for instance, that it is our national Parliament, one or both chambers, which decides whether our Government, or at least it could decide—maybe the Government would decide by itself but also the national Parliament could decide—whether it is going to pull the emergency brake because they have at this point misgivings about the state of negotiations on this particular measure. So, that would be a way of achieving both objectives. I would not describe parliamentary involvement in the adoption of criminal law or policing legislation as a bureaucratic obstacle. I would describe it as an essential element that we just cannot live without, even if it means things are less efficient, even if it means that fewer operations are undertaken as quickly as you might want them to be because of delay in changing the law. It is necessarily the case, in the sort of society that you want to protect from terrorism, that this is a democratic society governed by the Rule of Law in which Parliaments have a decisive say in deciding criminal law and policing legislation, the powers of the courts and the police and the position of people who are detained. All of

that is fundamental and should not be seen as a bureaucratic obstacle but as something we should celebrate as an essential part of our society and should be reflected in any use of the *passerelle*.

Q83 Chairman: Coming to question 10, in a sense we have, I think, already addressed this, I think you are saying that the transfer would not necessarily involve co-decision by the European Parliament, but it would be likely to, and you, for your part, would regard that as desirable to supply the democratic element to the process if you are getting rid of the national vetoes?

Professor Peers: Yes. I think this is an opportunity to have a sort of dual parliamentary control, because national parliaments, as I said, could be given the capacity to be involved for the emergency brake system by requiring the government to stop discussions if they have a fundamental problem with what is going on, and, equally, the European Parliament would have its role under the co-decision procedures. So, it would be unprecedented under Community law that you would have that level of involvement of national parliaments, but I think that would be entirely appropriate given the subject matter.

Q84 Chairman: You have dealt with question 11. Question 12: the question of the right of initiative. If you transfer to the First Pillar, ordinarily, as I understand it, the Commission has the monopoly of the right of proposal, the right to initiate decision-making. Is that necessarily something that the Member States would therefore lose after transfer?

Professor Peers: As I interpret Article 42 of the Treaty, the Council can only determine voting conditions and not anything else; so the answer to that question is it depends on whether you interpret voting conditions cover the position of the Commission in making proposals or not. Perhaps on a fairly strict interpretation it would not cover the Commission's position; under a wider interpretation it probably would. The Commission might propose, of course, from its point of view, that it should have a monopoly and then the Member States during the discussion of the *passerelle* may be inclined to say that it should share its monopoly, as the Constitutional Treaty provides for in this area.

Q85 Chairman: If you went down the Constitutional Treaty route, then Member States would retain their power to initiate proposals?

Professor Peers: Yes, although it would be qualified. It would have to be a quarter of them. You would have to get seven.

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Q86 Chairman: I see that, but if they go down the Article 42 route, because I think you say in paragraph 3.3 at the bottom of page four of your paper you do not find the argument a very convincing one for saying that they would be able under the Article 42 rubric of determining the relevant voting conditions to maintain their own right to initiate proposals, they would actually be likely to lose that?

Professor Peers: I do not find it convincing that the Council can do anything except decide on voting conditions. It is just about possible to argue that the Commission's position is a voting condition. At least in English it does sound unusual to say that is covered by the concept of voting condition, but in other language versions of the Treaty there is likely to be a different phrase used, not in the French text, but there are another 18 language versions which might suggest a slightly wider concept of voting conditions than the words suggest in English. It might just be possible to argue that, and it might be crucial to Member States' acceptance of a *passerelle* decision that they do retain a shared right of initiative; it may be a deal-breaker for some of the states.

Q87 Chairman: Would they have to amend the Treaty in order to achieve that?

Professor Peers: They can just interpret the Treaty in a certain way, which might be doubted, but if all the Member States can agree on it and it satisfies concerns that would otherwise exist, that would lead to a veto of this proposal, then who is going to annul it? It may be the Commission or the Parliament would, in fact, but they would probably turn a blind eye as well because otherwise the transfer would not happen.

Q88 Chairman: Turning to question 13, the legal effect of policing and criminal law measures if the *passerelle* were used, in terms of direct effect, as I understand it, First Pillar legislation does have a direct effect, the Third Pillar not. Is that right, broadly speaking?

Professor Peers: Yes.

Q89 Chairman: So the consequence would be to give these measures direct effect?

Professor Peers: That is right, and also supremacy over national law and national constitutions.

Q90 Chairman: The two go hand in hand?

Professor Peers: Not necessarily. There are some examples, like the position of the World Trade Organisation in Community law where you have supremacy but not direct effect, but essentially the basic characteristic of Community legislation is that it has both supremacy and direct effect.

Q91 Chairman: Then we come to question 14, which is rather tricky: what are the consequences following the use of the *passerelle* on the jurisdiction of the European Court of Justice? This is the subject of your lengthy and, I found, I have to say, not altogether easy to follow paragraph 2.4. Perhaps you could start by giving us the simple answer, the simple man's answer to that question 14?

Professor Peers: At the moment you have got three different jurisdictions in the Court of Justice. You have got a normal Community law jurisdiction under which, among other things, every national court can send questions, you have got a restricted version of that as regards immigration, asylum and civil law and you have got an even more restricted version for some aspects as regards policing and criminal law. The effect of transferring policing and criminal law to the EC Treaty is that it has to be transferred to join immigration, asylum and civil laws. So, in principle, the same rules as immigration, asylum and civil law, as regards the Court, would apply to policing and criminal law; but there is also a clause that the rules on immigration, asylum and civil law can be adjusted by the Council acting unanimously. Therefore, they could decide, having moved over policing and criminal law, or even before hand, to adjust the rules relating to the Court in that area and the adjustments would therefore apply to policing and criminal law as well; or they could decide to divide up the issue and have different Court of Jurisdiction rules for immigration, asylum and civil law on the one hand and policing and criminal law on the other, and even more divisions, if they wanted, which I think would be undesirable, but it is something which they could do. I think the Commission is going to propose that the normal jurisdiction should apply to the whole area of justice in home affairs, immigration, asylum or civil law and policing and criminal law, and I think that would be by far the best solution, but whether that is agreed or not is another question.

Q92 Chairman: Do you have the impression that again Member States, generally speaking, are happy and confident in the Court having wider jurisdiction than they presently have, or do you sense that perhaps they are cautious about giving further jurisdiction to the ECJ?

Professor Peers: They were willing in the Constitutional Treaty to sign up to extending the Court's current normal jurisdiction to the whole area of justice and home affairs with one relatively minor restriction relating to policing matters, where the Court would have no jurisdiction over the validity or proportionality of policing action, but, otherwise, the entire normal jurisdiction of the Court would apply. So, if they were willing to agree that in the Constitutional Treaty, perhaps they would equally

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be willing to agree it within the framework of the existing treaties, as they can do.

Q93 Chairman: As you have set out at page six, the current powers of the Court over Third Pillar matters are obviously less than underneath the First Pillar, the references on the ability and interpretation of EC law only with the discretion of Member States. For example, the United Kingdom has not exercised its discretion in favour of granting that right to refer. That is right?

Professor Peers: Yes.

Q94 Chairman: Secondly, the annulment action. As I understand it, 176/03 is brought pursuant to that by the Commission. Is that right?

Professor Peers: That is right, yes.

Q95 Chairman: Dispute settlement proceedings. That is not a very large area of the Court's business, is it?

Professor Peers: It has never had a single dispute settlement.

Q96 Chairman: There has never been such a case?

Professor Peers: No, not under Article 35 of the EU Treaty or any prior conventions, no.

Q97 Chairman: I may be being rather obtuse, but at the moment under the First Pillar, immigration, asylum and civil law, you say the Court has different jurisdictional powers than over other First Pillar matters?

Professor Peers: That is right. The only difference relates to references from national courts, that is that only final courts can send questions to the Court over immigration, asylum and civil law. In other words, infringement proceedings, annulment actions, and so on, are all exactly the same.

Q98 Chairman: When did that difference happen?

Professor Peers: It happened when immigration, asylum and civil law became part of Community law from May 1999 when the Amsterdam Treaty came into force, but the Council can change that, and, in fact, it "shall" change it, according to the Treaty, as from 2004, but it has not done so yet.

Q99 Chairman: So this adaptation relates explicitly, does it, to that area of the Community's business: immigration, asylum and civil law?

Professor Peers: Yes, but if you added policing and criminal law to the EC treaty, it has to be added to that part of the Treaty, to Title IV of Part Three of the Treaty, which presumably means they would be covered by that adaptational clause and by the other provisions on the Court's jurisdiction.

Chairman: I think I do begin to understand. Thank you very much.

Q100 Lord Lester of Herne Hill: I do not know if I am irritating by asking too many questions. I keep asking, what I really am asking is plain person questions rather as though I am a lawyer. What strikes me is, as my Lord Chairman quite rightly is saying, how complicated the position is at the moment, and all the time I am thinking about the new Member States and their judges and their legal profession and their citizens, and what is going through my head as we speak is, whatever is the right or wrong decision about these matters, is there not an overriding public interest in making the whole system as user-friendly and intelligible as possible so that in the new states as well as the old ones you can actually understand the system that they have to operate. Therefore, given that we have not got a Constitutional Treaty, whatever the right or wrong answers in the exam paper, is not the one thing that is perfectly clear that we cannot go on with this high degree of obscurity and technicality in the framework, both on the jurisdiction of the Court and on questions of law-making competence?

Professor Peers: I agree entirely. That is one of the reasons why I say the best solution would be to apply the normal Community law jurisdiction to all these matters as far as possible.

Lord Lester of Herne Hill: That is what I am really getting at.

Q101 Chairman: Can we turn to the implication of the use of the *passerelle* on the opt-ins or opt-outs that we have got in the UK, Ireland and Denmark? Presumably, if everything is transferred to the First Pillar, automatically the provision for opt-ins or opt-outs continues to apply, or may that be up for negotiation in the process?

Professor Peers: As I said before, I think the Council can only decide on voting conditions, and that is distinct from the issue of participation, although that has an impact, obviously, on who can vote, but that is still distinct issue from the voting conditions, and so, therefore, they cannot adjust the opt-outs; and because our opt-outs relate to Title IV rules for immigration, asylum and civil law, they would therefore relate to policing and criminal law if it is transferred. Therefore, these rules would equally apply to policing and criminal law in the future, whereas at the moment we do not have an opt-out on policing and criminal law, we have a veto instead.

Q102 Chairman: But that might be thought to make the whole process more palatable for us?

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Professor Peers: Yes.

Q103 Chairman: We would have less objection to that because there it is, we lose our veto, but we retain our opt-out, but that would not be a consideration available to those who do not already enjoy their opt-outs. Is that right?

Professor Peers: That is right. There is no way you could give any new opt-out to Member States who do not already have one, as I understand it, by means of the Article 42 decision; but then again, if you have an emergency brake, that is not exactly an opt-out, but it would function to some extent in the same way as an opt-out, because once the state has pulled it and the discussion ceases, unless there is a deal, of course, as a result the other Member States can go ahead without them, and that, in effect, is the same result as an opt-out would have, and in the UK we would end up having potentially both. We could opt out at the beginning or we can opt in and then pull the emergency brake, having decided we do not like the way the discussions have gone, and then they would go ahead without us, and so you still have two bites at opting out.

Q104 Chairman: We would have the best of all possible worlds?

Professor Peers: Yes, it would be a pretty good deal for the UK, and we would only have one of those things under the Constitutional Treaty. We would not have the opt-out except on tax for policing and criminal matters under the Constitutional Treaty; so this would actually put the UK in an appreciably better position than under the Constitutional Treaty.

Q105 Chairman: Do you think those who are currently interested and will negotiate our position here are alive to these advantages?

Professor Peers: I think so. Perhaps that is one of the main reasons why, according to the press, the Home Office and the Foreign Office seemed to be willing to consider the issue. I do not think they would be wildly thrilled to discuss the issue if it was a simple application of qualified majority voting, but if you have the emergency brake and certainly if you automatically have the opt-out, then it is much more attractive to the public and to parliaments, I think, as well.

Q106 Chairman: Unless anybody has anything on those questions, can we move to the last section of the questions, the overlap and constitutional issues. Question 16: are there any implications for the Schengen agreement? Do you envisage any problems or difficulties?

Professor Peers: I would not imagine there would be any problems. It would probably be easier to adopt measures building on the Schengen acquis, as it is

called, once you had the transfer, because you no longer have the Schengen measures divided up among the First and Third Pillar. All future Schengen measures would be in the First Pillar, almost entirely in Title IV, so therefore things would actually be simpler. Instead of having a long regulation and a long decision on the Schengen Information System which cross over and overlap with each other, you could have one act. It would be quite straightforward. Therefore that is not a fundamental problem.

Q107 Chairman: I have just been rightly rebuked for having omitted to ask you to deal with the specific position of Denmark with regard to their opt-in under question 15. Do any different considerations apply there?

Professor Peers: They are in a different position, because they cannot opt into individual measures like the UK and Ireland. In principle they have to opt-out of almost everything in Title IV, except a few visas issues, so they would have to opt-out of all the policing and criminal measures in which they would be participating now. If those measures build on Schengen, they can apply them as a matter of international law. Otherwise they are not associated with them at all, but it seems to me, of course, they could still, nevertheless, if they liked the look of the Framework Decision on terrorism, for instance, decide to amend their national law to suit it; but it does mean that if there is an arrest warrant in future, if it got amended, then Denmark would be covered by the existing Framework Decision but they could not be covered as such by the directive amending the European arrest warrant. What has been done at the moment is to actually have treaties between the Community and Denmark associating Denmark with certain issues of civil and asylum law; so I suppose you can do that in relation to aspects of criminal law and policing, you would have a Community treaty with Denmark, an association with a Member State, which is rather bizarre, but it is an established practice which could be extended after the application of the transfer decision.

Q108 Lord Lester of Herne Hill: Professor Peers, you describe our position in Britain in having opted out of Schengen as being advantageous and I understand that. It seems from a defensive point of view to those who regard encroachments from the European Union as undesirable *per se*, but are there not benefits which people of this country lose by virtue of the fact that we have opted out of Schengen?
Professor Peers: I was talking not just about Schengen but about all the other immigration and asylum measures.

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Q109 Lord Lester of Herne Hill: I meant only Schengen.

Professor Peers: Yes, there would certainly be some advantages to fully applying Schengen. We already apply the criminal law and most policing parts, but I think there would certainly be a strong case in favour of fully participating in Schengen. I think the threat that would arise from abolishing internal border checks with other Member States is probably overrated and there would be advantages to the freedom of travel that we would enjoy and that everyone living in the UK would enjoy to other Member States and from other Member States to us. There would be disadvantages because of adding some defects with the Schengen Information System and because we would largely have to extend our visa list to cover a number of Commonwealth countries which are now not subject to visa obligations, so there would be a mix of positive and negative aspects to fully participating in Schengen.

Q110 Chairman: How would the use of the *passerelle* affect Member States' competence to conclude agreements with non-EU States in Third Pillar areas?

Professor Peers: As I understand it, the external competence of the Community would apply, so once the Community had acted internally Member States would lose external competence to conclude treaties. To the extent the Community has fully harmonised something, Member States have fully lost their external competence, but if the Community partly harmonises something, Member States have partly lost their external competence, meaning both the Community and Member States would share competence to conclude treaties. In fact, if that were to be the case, almost any future negotiations certainly at a multilateral level within the Council of Europe, for instance on international criminal treaties would involve both the Community and the Member States. There might be certain specific issues where the Community would enjoy exclusive competence, perhaps on issues like competing extradition requests, that would derive from a Directive on the European arrest warrant, for instance. In effect, that would create exclusive competence on the issue of priority over arrest warrants, so there would be a significant impact, but since there would only be a handful of areas where exclusive competence of the Community would apply it would still leave Member States the capacity to veto

international treaties and a fair amount of latitude to exercise their competence in international negotiations.

Q111 Chairman: Finally, a matter we have already touched on, if you are going to go through the Article 14 process, the need on the part of all 25 States to complete any necessary constitutional requirements. Do you happen to know of any specific difficulties that would be faced by any particular Member State?

Professor Peers: I do not know precisely what the arrangements are in particular Member States. One thing I would emphasise is the importance of looking closely at the European Communities Act amendment that would go through in this country because there are some interesting issues that would arise. For instance, this would be an opportunity to have greater parliamentary control over the use of the opt-in or opt-out from legislation in this area, including immigration and asylum legislation. It would be the opportunity to provide for parliamentary control over the emergency brake being pulled if it is included as part of the *passerelle*. We should, I think, resist any idea that the current restriction upon imposing criminal law sanctions by delegated legislation which exists in the European Communities Act should be dropped. Just because we have criminal law now more fully in parts of the European Communities Act does not mean that the executive should have greater power to impose criminal sanctions by executive legislation. I still think they should be required to go through Parliament in exactly the same circumstances as they would today. I know on the back of the Anti-Terrorism Act in 2001 the Government previously proposed a bill to remove this restriction and I think that was rejected and equally should be rejected in future if we were to approve the *passerelle* through our national legislation.

Q112 Chairman: That addresses very fully the situation in this country, but you are not allowed—

Professor Peers: I am not a comparative constitutional law expert, I am afraid.

Chairman: Unless there are any questions from any other members of the Committee on any of these matters, can I close by saying how enormously grateful we are to you, Professor Peers. Your expertise is patent and, for my part, I found it enormously helpful. Thank you very much indeed.

 WEDNESDAY 7 JUNE 2006

Present	Borrie, L. Brown of Eaton-under-Heywood, L. (Chairman) Clinton-Davis, L. Lucas, L.	Mance, L. Neill of Bladen, L. Norton of Louth, L. Tyler, L.
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Examination of Witnesses

Witnesses: MR PER LACHMANN, Chief Adviser EU Law and Constitutional Law, and MR CHRISTIAN THORNING, Deputy Head of EU Legal Department, Danish Ministry of Foreign Affairs, examined.

Q113 Chairman: Good afternoon, gentlemen, and thank you both very much indeed for coming. I gather you flew in yesterday from Denmark and it is very good to see you here. We are very grateful to you. As I think you know, the witness session this afternoon in our inquiry is live and recorded, a transcript will be produced and will be sent to you and you will have an opportunity to correct it. I think, in fact, before you correct it it goes in its present state on to the web but then any corrections are put in place later, and if there is anything later you feel you would like to add to what you said please do not hesitate to do that. Could I perhaps ask you to start simply by formally, so to speak, identifying yourselves in turn and indicating your official responsibilities?

Mr Lachmann: Thank you, my Lord Chairman. I am chief adviser in constitutional law in the Danish Ministry of Foreign Affairs, constitutional law meaning Danish constitutional law as well as European Union constitutional law, and in that capacity I also attend to the problems related to the various Danish opts-outs that we will touch upon here today.

Mr Thorning: I am the deputy head of department EU Law in the Ministry of Foreign Affairs of Denmark. My responsibilities are EU law as such, meaning litigation in the EC Court of Justice in Luxembourg but also general advising on EU matters.

Q114 Chairman: Thank you very much. You have, I know, seen a list of the draft questions that we shall, I hope, talk around, and you have also I think been sent copies of the evidence, both the original statements and then the transcripts which have been provided to us, first by Richard Plender QC, and then by Professor Steve Peers. Is that right? You have had their written contributions and their oral evidence to the Committee?

Mr Lachmann: Yes.

Q115 Chairman: Good. And I could not help noticing that in Professor Peer's very helpful

statement he explains, Denmark's, special position. You are excluded from all Title IV measures, is this right, except for specific aspects of visa law and for measures building on the Schengen Convention, and as to Schengen you decide whether to approve those measures or not and they have the legal effect of international rather than EC law. Is that how matters stand for Denmark, just so we have that rough idea of your own special position before we then start on the questions?

Mr Lachmann: Yes, my Lord Chairman. That is entirely correct.

Q116 Chairman: Good. Shall we look first, perhaps, at question 1, a sort of overview of the decision of the Court in Luxembourg on *Commission v Counsel*, 176/03. How far in your view does that take matters? How far does that seem to give criminal competence to the Community?

Mr Lachmann: Thank you, my Lord Chairman. May I before answering the questions say that the Court decision attracted considerable attention in Denmark and gave rise to a hearing of our Minister of Justice in the Danish European Committee in the Danish Parliament, and after that a full plenary debate in the Folketing. The Folketing adopted a resolution on the Court decision, and with your permission I would like to quote the resolution of the Danish Folketing on the Court decision. "In September 2005 the EC-Court annulled the framework decision of the Council on criminal law protection of the environment. The Folketing takes note of the Court decision, but notes that it is a far-reaching decision and that the implications of the decisions on several points are open for discussion. The Folketing stresses the importance of effective sanctions of violations of EU law. At the same time the Folketing considers that EU criminal law, based on the current Treaties, as far as possible shall be developed with in the intergovernmental co-operation under the EU Treaty, the Third Pillar. The Folketing calls upon the Government to pursue this line, when Denmark shall take position on draft community legislation, on criminal law questions. The Folketing notes that the Government will

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support the Council in the new court case on which criminal law issues may be regulated in community law. The Folketing stresses at the same time that EC-Court fulfils an important function as the institution safeguarding the unity and effectiveness of EU law". I am sorry to take so much time but this is important.

Q117 Chairman: Quite. The case that that refers to is the one, I think, on ship source pollution, which is before the Court at the moment, but I think we understand that it will be at least a year before we get any further help from that. So there it is, Denmark is plainly concerned. Turning to question 2, do you perhaps think it would be difficult to restrict the scope of the decision just to environmental protection?

Mr Lachmann: My Lord Chairman, this was just meant as my introduction before going into the way we read the Court decision on the environment. The first point to make is that the Court decision confirms that, in principle, criminal law is under the Third Pillar. The second point is that the exception which the Court opens up for is limited to criminal law matters related to community law measures. In other words, you cannot under the First Pillar make criminal law provisions that are not related to violation of community law provisions. Those two things, I think, stand unchallenged. Then there are a number of other limitations that we see in the Court decision but which are already challenged by the Commission in the new court case regarding ship-based pollution, and there I shall willingly give our opinion but it is obvious that a final say on what the Court thinks in these matters will be determined in the next case. It is also obvious that the Danish Government, under guidance from Parliament, fully supports the Council position in that court decision, and therefore we challenge practically all the allegations of the Commission, starting with the first point, where the Council pleads that the Court decision deals exclusively with environmental matters and can only apply to environmental matters. There is strong language in the Court decision that points in this direction and, like the Council, we will plead that in the next court proceedings.

Q118 Chairman: You will try and confine it to environmental matters?

Mr Lachmann: That is the position of the Council and that is the position Denmark and other state members of the Council take, and then we shall see what the outcome will be. All we can say is it has been challenged and therefore in that sense it is open for debate. All the questions I will now mention are being challenged. The provision, in order to be based in the First Pillar, must be either essential,

indispensable or necessary, depending upon what language in the Court decision you prefer, and even in some language versions you have several of these words used simultaneously. I think that is a key point and will be an important point in the next court case. Should the mere fact that Member States find it useful to make certain harmonisations in the Third Pillar be construed as if they consider such harmonisation indispensable, essential and necessary in the sense of the First Pillar measure. That is also open for discussion and will also finally be settled by the Court. The next point is, of course, what measures of criminal law may be adopted under Pillar One. Also here the court uses different language in different parts of the Court decision. It seems that the choice of sanctions should be left to the Member States. At least the Court noticed in its decision that the challenged decision leaves sanctions to be determined by the Member States, and this is also the position taken by the Council and by Denmark in the next case. It also seems to follow from the Court decision that matters like extradition, prosecution, and other similar things fall outside the scope of the First Pillar. My Lord Chairman, I think that completes my view.

Q119 Chairman: That really certainly embraces the first and second questions. The third one, not even the Commission, as I apprehend claimed, before the Court that there was Community competence to include, for example, provisions about extradition and prosecution, but now I think that they rather would wish to build on their success and perhaps contend for those powers too. Is that how you see it?

Mr Lachmann: My Lord Chairman, yes, I think the appetite of the Commission has obviously grown in the second law suit against the Council as compared to the first.

Q120 Chairman: The "quick and easy solution" was, I think, proposed after the Court's judgment in November of last year, being, as I understand it, that the Commission would, so to speak, take over Third Pillar matters that were already the subject of Third Pillar framework decisions and would make proposals, but proposals which contain essentially the same provisions as the already adopted acts. That would therefore have avoided any need really to resolve the question and would simply have provided a quick and easy solution, but is that a dead letter now? Nobody seems to be going down that road now. Is that how you see it?

Mr Lachmann: Yes, my Lord Chairman. I see that as being outdated and not accepted and no longer relevant. When the Ministers of Justice met in Vienna to discuss this matter with the Commission it is my impression that the general sense of the meeting was that this was not the way to proceed,

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and I think it goes without saying that when a second law suit is introduced that makes it very difficult for the Council to act prior to the new verdict from the Court, so I think we will have a fairly long waiting time until we have the next Court decision.

Q121 Chairman: What about the various other framework decisions we already have—counterfeiting, corruption, money-laundering? After your evidence we are proceeding to various scrutiny items and we will look at criminal measures designed to advance intellectual property rights. How do you see all these sort of framework decisions until, a year or more hence, we know more from the Court as to how they view the whole question?

Mr Lachmann: I see it the way that this new evolution started with the environmental case, it proceeds with the ship-based pollution case, and until that is solved and the lessons learned how the Court views matters, nothing will happen regarding the other framework decisions. Indeed, there is hardly any urgency in changing these matters before we have a solid basis for changing them. So I think we will have to wait a year or whatever it takes for the Court to render its new judgment, and then we will have a better base for discussion.

Chairman: I know Lord Neill has a question. Can I just say, you are obviously agreed between yourselves but if Mr Thorning wants to add anything I hope he will feel free, certainly from our point of view, to do so but we will not, so to speak, call on him specifically on these individual questions.

Q122 Lord Neill of Bladen: If we have time towards the end I would like to ask you about the procedure you describe whereby the Danish Parliament actually considered this particular decision and reached certain conclusions which you read to us, but my first point is really this. Does the Danish argument now in the pollution case, found very much on paragraph 47, and, just to remind you, that is the paragraph in the judgment in which they say what the general rule is, there is no EC competence in criminal matters, and then in paragraph 48 the, as it were, narrow way in which the exception to that is stated with a string of adjectives in there, but, of course, including the reference to environmental interest. It would have been possible, would it not, for the Court to have laid down in this judgment a much broader exception to the general rule and then have fitted the particular case within it. Do you understand my point?

Mr Lachmann: Yes. My Lord Chairman, the reason we attach so much importance to the environmental field and find that possibly the judgment is limited to this field is that the Court, it seems to us, goes out of its way to stress the special position environmental issues have under the Treaty. The environment is

mentioned in Article 2, in Article 3, and in Article 6 of the Treaty as a cross-cutting policy, and it seems that there would hardly be any reason to stress this so much if it had no significance whatsoever. That is the reasoning, rather than the language in paragraph 48.

Q123 Lord Neill of Bladen: There is also the point, is there not, that the Advocate General's opinion went into a great deal of detail about the environmental position in other international treaties and so on. He made a very strong feature of that point.

Mr Lachmann: Yes.

Q124 Chairman: You are not troubled by the reference in paragraph 41 to protection of the environment constituting "one of the essential objectives of the Community"?

Mr Lachmann: My Lord Chairman, if you ask me whether I am troubled by this or that part—

Chairman: You are troubled by the whole of it! Quite.

Q125 Lord Borrie: I noticed Mr Lachmann said a few minutes ago said that the appetite of the Commission has grown, and I wrote that down, because I thought to myself I must try and ask, surely that is not surprising, is it, in view of the fact that in the paragraphs mentioned just now by Lord Neill and the paragraph 41 just mentioned by the Lord Chairman, although the case of course concerned the environment, the Court seemed to go out of its way to suggest that this was not an isolated matter, and that there will be other cases where criminal sanctions are needed so as to have an effective, dissuasive—I forget the other word—outcome, and there may be many examples, fortunately or unfortunately, other than the environment where the same arguments of principle which the Court enunciated in this case, could apply.

Mr Lachmann: My Lord Chairman, it is obvious that the basic principle of the Treaty system is that criminal law lies in the Third Pillar, and we are dealing here in that sense with an exception that certain aspects nevertheless may be decided under the First Pillar. I was brought up with the principle that exceptions would tend to be narrowly interpreted, and that is how we would view the Court decision. I cannot say what the Court will end up prescribing as law in the next case. All I can say is what the Council and my own country wish to put before the Court, and that is an interpretation which respects that this is a limited exception from the general rule that criminal matters lie in the Third Pillar.

Q126 Lord Clinton-Davis: Is your thinking governed by the fact that the environment is considered very important in Denmark, much more important than other issues?

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Mr Lachmann: Yes, my Lord Chairman. I remember one distinct politician in Denmark who said something like: “This is a great day for the environment but it is a sad day for the”—and I have forgotten the exact word, either the “constitutional” situation in Europe or whatever, but he implied, of course, that it could very well be good for the environment but he was not particularly happy with the decision because he did not think it was—

Q127 Chairman: It was too high a price constitutionally?

Mr Lachmann: So there are both sides, of course, and there are both sides also in the Danish opinion.

Q128 Lord Borrie: Are there not two aspects to the extent of the meaning of the Court decision? One is whether it applies to other topics than the environment, which we have been discussing. The other is whether it applies to the actual penalties and the actual creation of criminal law to establish those penalties, or is simply a broader statement by the European Court that the Community may say that criminal sanctions of some kind decided by the Member States are necessary in order to deal with this serious problem in a dissuasive—I have remembered the other word now—proportionate way?

Mr Lachmann: My Lord Chairman, obviously the least of the steps of interpreting Community competence in criminal law is to say that the Community can prescribe dissuasive and proportional criminal sanctions. That is an important theoretical step but it does not in practical terms go so far as compared to some of the text we already know in the fisheries and other areas.

*The Committee suspended between 4.35 pm and 4.45 pm
for a division in the House*

Q129 Chairman: Can we then move perhaps, gentlemen, to the passerelle, article 42, and of course if this procedure is invoked it requires unanimity, and I begin to get the impression from our witnesses that Denmark will not be in the front rank of enthusiasts for it, but we will perhaps come to that shortly. I have already made mention of Denmark’s special provision with regard to Title IV of the Community Treaty. You have a general opt-out. As you see from the question, we are really interested in your answers as to why originally you negotiated that. What are your comments on that?

Mr Lachmann: Thank you, my Lord Chairman. The Danish opt-outs, not only in home affairs, have their roots in the Danish “no” in the referendum to the Maastricht Treaty. Following that “no”, the Danish political parties took it upon themselves, I might add in contrast to certain countries presently, to

formulate policies that could solve the situation for the Danish government as well as for our partners, and the solutions were found in four special situations, or opt-outs, one of them being the opt-out from justice and home affairs. The latter is particular in the sense that, under the Maastricht Treaty, justice and home affairs were placed in the Third Pillar, intergovernmental co-operation. That was not objected to in Denmark, so our opt-out did not relate to the Third Pillar co-operation; it related to, or was based on, the fear that the *passerelle*, as it was then, would be used to switch things from the Third Pillar to the First Pillar. Therefore the opt-out clause, as it was then, simply stated: Denmark participates in justice and home affairs on the basis of the EU Treaty rather than the EC Treaty. The *passerelle*, of course, was never used but in the Amsterdam Treaty a good part of Pillar Three was moved to Pillar One. The Danish opt-out materialised in the way that Denmark was granted a protocol saying we do not participate in, nor are we bound by, measures adopted under Title IV of the First Pillar, that is where the justice and home affairs matters were placed. This is how the opt-out stands as it is now; Denmark has not participated in nor are we bound by measures adopted under Title IV in the TEC. If the *passerelle* in Article 42 of the TEU is used now, as the discussion goes, it will move matters precisely from the Third Pillar into Title IV of TEC, meaning that Denmark will not be affected by decisions taken after the *passerelle* has been adopted; if police matters or criminal matters are moved from the Third Pillar to the First Pillar, the result will be that new decisions taken will not be applicable to Denmark. It also means that Denmark will thereby gradually have to leave the co-operation on criminal law and police matters, and that is a prospect that is grave for the Danish government because we consider that co-operation very important, in particular regarding anti-terrorism, organised crime, trafficking in women, and so on.

Q130 Chairman: You would be able to opt in? Or not? Once you have opted out, you have opted out?

Mr Lachmann: I should add the Danish opt-out is quite different from the British and, seen from our point of view, we envy the British because the British can opt in case-by-case, group-by-group, at the time the proposal is submitted by the Commission, or even after it has been adopted by the Council. Denmark cannot opt in, not before the matter is adopted, not after the matter is adopted. We stand outside. You may wonder why such a provision was made, and I think the explanation is this: the Government and the political parties in favour of ratifying the Maastricht Treaty were defeated in the referendum, and the guarantees given to the electorate in order to persuade them to vote “yes” in the second

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referendum was a guarantee given to the Danish electorate that was tying the hand of the Danish government and the political parties, so our opt-out ties the hands of the Danish government, of the Danish political parties, the majority of which is clearly in favour of European co-operation. It is also a part of the Danish opt-out that you cannot see in the EU treaties that there is a solemn undertaking from the Danish political parties not to change this situation unless approved by another new referendum. So it is quite a strong system that has been built and that we have to respect.

Q131 Chairman: Does that explain why, when Denmark does approve measures building on the Schengen Convention, they have to have legal effect in international law rather than EC law? Is that the explanation for this? I read out earlier what Professor Peers had said but what you said earlier I think probably indicates why, once the matter has gone to the First Pillar and is the subject of your opt-out, you can never give effect to it as part of EC law. Is that the position? Have I understood correctly?

Mr Lachmann: Yes.

Mr Thorning: My Lord Chairman, as you stated we are very well co-ordinated among ourselves but nevertheless if you will allow me, just on this Schengen matter, just to clarify, in principle I believe it is wrong to use the term that Denmark opt in on these Schengen matters according to our protocol Article 5 because we do not. What we do is we apply these Schengen matters under national law, under our domestic law, and that constitutes what you call an international obligation between us and our partners but we can never opt in as you can opt in, into legal acts.

Q132 Chairman: I follow. Just completing question 5, and we must perhaps speed up, has the new proposal following the European Court's decision last year to use the passerelle caused you to revisit the Danish position? I suspect this is capable of a short answer!

Mr Lachmann: The short answer is that we revisited our position during the Constitutional Treaty negotiations because that was when we saw the entire Third Pillar being transferred to the First Pillar. At that time we negotiated and found a solution by simply copying the British opt-in, so that we gained a right to change our opt-out, into a British style opt-in. So our position was revisited then, and that is the answer.

Q133 Chairman: But outside the context of the Constitutional Treaty, if now there is a passerelle Article 42 proposal, would you be able to agree to

that on the basis that you would then have an opt-in in relation to the transferred matters, to the Title IV?

Mr Lachmann: It was stated clearly and unambiguously by our Prime Minister that proposals to speed up and improve the fight against terrorism, organised crime, was so important for Europe that Denmark would be strongly in favour of it and in the next line he said: "However, it creates a serious problem for Denmark, because we have to leave that co-operation which is also important to us, but our problems should not stand in the way of progress in these important matters for Europe". In case a passerelle should be adopted we would try to see how we could meet the special Danish demands, and that would most likely be by finding a way to shift to an opt-in solution, British style, rather than the opt-out solution.

Q134 Chairman: So in principle you might be agreeable to use of the passerelle provided you could get opt-in powers in respect of the transferred matters?

Mr Lachmann: I think the Prime Minister was even more brave—

Q135 Chairman: More positive?

Mr Lachmann:—because he said "We support the idea of strengthening this co-operation because it is important for Europe, and then afterwards we will see if we can also solve the problems that that creates for Denmark."

Q136 Chairman: I think that deals with question 6 as well because, as you say, you currently participate under the Third Pillar; however, if it went to the First Pillar, well, unless you can opt-in that creates the difficulties. On question 7, have you any concerns about whether if there is transfer to the First Pillar then you are likely to get QMV in the Council and co-decision with the Parliament? Do those matters give you concern, or do you welcome them?

Mr Lachmann: Our starting point, I believe, is that an improvement of the way we work against terrorism and crime etc. by moving it from the Third Pillar to the First involves a range of possibilities, notably QMV. It would be strange to move matters from the Third Pillar to the First Pillar and then retain totally unanimity. That seems to make little sense. It would not necessarily follow that everything that was moved would have to be QMV. The Government has had no opportunity to discuss these matters, that is way too early, but I am sure that a guiding line would be the Constitutional Treaty which neatly describes areas of QMV with emergency brakes, areas of QMV without emergency brakes, areas where there is unanimity, so that would be a natural starting point but the Government has no position on it.

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Q137 Chairman: These are all possibilities?

Mr Lachmann: Yes.

Q138 Chairman: And your policies will have to crystallise in form at the time. Presumably to question 8 you would respond to similarly. Should the Commission have the sole right of initiative on transfer? Logically, it would but I am not sure you can put a condition on Article 42 if not because Article 42 only allows, what is it, voting rights to be prescribed, does it not? Would you be able to invoke Article 42 and still retain a right of initiative in the Council to initiate proposals?

Mr Lachmann: I took part in the negotiations on the Constitutional Treaty, and I think the worst way to start negotiations is to say: “You cannot do this and you cannot do that”, so I would hate to say in so many words: “You cannot do this or you cannot do that”. That I would leave to academics and others.

Q139 Chairman: What Article 42 allows is a decision to transfer and at the same time determine the relevant voting conditions relating to it. It does not say anything about determining who should have the rights of initiative, but there it is. The lawyers will no doubt work their way through that one. What about the European Court of Justice? That would be the logical consequence of transfer, would it not?

Mr Lachmann: Yes, my Lord Chairman, that certainly would be the logical consequence. The Council is already somewhat in delay in giving full powers to the Court of Justice under Title IV, but over and above that I do not think you can do away with the Court’s powers under Title IV by way of a passerelle. I simply would strongly doubt that the Court would accept that.

Q140 Chairman: Question 9 I think in a way you have already answered: Would a passerelle measure be more attractive if Member States retained unanimity, and really what you have said is it would rather lose its point. The object of transfer would be because you would then hope to be able actually to accomplish some of these important anti terrorist acts and measures which at the moment are rather thwarted by the requirements of the Third Pillar, is that it?

Mr Lachmann: Yes.

Q141 Chairman: Question 10, would transfer necessitate a switch to co-decision or could you, as under the Third Pillar, still adopt measures merely consulting with Parliament? And, anyhow, what is your view as to whether greater parliamentary involvement is desirable or not?

Mr Lachmann: Again, the Danish government has not any position on it except what you can deduce from the Constitutional Treaty. I would imagine that

it would be a normal, natural, Danish starting point that qualified majority and full participation by the European Parliament are linked, but those matters are open for negotiation.

Q142 Chairman: And the brake which the Constitutional Treaty itself contemplated, and you perhaps cannot commit your government to this, might Denmark be in favour of this?

Mr Lachmann: Again, the Government has no position but since it is in the Constitutional Treaty and the Danish Government was quite satisfied with that brake in the Constitutional Treaty, I would imagine that we would also be satisfied with it if it constituted part of a passerelle.

Q143 Chairman: The brake, as I understand it, is this right, and I think I am taking this from Professor Peers’ paper, in principle entails qualified majority voting but allows any Member State to block the adoption of a measure on specified grounds, so you can have QMV but you can give a reasoned blockage—it has to be reasoned, presumably?

Mr Lachmann: Yes.

Q144 Chairman: Is the reasoning accountable to anyone? Or is it that you just have to give a reason and that is good enough?

Mr Lachmann: If I remember correctly it is a brake with an accelerator, so if you continue having your foot on the brake the others can go on accelerating, so checks and balances.

Q145 Chairman: I see. So that is sort of—and I am not sure Professor Peers did not explain this to us—in a way another opt-in.

Mr Lachmann: It is a balanced solution.

Q146 Chairman: But it enables a particular country that objects to a particular measure which has been passed by QMV to say: “Well, thanks very much, not for us”. Is that it?

Mr Lachmann: Yes.

Lord Norton of Louth: So that is an opt-out but the others collectively could then opt in?

Q147 Chairman: The others collectively go ahead and to that extent you do not co-operate in that particular measure?

Mr Lachmann: That is right.

Q148 Chairman: Well, then, unless anybody has any further questions on that group we come to a short question on the Overlap and Constitutional issues. We have talked about Schengen already and, as I understand it, there are no implications for Schengen—well, I am not sure. I do not think we are

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looking at this exclusively from a Danish point of view, are we? What is your reaction to question 12?

Mr Lachmann: The implication for Denmark of moving matters from Pillar Three to Title IV with respect to new measures that build on Schengen and that under Pillar Three we would have a full vote and full participation, will be that we will no longer have a vote and full participation. But we will be able to become part of such measures in the way Christian Thorning described to you by deciding to adopt under Danish law similar provisions and, thereby, in practical terms become a party to them after their adoption, but without a vote. We do not vote.

Q149 Chairman: So that problem, insofar as it is a problem, is not going to discourage Denmark from lending itself to the use of Article 42 for benefit generally?

Mr Lachmann: The attitude of the Prime Minister and the Government is that our opt-out and our Schengen Agreement is a solution to specific Danish problems that should not stand in the way of solving the broader European problems.

Q150 Chairman: Quite. How would the use of the passerelle affect Member States' competence to conclude agreements with non-EU states in Third Pillar areas?

Mr Lachmann: My Lord Chairman, every time you increase the scope of Pillar One you have the sometimes complicated discussion of exclusive external competence, and I have spent a good part of my professional life dealing with these matters. Sometimes it comes in very handy, sometimes it comes in in very bad situations, and I do not see that you can do anything about it. That is part of the structure. Sometimes it is good; sometimes it is bad—

Q151 Chairman: Can you bring this to life for me? I do not really think I follow it. Can you give us an instance of where it is a good thing.

Mr Lachmann: Yes. When I was a young lawyer environmental issues suddenly were brought into the European Community and suddenly Denmark could not ratify a convention dealing with the pollution in the Baltic because the Community was not a party to it because the Soviet Union did not want to recognise the EU, and that was a problem for us. Such issues have been solved many times, but the Community exclusive external competence is, of course, a straitjacket for the Member States and it is quite often felt as a straitjacket. On the other hand, it is also a tremendous strength that you have e.g. in the common commercial policy, that by acting together you have this tremendous strength. It is obvious there are unpleasant aspects of it as well as good aspects of it. In my long career I have never found ways of avoiding the unpleasant aspects which are there, and

still have the good aspects which are also there. It is a fact that we have to live with.

Q152 Chairman: But that is not going to influence Denmark, you do not think, as to whether the passerelle is used?

Mr Lachmann: Not in the general way, no.

Q153 Chairman: And then, finally in terms of the list of questions, Article 42 in terms, of course, refers to the Member States adopting the decision "in accordance with their respective constitutional requirements". In your own words, how does that apply in the case of Denmark?

Mr Lachmann: The big question is whether we should use the heavy procedure in Section 20 of our constitution which will normally result in a referendum. That is not the case because we will not under the passerelle transfer legislative power, sovereignty in the form of legislative power, to the European Community. Why not? Because the rules adopted according to a passerelle are inapplicable to Denmark because of the opt-out that we have. So the simple answer is we will not have to use this heavy constitutional procedure; most likely we will simply have approval by the Folketing of the Danish Government's position to accept the passerelle, and that will be a fairly simple procedure.

Q154 Chairman: But I am not sure I follow this because if, in Denmark's case, the transferred matters are only transferred on the basis not that you simply continue your opt-out but that you get instead an opt-in, does that not affect the constitutional position?

Mr Lachmann: Yes, it does my Lord Chairman, and then things start to become complex. A change from the opt-out to the opt-in is probably not possible to insert in a passerelle decision. I am sorry that things become so difficult but acting on the assumption that we could not change our opt-out in the passerelle, the way forward for us would be to get the Treaty protocol which is already elaborated as part of the Constitutional Treaty and have that adopted when, some time, the governments decide either to conclude and ratify the Constitutional Treaty or ratify a mini Treaty, or to ratify a mix between the Constitutional and a mini Treaty. Then, first, can we change our opt-in to an opt-out. That could well be a year or two or three after passerelle, but that is the best way. At that time we would most likely need a referendum on the switch from the opt-out to the opt-in. I am sorry it is so complicated.

Q155 Chairman: But meantime you would not let that obstruct or delay the introduction of the passerelle, the transfer? You would simply have to live with the problem that you would no longer be

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able, except by reference to your own domestic law, to introduce co-operative measures in the relevant fields, is that it?

Mr Lachmann: Yes.

Mr Thorning: If I may add, my Lord, I think in the Danish context the question of either the Constitutional Treaty or now the passerelle we are discussing is one matter, whereas the Danish opt-out, since we have more than just justice and home affairs, is another matter, and politically they are treated separately. So any referenda in Denmark on the opt-outs I believe would be treated separately from the constitutional procedures on a passerelle, or, say, the Constitutional Treaty. Perhaps that did not clarify but complicated matters!

Chairman: I think I did follow that. Unless any of the other members of the Committee have any particular question or you feel there is anything you would like to add I have to say I found that enormously helpful, and I think I really do at last understand the difference between an opt-out and an opt-in which I am quite confident I did not understand before! So thank you both very much indeed for that enormously helpful evidence.

Q156 Lord Neill of Bladen: Could I ask one question? One of the arguments that the Commission uses in various contexts is that if you have a disparity of the law operated within different Member States that leads to a breakdown in the operation of the internal market. It is quite often used to support legislation which they are putting forward. I just wonder what the effect is when you have a Danish opt-out. You would find presumably that there is quite a lot of "legislation" that the other Member States will have to adopt and will proceed to implement that will just not take effect in Denmark at all, and I am wondering whether there is a vulnerability in Denmark to this argument about distortion in the internal market.

Mr Lachmann: I think this is what I would call a very good question—

Q157 Chairman: Lord Neill's generally are!

Mr Lachmann: It was a broad concern during the negotiations for the Constitutional Treaty on the Danish side, and on the side of our partners, and our answer which finally prevailed is that the best thing we can do is to go from an opt-out to an opt-in. That surely will mean that we will opt in to the vast majority of legislation, and that is probably the best thing we can do. But we accept entirely the possible problems that you also point out.

Q158 Lord Neill of Bladen: I have one more question related to what I said right at the beginning, if I may, as we have the opportunity. I very much admire what I have heard about the way Denmark handles these

difficult issues within Parliament. There are two aspects of that, one is quite off the agenda, which is that my understanding is there is a system whereby the equivalent of the European Scrutiny Committee in the House of Lords and, maybe, in the House of Commons, in Denmark has much greater powers because there is a face-to-face meeting between that Committee on a regular basis with Ministers to discuss the forthcoming agenda in the Council of Ministers, whatever they may be, finance ministers or agriculture, and the Danish Parliamentary Committee can say it does not like the proposed way in which the Ministers are going to argue the case or the cases which they are going to adopt. Have I accurately described what actually happens? Is that correct?

Mr Lachmann: Yes, that is an accurate description. The position is that in important European matters in the Council the Government goes to the European Committee, explains the negotiating brief it works on the basis of, and that stands unless there is a majority against it in the Committee. If there is a majority against it in the Committee the Government will have to change its position in such a way that there is no longer a majority against. In order to evaluate this system you must bear in mind, and I think this is quite important, that Denmark traditionally has minority governments. I think that makes an incredibly big difference. It is not only of interest for the opposition to control the Government in Denmark; it is also of interest for a minority government not to be defeated returning from Brussels because the majority does not like the result.

Q159 Lord Norton of Louth: I have a follow-up question, possibly a little tangential, about the role of national parliaments rather than simply the role of a national parliament because under Pillar Three, where you require unanimity then, in a way the role of the national Parliament is strengthened in relation to its own government because it, in your case, mandates the Government and you can block something, but if it is under the First Pillar and QMV then, of course, that weakens the impact of a national parliament because even with its own government it is not necessarily assured it will be able to get its own way. Do you have any view on the role that national parliaments, therefore, may play? There was a provision in the Constitutional Treaty, a rather weak one, in relation to national parliaments, but do you think there is anything that could be explored that involves national parliaments operating in at least collaboration rather than simply in isolation?

Mr Lachmann: That is a difficult question but also an intriguing one because it is obvious that this is very much in focus. I am afraid I cannot give you any great ideas. Had I had them I would probably have

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proposed them at the Constitutional Treaty negotiations. I am sorry.

Q160 Chairman: I am sorry to return to the fray but I rather get the impression from your responses to questions arising under the heading of the passerelle and so forth that actually the Prime Minister and your government is really not unenthusiastic about facilitating measures against terrorism, crime, so forth, and sees the need therefore to transfer Third Pillar to First Pillar some of these areas, and yet there seems to be some tension between that approach and your really very strong resistance to the Luxembourg Court's decision that we began by discussing, and the way that that decision could be applied to transfer criminal competence to the First Pillar.

Mr Lachmann: I do not see that fighting of terrorism and the matter dealt with in the Court's decision regarding environmental criminal action, are in the same category. I think our Prime Minister, when thinking about the problems that terrorism is giving us, thought that here we must do everything we can and other considerations, which are quite often valid also in my country, must be put aside because we must have a strong international co-operation. Everything is a matter of balance and environmental issues I do not think, although very important, should be put at the same level as that of terrorism.

Chairman: Thank you very much. If there are no other questions I will again thank you both very much indeed for the enormously helpful contribution you have made to our inquiry. Thank you so much.

THURSDAY 15 JUNE 2006

Present	Brennan, L Brown of Eaton-under- Heywood, L (Chairman) Clinton-Davis, L Grenfell, L	Lucas, L Mance, L Neill of Bladen, L, Norton of Louth, L
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Examination of Witnesses

Witnesses: MR MICHAEL McDOWELL TD, Minister for Justice, Equality and Law Reform, Ireland
and MR RICHARD RYAN, examined.

Q161 Chairman: Minister, welcome and welcome to Mr Ryan too who, as I understand it, is Assistant Secretary in the International Policy Division. We are most grateful to you for coming and assisting in the inquiry. You know what the subject of the inquiry is; you know that we are on air and this is a recorded public meeting; and you will get a copy of the transcript and be able to correct it, but in the meantime it will be published on the Web. We would be very grateful, if there was anything that you felt you wanted to alter or add, to please feel free to do so. I understand that you would like to begin by making a short introduction. I think you have already had a copy of the questions on which we are seeking your assistance.

Mr McDowell: Yes.

Q162 Chairman: Then perhaps at that stage we could start looking at some of those. Do please feel free to make a short introduction.

Mr McDowell: My Lord Chairman, it is a great honour and pleasure to be able to address this Committee on a subject which I believe is one of great importance, and it is pertinent at this point in time, which is the competence of the European Community in the area of criminal law. I am aware of the Committee's interest in discussing in this context the European Court of Justice case, C-176/03, in relation to the protection of the environment and the possible use of the *passerelle* provision of Article 42 of the Treaty of the European Union. It is important to bear in mind that these matters would effectively be settled by the Constitutional Treaty, which removes the pillar divisions from the Treaties, and provides carefully designed provisions on police and judicial cooperation in criminal matters and, more importantly, important safeguards for Member States. The Irish position, as the Committee is probably aware, is one of strong support for the Constitutional Treaty. We have concerns, therefore, about any developments which could be seen as cherry-picking of the Constitutional Treaty. The extent to which Article 42 of Title VI could be used to create an architecture for police and judicial cooperation in criminal matters as acceptable as that

contained in the Constitutional Treaty is unclear at the moment, although it is certainly likely that the European Commission will examine this matter in the context of their stated aim of proposing ways to improve decision-making in the justice and home affairs area. But what I can say at this stage is that we would not favour anything which might undermine the prospects of adoption of the Constitutional Treaty. Having said that, I think it is important to look at the rationale behind the division of competence between the Community of the Union and the Member States in relation to criminal matters. Firstly, I think it is important to recall what the European Court of Justice itself noted in relation to the matter in the case C-176/03. It said that neither the criminal law nor the rules of criminal procedure fall within Community competence, and the court went on to carve out a narrow exception, I believe, to that rule, which I understand we intend to discuss later. The Treaty on the European Union provides for a competence for the cooperation in criminal matters, in particular in relation to matters such as organised crime and terrorism, trafficking in persons and other circumstances. In effect it allows the Union to achieve action against trans-national crime, which Member States acting individually could not achieve, and it is extremely important that the European Union has such a competence in order to enable it to take concerted and coordinated action against organised crime and terrorism, as events of recent years have shown so clearly. However, it is equally important that in supporting the international effort Member States are careful also to preserve for themselves the powers and the systems which they need at national level to safeguard their own internal security and to ensure an ordered functioning of their own democratic societies. In conferring powers to legislate in criminal matters on the European Union we must be very careful that we do so in a way which preserves our capacity in this respect. We must also balance our international efforts to fight terrorism and trans-national organised crime with the need to protect the integrity of our legal systems. The principles which govern our systems of criminal law have been devised over many, many years and have

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developed into a system of justice where many different rules interact to achieve an overall balance of justice. I believe that it is particularly relevant for the common law States in the European Union because our systems are very different from the civil law systems which operate in most European countries. I think unless we have arrangements in place to safeguard the integrity of Ireland's system of law that there is a risk that over time EU developments could fundamentally adversely affect the coherence and alter the nature of Ireland's criminal justice system. This is an important concern for me in addressing issues relating to European Union competency or proposed competency. Title VI of the European Union Treaty contained relevant safeguards, including the use of a unanimous voting system, and indeed the Hague Programme, which sets out the current agenda for working in the JHA area, specifically recognised the importance of respecting the integrity of national legal systems. The same recognition is written into the Constitutional Treaty provisions in relation to police and judicial cooperation in criminal matters, and the Constitutional Treaty's provisions also contained very important safeguards which address the underlying concern, which I certainly have, about safeguarding the integrity of our criminal justice system, and I think most important of those, of course, is what is referred to as the "emergency brake". I stress these points because I think they are essential to our understanding of how we respond to developments which, my Lords, you are examining, which are the ECJ case 176/03, and the emerging debate on the proposed use of the *passerelle* in Article 42, to transfer competence in relation to police and judicial cooperation in criminal matters into Title IV. I hope that that very short and light introduction is useful just to set the scene as far as where I am coming from.

Q163 Chairman: Extremely helpfully, thank you very much. Can I start by saying that I have been provided with a copy of a publication by *EU Observer* of last week, the 8th—I do not know if you have seen this—which was considering the likely draft conclusions of the present Summit, which I think is taking place as we speak, today and tomorrow, and was indicating that Germany, backed by Ireland, were rather strongly opposed to the suggestion that at this juncture the *passerelle* might be invoked to transfer Third Pillar to First Pillar matters, and indeed you have used the word in your introductory speech, "cherry-picking", and so does this article. You are both concerned that that would constitute cherry-picking from the Constitution and that that would not carry with it the advantages that would come from enacting the Constitutional Treaty,

and so you have your reservations, it seems; is that right?

Mr McDowell: That is broadly correct. The Irish Government's position is in line with the stated objections of Germany to using the *passerelle* at this point for that purpose. But we await proposals that actually emerge.

Q164 Chairman: Perhaps just for the moment we will put the *passerelle* on the back burner because really the scope of the decision 176/03 is a lead-up to it. Ireland, just like the UK, of course, was amongst the States that were opposed to the Commission's application against the Council in that case and lost. What is the Irish Government's reaction to the decision?

Mr McDowell: Firstly, I have had the advantage of reading Richard Plender's testimony to this Committee.

Q165 Chairman: He was our unsuccessful advocate.

Mr McDowell: You cannot win them all! In relation to the case Ireland did, as you say, intervene on behalf of the Council and against the Commission's application for annulment. We noted that the court in the particular case, as I said in my introductory remarks, acknowledged that neither the criminal law nor the rules of criminal procedure fall within Community competence, and we believe that the particular case should be seen as a narrow exception to that rule based on the particular emphasis on environmental protection. We were surprised at the Commission's Communication, which gave a very broad interpretation to the judgment. I suppose, having said that, it now forms part of European law, and although there is in theory a capacity for the European Court of Justice to reverse itself it is not bound by some *stare decisis* rule. The decision seems an immovable part of their jurisprudence, whatever it means and whatever its implications are, subject to one proposition—and again this is a personal reflection of mine and not an Irish governmental position—but if there were widespread dissatisfaction with the outcome and if it were generally perceived as not reflecting what Mr Plender, I think, referred to as the subjective intentions of the Treaty-makers, there is of course always the possibility that the Member States would simply adopt a corrective Treaty with one clause in it saying that the decision is not to have effect or that the Treaties are not to be interpreted in that way.

Q166 Chairman: It would be a fairly nuclear outcome, would it not?

Mr McDowell: On the other hand the Treaties are a balance between what the Member States thought they were doing and what an objective court developing its jurisprudence interprets the Treaties as

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meaning. If the result were to be interpreted as broadly as the Commission claims and if in the ship source pollution case further expansion were to take place, I do not think it is disrespectful of the Court to say, “We find that that emerging jurisprudence is inconvenient” and to call a halt to it. I would not call it a nuclear option, I would call it decisive; but it is the duty of Member States to be decisive sometimes, perhaps.

Q167 Chairman: Just before I open it up, you are right of course in the sense that the environment focuses largely in the Court’s judgment, but do you really think that it is going to be possible to confine this and to read this as confined to the environmental area? What about paragraph 41, which merely says that it is common ground that the protection of the environment constitutes one of the essential objectives of the Community?

Mr McDowell: I can see that that phrase is pregnant with the implication that it is not the only objective of the Community. I was studying our submissions in relation to the ship source pollution case and we adamantly take the view that the first decision should be read narrowly and that the particular phrase that you used should not be a sign of things to come.

Q168 Chairman: So therefore it should not work in the ship pollution case?

Mr McDowell: That is our very strong point, and we have other arguments in the ship pollution case, which are suitable—

Q169 Chairman: But that is your first line of argument?

Mr McDowell: That is our first line of defence.

Chairman: Alas, we shall not hear the result of that for another year or more, I gather. Lord Mance has a question.

Q170 Lord Mance: Minister, I was going to ask you, if I might, a corrective one-clause Treaty would require unanimity.

Mr McDowell: That is right, but I have not seen anybody going out waving a flag for increasing criminal competence under the First Pillar thus far.

Q171 Lord Mance: There were Member States who supported the outcome which the Commission was urging in the case 176/03 though, were there not?

Mr McDowell: There were but I suppose you could argue that they were doing it on the narrow environmental basis, but if the crack in the dam, so to speak, developed into a deluge then there might be a different issue. It would not have to be a direct negative either, it could be a containment Treaty, and I just make the point that it is not the case that we are

all powerless to arrest jurisprudential developments which are unwelcome.

Q172 Lord Mance: Has it ever happened before?

Mr McDowell: No.

Q173 Chairman: That is one area of uncertainty that the decision leaves, its scope, whether it extends beyond the environmental, but I think there is a little uncertainty too as to how far it goes in transferring Community competence in terms of actually prescribing in detail what are to be criminal offences and prescribing the actual penalties for their commission.

Mr McDowell: That, perhaps, is one of the more unsatisfactory aspects of it, that it asserts a general competence without in any way being sharp as to where the edges of that competence would lie. It does not state with any degree of precision what are the limits to actually prescribing prohibited acts or prohibited breaches of duty, where they would begin and where they would end. In so far as it talks about the entitlement under Pillar 1 to require effective, dissuasive and proportionate penalties it is a matter of conjecture at this point as to whether that means that that latitude is to be conferred to Member States or whether it becomes a matter for judgment under Pillar 1, or indeed a matter ultimately of decision-making for the European Court of Justice itself as to whether in any particular case a penalty is one of those three things.

Q174 Chairman: Do we look for clarification on these issues too, do you think, eventually, from the ship source pollution case?

Mr McDowell: It potentially does have the capacity to clarify those issues and I suppose much depends on the appetite of the European Court of Justice to limit the effect of the first case. But I do not think we should be naïve because I do not think there is a strong tradition of self-limitation in that area.

Q175 Chairman: Dynamic decision-making encouraged by the Commission and the Parliament.

Mr McDowell: Yes.

Q176 Chairman: But in the meantime one is faced with what do we do about other now challenged framework decisions, and question 4 addresses some of those—counterfeiting, corruption and money laundering. In particular to start with, what about the originally proposed quick and easy solution? As I understood it the Commission were simply going to say, “There it is, we will simply ourselves now adopt in these areas proposals which mirror those that are already in the framework decisions, even if we do not entirely agree with them,” but simply to be non-contentious and simply therefore to resolve the

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difficulty pending further clarification. Is that a runner?

Mr McDowell: Firstly, we do not want to concede the proposition that there is a difficulty with the legal base of the other framework decisions. So, to start mending something while not conceding it is broken is doubtful. Frankly, we are not attracted to a re-formatting, in a composite or any other way, of instruments which have not been struck down, and we would be opposed to a premature acceptance that they are all in danger of being struck down by implication. I suppose I should also say that the Commission has not yet come forward with any such proposal. Whether they will do so while the ship source pollution case is pending is another question. Then we have to bear in mind that the European Parliament has helpfully said that if such a quick and easy solution is proposed they reserve their right to make it slightly less quick and slightly less easy, as they see fit. So re-negotiation of all of these instruments would bring obvious problems which might not be helpful in the longer-term. So I do not think that we should be rushed to a particular conclusion here. For a moment, dropping my formal legal position, and saying, "Supposing there is a question mark over the framework decisions?" framework decisions in fact have this indirect effect that they require Member States to do things on the foot of them. Most Member States, I hope, will have already brought into internal law what they were required to do by many of the impugned framework decisions. The only difficulty that I could see is if some Member State citizen argued that absent a valid European law basis those domestic measures were somehow unconstitutional by reference to the domestic constitution. Apart from that I do not think there is any immediate crisis; I do not think we should be bluffed into accepting the correctness of this decision on a global basis, which the quick and easy solution would in fact amount to raising the white flag on these issues.

Q177 Chairman: These are already implemented framework decisions by definition. The States have been unanimous in adopting them and there is not really any good reason to suppose that anybody is therefore going to try and strike them down on *vires* grounds, unless perhaps anybody whose private interest is opposed. Is that possible?

Mr McDowell: That could happen. To take an Irish example, supposing there were a framework decision which has been translated into domestic Irish legislation and, absent a base in European law, it would have infringed some Irish constitutional provision, that could give *locus standi* for somebody to argue that the Irish legislation was invalid.

Q178 Chairman: Climbing on the back of 176/03.

Mr McDowell: Yes, it would be a long battle for somebody to upset a domestic law that way.

Chairman: Lord Mance.

Q179 Lord Mance: Minister, you said that there is no immediate crisis and I just wondered whether there was any immediate resolution of the issues we have been discussing? Lord Brown mentioned that the ship source pollution case might be determined in a year, and I wondered whether you thought that that was going to give us necessarily any clearer answer because although it deals with transport, which is a different title under the EC Treaty, nonetheless the Directive which is in question says it is concerned with maritime safety policy which is aimed at a high level of safety and environmental protection, and it seemed rather close to the existing issue. I wonder whether there is any other mechanism or a case in which these issues are likely to be ventilated and really discussed?

Mr McDowell: It may be that the court will choose to remove the question mark to some extent, or to limit the consequences of the first decision in the ship source pollution case. I do not see, if you will cast aside the option of bringing the matter to a head by a corrective Treaty, how any other litigation is going to take place in the intermediate period. I do not think there is a fast track way to achieve certainty. What I am really saying is that I do not see what the real problem is with having a question mark hang over some framework decisions for some time.

Q180 Lord Mance: What about the new legislation? Is there going to be a problem in bringing forward new European legislation whilst this uncertainty remains?

Mr McDowell: I would imagine there would be, yes. Obviously some things that might have been planned may now be put on the back burner until these matters are decided.

Q181 Chairman: As we pass to the questions arising out of the *passerelle*, if the *passerelle* is used, if there is a decision under Article 42, which has to be unanimous, does that actually immediately then solve all problems caused by 176/03, necessarily? I suppose if you transfer the whole of Title III to Title I that probably does?

Mr McDowell: It is a solution to a problem unless you think that the solution is worse than the problem itself.

Q182 Chairman: It may very well be, but just before we discuss that, would it not at least be worth clarifying? If the *passerelle* is used does it simply make irrelevant what was decided in Luxembourg?

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Mr McDowell: There are points which I was discussing with Mr Ryan earlier today. There are issues in relation to international agreements which could arise. If everything becomes a Pillar 1 competence the question of Member States being able to conclude international agreements other than through the Union arises. In particular, in relation to UK and Ireland, since we have opt-ins that raises another interesting question as to whether if we did not opt-in the Union would have competence in an area which had gone via *passerelle* into the First Pillar, and our failure to opt-in might, in those circumstances, be argued not to give us a consequential right to negotiate unilaterally in an area of EU competence. That is an honours question!

Q183 Chairman: That is a wrinkle really, but substantially it would certainly much reduce the relevance of the decision.

Mr McDowell: It is an issue that we would have to look at very carefully, no matter what is suggested in relation to a *passerelle* because if you put an area from Third Pillar into the First Pillar it may be that you have different means of deciding issues, QMV, or whatever, but if it also makes it a Union competence on existing jurisprudence at least there is an arguable case—and I am not saying whether it is a compelling case—that international dimensions of the same issues would fall exclusively to be decided by the Union, and that is something which the UK in particular might reflect upon before it gets enthusiastic in any particular direction.

Q184 Lord Neill of Bladen: Minister, I have a question which I think you may have covered, but the Commission issued a document, as you know, commenting on the decision by the court and expressing views about the breadth of its future application and what was involved in it. Did that cause surprise in Ireland?

Mr McDowell: We disagreed with the document. Should we be surprised that ambitious claims are made for an outcome which, if your perspective is always extending the competence of the Union, should we be surprised that the Commission actually made those claims for the decision? That is a matter of individual judgment, but I think that anybody who expects the Commission to be modest about what might seem, to some of its members, to be a breakthrough perhaps is not looking to experience as a guide.

Q185 Lord Neill of Bladen: But it throws some light on what the Commission's attitude will be in forthcoming legislation, does it not?

Mr McDowell: It does. If they are that ambitious about the C-176 case, yes. The point I would make is that we should not be panicked one way or another

about these emerging events. There is a difficulty there, there is a question mark there, but it does not mean that we have to rush towards a neat solution. The fact that there is a lacuna or the fact that there is an area of doubt does not mean that it has to be resolved as a matter of urgency. If its resolution would entail surrendering considerable competencies to the Union as a way of staunching a sort of jurisprudential wound then I do not think we should be too enthusiastic about coming to an early solution. The other point I would make is that the Commission itself may be reluctant to move on foot on all of this claimed implication until it sees the outcome of the ship source pollution case.

Q186 Chairman: Minister, as you have already observed, you, like the UK, have the right to opt-in, in contrast with the Danes from whom we heard evidence last week, who have the opt-out. You presumably think it is important to retain that, or not? Does the possibility of the *passerelle* affect your views on that or not?

Mr McDowell: I have not received definitive advice from the Attorney General in Dublin as to whether the existence of the *passerelle* in respect of opt-in matters is slightly academic from Ireland's point of view, and I do not know if the Committee has yet arrived at the view that makes it academic from the UK point of view. I do instance again the question of international competence that what goes into the First Pillar cannot be retrieved. Can competence for a Member State to engage in bilateral agreements be retrieved by simply not opting into an area? That is not clear to me at this stage. Since this is all going on the record, in the absence of firm legal advice as to whether the opt-in is a viable substitute for the unanimity rule, I do not think I should come down one way or the other on that issue. I do not want to be evasive but I do not see why I should express a view which might not be helpful.

Q187 Chairman: I entirely accept that, but subject to that it looks as if you have the best of all possible worlds.

Mr McDowell: I am not going to be that optimistic because firstly Ireland's position is opposed at this point to the use of the *passerelle* in a general way; secondly, 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. Again, I say that in relation to international relations there is a significant issue there and I would be very loath to concede the point

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that we have a double lock on all issues. If the *passerelle* were employed then areas of Third Pillar competence coming within First Pillar competence would be, at the very least, doubtful as to their implications for international relations. The other point I would make is that we regard the *passerelle* as an option which exists in new law, but we also regard the Constitutional Treaty provisions as giving us important safeguards. It has been argued by some that the ability in the context of a unanimous *passerelle* decision to determine the voting outcomes is an area of flexibility, but I do not know whether the voting arrangement provision in Article 42 actually is sufficient to comprehend an emergency brake clause. The problem again with that is that it may be from an optimistic view—Professor Peers’ document suggested that it might be—but one of the things I would be concerned about is that if it is we will only find out if the European Court of Justice decision tells us it is not, and that will be a total disaster. For instance, if we agreed to employ the *passerelle* on the basis that we would have an emergency brake and then found out that that was *ultra vires* Article 42—

Q188 Chairman: This all depends on the scope of the phrase, “the relevant voting conditions relating to it”.

Mr McDowell: Professor Peers took an optimistic view and said that that could be interpreted widely, but what would happen if the European Court of Justice were to say. “Voting conditions are voting conditions, they are not emergency brake? It does not authorise an emergency brake procedure.”

Q189 Chairman: I thought Professor Peers was fairly clear that it would encompass the emergency brake procedures but not necessarily other matters that we are coming to, such as joint co-decision and the sole right of initiative.

Mr McDowell: That is the point. He seemed to assume that the phrase “voting conditions” was sufficient to cover an emergency brake, but it could at least be argued—and I am putting it by way of devil’s advocate here—that voting conditions would not apply to a qualitative category of decisions within the competences transferred under Article 42 in such a way as to allow a State to say, “In respect of this particular measure it is so objectionable and demands unanimity.” That might not be a “voting condition”, that might be a different animal.

Q190 Chairman: I understand your reservations, thank you. Can we proceed to question 6, which raises one or two specific aspects of this? What is your reaction to QMV in the Council? There it is, it is question 6(a). If you use Article 42 but retain unanimity voting what have you actually achieved?

Mr McDowell: The one thing you have achieved is that you have brought it into First Pillar competence and delivered international relations into the hands of the Community. Co-decision comes with it as well, so is co-decision a huge advantage? That is a political judgment.

Q191 Chairman: So it would be more attractive with unanimity voting?

Mr McDowell: Obviously if unanimity were to be retained it would be less unattractive, I will put it that way, than if QMV came with it.

Q192 Chairman: What about co-decision? Is it your view that greater parliamentary involvement is a good thing?

Mr McDowell: That very much depends, I would have to say. It really depends on the subject matter. If you are dealing with something like sexual crime then individual Member States may feel that they are the best judges of where the balance should be struck in relation to any particular issue, and their legislatures might feel very strongly that the European Parliament would not strike the same balance as they might do domestically. Whereas everybody is in favour of motherhood, apple pie and democratic involvement by the European Parliament in principle, in any individual case for a country that is in a minority, assuming QMV, to give to the European Parliament the democratic function and effectively to take it away from their own Parliament, might not be attractive.

Q193 Chairman: What about sole right of initiative?

Mr McDowell: Under the Constitutional Treaty there was a proposal that that be modified and the four Member States should be able to cooperate in this area. I do believe that the area of criminal justice in particular is one in which sole right should not be transferred of initiative 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.

Q194 Chairman: Could that be achieved under Article 42? The transfer and at the same time keep the power of initiative to the four Member States?

Mr McDowell: We are now back to the Professor’s article. Does Article 42 create *vires* to make the distinction of that kind? I do not think it does.

Q195 Chairman: Could it be done any other way?

Mr McDowell: Voting arrangements are one thing but initiative is a second thing.

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Q196 Chairman: I follow that. Could the initiative outside Article 42 be an initiative also granted to four Member States by some other process? It would have to be some other Treaty process.

Mr McDowell: I have not thought of that possibility, to be honest with you. All I would say is that it is by no means evident and I would say that it is less than probable that Article 42 would confer any express power to deal with the question of who would have the right of initiative.

Q197 Chairman: Then 7(b). The European Court of Justice should have jurisdiction not only to interpret Directives containing criminal law provisions but also to rule on implementation.

Mr McDowell: That would be, in my view, a fundamental shift of judicial competence from the Member States to the European Court of Justice. In relation to the existing framework decision procedure some Member States made some concessions, others gave no competence whatever above the minimum to the European Court of Justice, and Ireland was one of the ones that was conservative in that respect. I do not think there would be a political appetite, certainly in Ireland, for gratuitously conferring it on the European Court of Justice. The final say as to whether our passing a law did or not comply with what they considered to be effective, dissuasive or proportionate penalties, or issues of that kind.

Q198 Lord Brennan: Developing that answer, Minister, whilst our discussion is quite technical, for the ordinary citizen the question of criminal law competence in the Community is extremely sensitive and highly political. So developing the answer you have just given, in the Irish context, where your traditions are very similar to ours in this field, what areas of the criminal justice system would you tell the ordinary citizen are going to be protected under national laws and practices and separated from any European competence? Where does the line presently fall to be drawn, in your view?

Mr McDowell: If the Committee had half an hour I would answer that at great length, but I will exercise some continence and say that as far as I am concerned our system, which we share, of adversarial justice and trial by jury and non-inquisitorial justice, is a fairly fundamental cornerstone of the philosophy of common law jurisprudence—adversarial justice and an arbitral judiciary, as opposed to an inquisitorial judiciary is probably the key characteristic which distinguishes the common law system from the civil law system generally. Without putting one system above the other, I am always convinced by my own argument in this respect, that countries which have strong arbitral judiciaries, to which they confer even the right, for instance, to

strike down legislation, are countries which have never succumbed to internal tyranny, historically, whereas every major tyranny has been attracted to a different form of judiciary, either as an emerging society, which had a different form of judiciary, or has adopted a different form of judiciary. So I believe that an arbitral judicial system of a powerful kind and adversarial criminal justice is a central plank of the successful philosophy of the common law States across the world. Things like jury trial and procedure are hugely important in relation to our view of where the balance should lie between the State and the accused in criminal justice. What I would say is that there are recent signs, for instance, that the Commission has been putting forward draft legislation, White Papers and Green Papers on procedural rights. Another thing, is the latest excursion in that territory, is the presumption of innocence. 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, I think—to go back to the point that you made at the beginning—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.

Q199 Chairman: That takes us conveniently to the last pair of questions over the heading of overlap and constitutional issues, and question 10 is something again that you have touched on. How would the use of the *passerelle* affect Member States' competence to conclude agreements with non-EU States in Third Pillar areas? Can you give us an example of an international agreement where the position of Ireland will be put in jeopardy by use of the *passerelle*?

Mr McDowell: Supposing I were to take something like extradition? If that were considered to be part of criminal law or judicial cooperation, (which I suppose it is), to move from the Third Pillar into the

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First Pillar on existing EU jurisprudence there would have to be a very strong case—I do not want to concede its correctness at this stage—that agreements, say, between Ireland and the United States became exclusively a matter for European competence in future, or whatever. That is an example of what could happen, but one of the terrible things is that while I am sitting here I know that many things will occur to me later this evening as other examples that might come up, so to speak, and bite us in the ankle in years to come!

Q200 Chairman: Finally, of course, Article 42 refers to Member States adopting the *passerelle* decision “in accordance with their respective constitutional requirements”. How does that apply in Ireland?

Mr McDowell: That has a very particular resonance in Ireland because the Supreme Court in Ireland has developed a very consistent line of jurisprudence that any development in the European Treaties, if I can use this phrase, which constitutes a “quantum leap” in transference of competence from the Irish Parliament to the European institutions, requires a further referendum in Ireland. So not every Treaty would fall into that category. Something that was of such significance that Ireland was now surrendering its veto, albeit in a way which was envisaged by the Treaty in principle, would raise a constitutional issue. If it were the view of the Supreme Court in Ireland that since Ireland had signed up to the *passerelle* in the first place it had conferred on its domestic legal institutions and on its government the right to vote for a *passerelle* resolution there is a second line of defence, and that is that Ireland has written into its own Constitution that where it exercises an option or discretion under the European Treaties that that cannot be done unless both Houses of the Oireachtas, which is our Parliament, concur. So, in other words, I could not go one afternoon to Brussels—in Irish law at any rate, whatever the Europeans would make of it—and just put up my hand and vote for the *passerelle* and bind Ireland accordingly. So in

relation to the *passerelle* there are two issues. Number one, there would be a live issue as to whether it was of such fundamental importance that it required a referendum; and even if the court were to hold “Ireland has signed up to Article 42 and therefore the people surrendered the right to be consulted on that issue to their own democratic institutions”, at the very least, under existing practice in Ireland, it would require parliamentary resolutions of both Houses in favour, and they would be, I would imagine in present circumstances, highly controversial.

Q201 Chairman: I follow that, that Parliament passes resolutions from both Houses, but on the question of the referendum, quite aside from having already signed up to Article 42, if you retained your opt-in on transfer—

Mr McDowell: That is another point that could be made. It might be said that particularly since Ireland had an opt-in in this area that it was not a quantum leap that would require a referendum, but it would require it to be a positive resolution.

Q202 Chairman: That I of course understand.

Mr McDowell: Incidentally, when I was considering my nuclear option earlier, before I spoke to you, I was musing to myself that if there were such a corrective Treaty proposed it probably would not require popular approval in Ireland because it would be re-giving back to the Irish people—

Q203 Chairman: Repatriating.

Mr McDowell: It is only expatriation competences that require a referendum.

Q204 Chairman: Unless there are other questions it remains for me to thank you again, Minister, for coming. It has been a most valuable session for us and we really are grateful to you for taking time out of your busy schedule to accommodate us on this Thursday evening.

Mr McDowell: Thank you very much indeed.

Supplementary memorandum from the Department of Justice, Equality and Law Reform

The Minister discussed with the Committee the possible implications for Ireland if the Community negotiated an agreement with a third state in relation to criminal judicial co-operation in an area of co-operation transferred to Title IV of the Treaty establishing the European Community (TEC) in which Ireland had decided not to opt in.

In addition to the points he made in this regard, he wishes to add that it would appear that Article 10 TEC (duty of co-operation) might be interpreted as precluding Ireland from enjoying the right to negotiate a 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.

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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.

22 June 2006

WEDNESDAY 21 JUNE 2006

Present	Borrie, L Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L	Lester of Herne Hill, L Neill of Bladen, L Norton of Louth, L Tyler, L
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Letter from Mr Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Home Office, to Lord Grenfell, Chairman of the European Union Committee

Thank you for your letter of 18 May (*not printed with this Report*), containing a number of questions on the implications of the recent extension of European Community competence to criminal matters. I look forward to discussing this topic at the meeting with Sub-Committee E, although I also very much appreciate the decision to postpone the meeting of Sub-Committee E until 21 June in order to allow me some time to prepare.

In the meantime I offer the attached written responses to your questions, which I hope you will find helpful.

It may be helpful if I explain at the outset that the definitive answers to a number of your questions are not possible until we know the outcome of the present Case C-444/05 *Commission v Council* (ship source pollution). The Government is intervening in this case and will ensure the arguments in favour of limiting community competence in criminal law are made as cogently as possible.

8 June 2006

ANNEX A

MEMBER STATES' REACTIONS

1. *When Andy Burnham MP gave evidence to the Committee on 18 January he most helpfully summarised the discussion of Case 176/03 that had taken place at the informal JHA in Vienna earlier that month. He explained that some Member States expressed concern about the judgment and the ideas contained in the Commission's Communication of 23 November 2005 on Case C-176/03. The case was discussed again at the JHA on 21 February 2006. Do Member States still have concerns?*

Yes, all the indications are that Member States still have concerns. The majority of Member States, including the UK, have concerns about the wide interpretation relied on by the Commission in the Communication of 23 of November 2005. These concerns were expressed in the Vienna Informal and at the JHA meeting on 21 February 2006. Many Member States, including the UK, favour a more restricted interpretation of the Court's ruling. Some progress in addressing Member States' concerns has been made. At the JHA Council of 21 February the Council agreed new procedures which will ensure that any new First Pillar legislative proposals that contain criminal provision will be subject to scrutiny by the JHA elements of the Council legislature and where necessary will be examined at the JHA expert working group level.

Member States' concerns have been expressed during the negotiations of the new Directive on criminal sanctions for infringements of intellectual property rights (dossier 8866/06 Com (2006) 168. This is the first dossier to be negotiated in the Substantive Criminal Law Working Group since the judgment and the Commission's text very much reflects a wide interpretation of the ECJ's judgment. Most Member States accept that the Directive can identify conduct that should attract a criminal sanction but discussions so far have revealed a clear consensus among Member States in favour of leaving the detail on the specific nature and quantum of sanctions to be articulated in national law. Moreover, in response to the views of the vast majority of delegations, many of whom saw little prospect of any progress until the ECJ ruled on the Commission's recent challenge of the maritime pollution instrument, the Chair of the working group has suspended further discussion of the substantive issues in order to seek guidance from the Council as to the way forward pending the ECJ's judgment in the maritime pollution case. The Government supports this approach.

2. *Is the "quick and easy solution" proposed by the Commission Communication on Case C-176/03 a dead letter?*

The Commission's proposed fast-track scheme of transferring already adopted third-pillar instruments into the First pillar has been heavily criticised and rejected by Member States. At the Vienna Informal Commissioner Frattini conceded that the suggested approach was not the best way forward and the Commission now has accepted that a case by case appraisal is the best approach.

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SCOPE OF CASE 176/03

3. *It has been suggested that the power under the EC Treaty to require criminal sanctions might be restricted to environmental protection measures. Do you agree that the Court's ruling is so limited? If not, in what other areas might it apply? Do the Government accept the approach taken by the Commission, namely that the judgment contains principles that go beyond the case in question and which may apply to other Community policies and the freedom of movement of persons, goods, services and capital?*

4. *If not limited to protection of the environment, might the scope of the Community's competence in criminal law be limited to those matters which, like environmental protection, comprise an essential objective of the Community and to which other policies have to have regard?*

Questions number 3 and 4 are closely linked so I will address them jointly. There is some support in the ECJ judgment for the interpretation that the Court's ruling is limited to the environment and the Government intends to support this interpretation. Even if, however, the rationale of the judgment has read across to other Community policy areas it may not extend to all such areas. The Government notes that the ECJ judgment placed much emphasis on the fundamental importance of the protection of the environment as a Community objective. It has been suggested, therefore, that the scope of Community competence in criminal matters is limited to those areas of policy that are equally fundamental to Community aims and objectives. The Government is closely monitoring the development of the discussions. This issue can only be resolved finally by the ECJ, which will of course have a good opportunity to clarify the position in the maritime pollution case.

5. *In his evidence to the Committee Richard Plender QC argued that the extent of the power of the Community legislature is also limited. Do the Government accept that the Community has competence to define criminal offences and stipulate penalties or merely to identify areas of behaviour in respect of which Member States must impose criminal sanctions (ie leaving it to the Member State to define the offence and fix the penalty)?*

The new Community competence only extends so far as necessity requires, as explained in the judgment of the ECJ in the environment case. Articles 1 to 7 of the environmental framework decision that was the subject of C-176/03 required member States to establish that certain polluting activities constituted criminal offences. Such offences were required to be punishable by effective, proportionate and dissuasive penalties, including in serious cases penalties involving the deprivation of liberty which can give rise to extradition. The ECJ held that these requirements could have been adopted in a Community measure. So we know that where the Community has criminal competence that competence at least extends to adopting these types of criminal measures. The Government considers that it should only be necessary to identify conduct that should be met by a criminal sanction. It will then be for Member States to decide upon the detail of the nature and quantum of sanctions subject to the requirement that the penalties must be effective, proportionate and dissuasive. The Government has not yet accepted that there is Community competence to set out the detail on penalties when formulating EC legislation. The ECJ may clarify the position on the extent of the new Community competence in the maritime pollution case.

6. *The Commission itself did not claim that there was Community competence to include provision dealing with extradition, and prosecutions. It has been suggested that the power under the EC Treaty to require criminal sanctions also includes such powers? Do you agree?*

No. The Government will argue that these matters, and matters relating to, for example, jurisdiction and the operation of joint investigation teams, are outside Community competence. The Government believes that these matters should be legislated in the third pillar.

7. *If there are few or no limitations on the Community's powers, what brakes, if any, are there on the exercise of Community competence to harmonise criminal law and penalties? Are they limited to political ones as you suggest in the Government's Explanatory Memorandum of 16 January (ie Member States will simply not agree a measure imposing criminal offences or sanctions)?*

There is no doubt that the new Community competence is limited. The ECJ may clarify the position in the maritime pollution case but it is possible that the competence may be limited to environmental measures or those areas of policy that are fundamental to Community aims and objectives. Moreover, it is clear that the

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competence is limited to what is strictly necessary to ensure achieve community policy objectives. Having said that, an assessment of the extent of measures that are necessary to ensure the proper observance of community rules is an essentially political decision.

8. *Is this the end of the “dual text approach” in which a Third Pillar Framework Decision with criminal sanctions has supplemented a First Pillar instrument?*

Once again the ECJ will have a good opportunity to deal with all the outstanding issues in the maritime pollution case. The Government takes the view that Community competence should extend to no more than offences and penalties. In particular, we believe that matters such as jurisdiction, prosecution policy and the use of joint investigation teams should logically continue to be proposed in Third Pillar Framework Decisions. However it is up to the Council for the time being to provide guidance on the way forward until such time as a firm legal position is forthcoming from the ECJ.

INSTITUTIONAL IMPLICATIONS

9. *In the Government’s Explanatory Memorandum it is suggested that the judgment might “not be too far reaching” but acknowledged that it would allow criminal law measures to be proposed under the First Pillar “which is often subject to qualified majority voting (qmv) and co-decision procedure with the European Parliament, rather than unanimity as at present”. How do the Government view the prospect of EC legislation perhaps prescribing criminal offences and/or penalties being agreed by*

- (a) *qmv in the Council, and*
- (b) *jointly with the European Parliament?*

(a) The Government will fully engage in any negotiations regarding First Pillar instruments that propose criminal law measures. Of course, with QMV there is a risk that the UK could be out-voted on certain issues but it must be noted that the risk is limited to the proper scope of community competence. The ECJ has made it perfectly clear that the Third Pillar legislature remains the correct procedure for the generality of the criminal law provisions in pursuance of the EU’s judicial co-operation programme. The Government believes that a qualified majority voting procedure and co-decision will provide adequate opportunity for the United Kingdom to ensure thorough scrutiny of proposals and the proper application of the necessity test.

(b) The co-decision procedure provides the European Parliament with an important and valuable role in scrutinising legislative proposals. The Government is content that this procedure will not present any obstacles to the agreement of measures that respect the principals of subsidiarity and proportionality.

10. *Are the Government content*

- (a) *that the Commission should have the right of initiative on matters where the Community has criminal competence; and*

The legislative dynamic in the First Pillar is obviously different from that in the Third Pillar. It is right that the Commission has the right of initiative but it is important to note that any proposals containing criminal law measures are subject to effective scrutiny during the negotiating process in whichever of the pillars they are proposed in.

- (b) *that the European Court of Justice should have jurisdiction not only to interpret Directives containing criminal law provisions but also to rule on whether a Member State has correctly implemented them? If the latter involved the level of fines/custodial sentence actually imposed might this interfere with judicial discretion?*

The ECJ under the First Pillar have jurisdiction to interpret Directives containing criminal law provisions and to rule on whether a Member State has correctly implemented and applied them and we have to accept the ECJ judgment. It is therefore important that EU instruments are properly scrutinised and effectively negotiated so that objectives are clear and implementation effective. The ECJ can only interpret in accordance with the agreed language of the instrument and so we need to ensure that we are particularly clear on the intention of instruments and on the nature of Member States obligations. As regards penalties, there is a consensus in the Council that, even if there were Community competence to adopted detailed penalty provisions, the Third Pillar norm of setting ranges for minimum maximum penalties should be continued in the First Pillar and then only where this level of detail is necessary to achieve the community policy objective. The Intellectual Property Directive adopts this language. The Government supports this approach and will be quick to reject any proposals that would constrain judicial discretion.

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THE NEW PROCEDURE

11. *What is the purpose and what will be the practical effects of the new procedure agreed by Member States at the JHA on 21 February 2006?*

The purpose is to ensure JHA scrutiny of any First Pillar instrument creating obligations in respect of the application of criminal law. Under the new procedure measures will be referred to Article 36 Committee via COREPER to ensure an opportunity for JHA experts to offer views on criminal law provisions from an early stage of negotiations. Where necessary proposals will be put before a JHA experts working group for consideration of the relevant text in detail.

12. *What is the effect of the new procedure as regards the formation of the Council concerned? For example, if the Commission reintroduces its proposal for a directive on the protection of the environment through criminal law, would it be considered by Ministers in the Environment Council or the Justice and Home Affairs Council?*

Such an instrument would be ultimately considered by the Environment Council but during the negotiations the proposal will be referred to the JHA elements of the Council's legislature where it will, if necessary, be subject to close scrutiny at expert level and any necessary amendments made. Of course, this system requires Member States to ensure that capitals have effective liaison in place to ensure that the relevant Ministries are aware of developments. The United Kingdom has a good record in this regard.

CASE C-440/05 COMMISSION V COUNCIL

13. *You refer to Case C-440/05 Commission v Council (ship source pollution), pending in the ECJ. Has the UK intervened in this case? What clarification do the Government believe the Court might give?*

The Government has intervened on the Ship Source Pollution case and will ensure that the arguments in favour of a limited community competence in criminal law are made as forcefully as possible. Given the high levels of interest at the political level we believe that the Court will consider it important to give comprehensive guidance to the Council but the Government would not wish to offer an opinion as to the nature of the eventual decision.

CROSSING THE BRIDGE

14. *In their recent paper "Institutional improvement based on the framework provided by the existing Treaties" the French Government have suggested that Article 42 TEU should be implemented. This, they say, would enable European action in the area of security and justice (including combating terrorism and organised crime) to be made more effective. The Commission has also referred to the possible use of the "passerelle" in its recent Communication, "A Citizens' Agenda/Delivering Results for Europe". Any decision under Article 42 would, we assume, have to take into account the Court's ruling in Case C176/03. Do the Government support this proposal?*

The Commission has stated that it will present a formal initiative on the basis of Article 42 of the Treaty on European Union, but this proposal has not yet been published. When it is, the Government will carefully consider the potential risks and benefits and overall impact, in particular for our criminal justice system; whether it is in our national interests to support it and what safeguards may be required.

Examination of Witnesses

Witnesses: MR GERRY SUTCLIFFE, a Member of the House of Commons, Parliamentary Under Secretary of State, Home Office, MS CLAIRE FIELDER, MR RODERICK MACAULEY and MR KEVAN NORRIS, examined.

Q205 Chairman: Minister, may I formally welcome you, thank you very much for coming. You know the procedure, you know that we are broadcasting live and you will get a copy of the transcript with an opportunity to correct it. Can I first thank you very much for the written response that you have given us to the letter that we sent you back in May; you have given us a very helpful and full response by way of Annex A to your letter of 8 June which deals with the

large number of questions that we put to you on the implications of Case 176/03 and will enable us to concentrate largely on the *passerelle* questions. In the meantime, would you like to make a short opening statement and introduce your many colleagues?

Mr Sutcliffe: Good afternoon, My Lord Chairman and my Lords, thank you very much for the opportunity to discuss with the Committee the implications of the judgment of the European Court

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of Justice. Just by way of introduction, although looking around the room I do see many familiar faces in terms of discussions that we have had in the past in other roles, I have recently moved from the Department of Trade and Industry into the Home Office and I am very grateful for the Committee allowing me to put a written submission to you—it was day two of my new role within the Home Office. Thank you for that. I am joined by officials from the Home Office who are heavily involved in this matter and I hope that your Lordships would agree that it is better to have, for your Committee's consideration, detailed answers from the officials who are closely involved in this as well as me giving you the view from the Government in terms of the Government's position. If I can make a brief start, the Government believes that the judgment in the environment framework decision case has raised important issues in respect of the means by which criminal law measures necessary to support Community policies at the European level are legislated. Hitherto the assumption had been that all criminal law matters were properly dealt with under the inter-governmental Justice and Home Affairs arrangements of the Third Pillar. Indeed many Member States, including the UK, intervened on behalf of the Council to suggest that the agreement of criminal law measures was one of the very reasons for the creation of the JHA pillar. The full implications of the judgment are not yet clear. The European Court of Justice now has an opportunity to provide further clarification when giving judgment in the European Commission's challenge to the Council's ship source pollution framework decision. As the Committee is aware, the Government has intervened in that case and is providing a robust support of the Council's defence to the Commission's challenge. The UK's intervention advances the case for a restrictive interpretation of the judgment. We will have to await the outcome, of course, but whatever the outcome it is clear that in general terms the judgment means that we will henceforth, to one extent or another, negotiate some criminal measures without the veto provided by unanimity. Member States must of course accept the judgment. If, however, the Court rules against the Council and in favour of a relatively wide scope for EC competence to legislate for criminal matters supporting Community policies, we will have to seek to control the exercise of this competence. In some areas the UK already uses criminal sanctions when implementing Community obligations and so, in practice, in these areas the exercise of this competence may in any case have a limited impact. At this stage we can only be sure of two points: first, the court confirmed that generally criminal law measures should be legislated in the Third Pillar. Thus the work on judicial co-operation through mutual recognition, including

some limited approximation where necessary in order to deal with serious cross border crime, will continue under the unanimity voting system of the Third Pillar. The second point is that to one degree or another, criminal law measures necessary to ensure the effectiveness of Community legislation must be legislated in the First Pillar and not in the Third, so a number of issues remain outstanding. Does Community competence, for example, extend to any criminal law provisions necessary to support Community policies or is it limited to provision on applying criminal sanctions to specified conduct that falls within a Community policy area. The court appeared to rule that the criminal law provision must be necessary to ensure the effective enforcement of community rules and norms and not rules set out in national law, but it could have been clearer in this regard. These questions need to be resolved. The Commission has given its view of the scope of the judgment in their communication. The Commission's view is, perhaps unsurprisingly, founded upon the widest possible interpretation of the judgment, in which the only limits on the scope of Community competence is the necessity test and the need to ensure consistency. This is however one view. Many Member States, including the UK, favour a different view of the scope of the judgment. We believe that the judgment should be interpreted narrowly. The UK intervention in the ship source pollution case argues that the court has thus far only confirmed competence in respect of measures to protect the environment; that is the scope. As to the extent of EC competence in criminal matters the Government believes that in requiring Member States to apply criminal law sanctions to particular conduct in a Community policy area, much of the detail in respect of, for example, choice of penalties, should be left to Member States. The Government's view is that the extent of Community competence should certainly go no further than requiring criminal offences and penalties for certain infringements and should not for example extend to matters such as jurisdiction and criminal procedure. Pending the outcome of the Commission's challenge to the ship source pollution case, discussion within the Council will continue. Some discussion of the implications of the judgment has taken place within the Council under the auspices of the Austrian Presidency and some progress, particularly on the procedural safeguards to ensure proper JHA scrutiny of First Pillar proposals, has been made. The emerging consensus reveals that a large number of Member States are very concerned about the approach proposed by the Commission. All the indications are that most Member States favour a much narrower interpretation of the judgment. In particular the Commission's proposed "fast track"

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scheme for correcting the legal basis of a number of already adopted Third Pillar instruments has been rejected and the Commission now accept that this is not the correct approach. Member States also agreed that some kind of agreement on the approach to future documents was essential. My Lord Chairman, I will now turn to the question of the possible use of Article 42 of the Treaty on European Union, or the “*passerelle*”. The Committee is of course aware that the Commission, in its communication: “*A Citizens’ Agenda— Delivering Results for Europe*” indicated that it will bring forward an initiative based on Article 42. In its communication, the Commission stated that moving police and judicial co-operation matters from the Third Pillar to the First Pillar would improve decision-making and accountability and would give European citizens confidence that Europe is a fair and safe place to live. There is no formal proposal as yet, so at this stage we can only speculate on the content. There is a range of options available, ranging from very selective transition of Title VI measures, to wholesale transfer of Title VI. The Government is in the early stages of consideration of the impact of any proposals, and until we know the precise content of any proposal it is difficult to speculate about what our precise reaction is likely to be. My Lord Chairman, that is the opening statement from the Government and I would like my officials to introduce themselves to the Committee.

Mr Macauley: My Lord Chairman, my name is Roderick Macauley, I am a senior policy adviser. My job really entails ensuring compatibility between the UK position on European legislation, the domestic criminal justice policy agenda and domestic criminal law.

Q206 Chairman: You are a lawyer?

Mr Macauley: I am a lawyer, but I do not work as a lawyer at the moment.

Q207 Chairman: You work as a policy adviser

Mr Macauley: A policy adviser, that is right.

Q208 Chairman: Thank you very much.

Ms Fielder: Claire Fielder, I work in the international directorate at the Home Office. I am not a lawyer, I am a policy official in the Schengen and institutions team.

Mr Norris: I am Kevan Norris, I am a lawyer, I am from the legal adviser’s branch of the Home Office advising on EU law.

Q209 Chairman: Excellent. Thank you very much, Minister, for that most helpful opening statement. I have already noted your very full written response to the initial series of questions, which were almost all about the implications of Case 176—only the very

last question touched on the *passerelle*, the bridge, we could call it,—they therefore largely indicated the view of Government about the decision. I know you have been supplied with the further questions, and if we could just take quite quickly the first four, the ship source pollution case which you time and again refer to in your written response to the original questions, we are all looking for clarification, but it will not be for over a year we are given to expect, so in the meantime a number of problems really need to be considered. Assume—and it may be a fairly safe assumption—that the court are not going to say this is absolutely confined to the environment; where next, so to speak, might its limits be drawn. Your written answers to questions 3 and 4 spoke of: “Those areas of policy that are equally fundamental to Community aims and objectives.” What are these that you seek to limit the decision to?

Mr Sutcliffe: It is certainly the principle—and I will get Richard to talk about the timescale—that is the one that concerns us. My Lord Chairman, my previous experience on European matters was as an employment minister dealing with the Working Time Directive and a whole range of issues which come under the First Pillar competency, and I was well aware of the confusion in the administering of many of those decisions in terms of how they were supposed to apply across Member States and the reality was that there were different interpretations. At that level you can see how there could be difficulty if we ever reach the position where Pillar Three, which is about unanimity, gets into the First Pillar in terms of the impact and effect on national ways of life and national laws. That is why we think the support that there is of Member States in trying to restrict this should be a communication to the Commission about the seriousness with which Member States see this.

Mr Norris: The first thing we should say is that we have not yet conceded that this goes beyond the environment. There is a lot of emphasis in the Advocate-General’s opinion and in the judgment concentrating on the environment, so that would be one of the arguments that we put forward.

Q210 Chairman: I appreciate that is your front line.

Mr Norris: That is the front line against the background of conferral of powers, so that would be our front line. In so far as we lose that front line, partly we are in the hands of the court but obviously one possible judgment would be that this extends to all areas of Community policy where there is perceived to be a necessity to require criminal sanctions, but certainly our front line has been to try and hold this at the environment.

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Q211 Chairman: You are not, so to speak, canvassing a coherent fallback position short of the one you have just mentioned?

Mr Norris: There are distinctive features to the environment. Clearly pollution is a cross-border issue so one might try to extrapolate from the environment and say what are the features attached to the area of the environment and try to limit the criminal competence that way. But in a sense there is already a cross-border test in the Treaty subsidiarity and what can be better done at a Community level. Once one begins to try and establish limiting criteria, in this way, to try and extrapolate in from the features of the environment, it is going to be quite a difficult judgment.

Chairman: I know Lord Neill has a question.

Q212 Lord Neill of Bladen: It is more political guidance and your wisdom, having observed some of these institutions at work; it is really quite an extraordinary situation here in that you have got a rather technical legal case and the first time round the Advocate-General stressed enormously the environmental protection aspects, cited a whole lot of basic tests and other judgments and conventions and so on. The court did not make a great deal of that, but nevertheless took a pretty narrow line, referring expressly to the environment and resisting the opportunity to make a wide statement which would include the narrower case, but since then one gets certainly enthusiasm—I do not use the word passion—you get the Commission coming out with a paper saying well done court, the real interpretation of what you said goes far wider than environment, it covers a lot of other examples, one is pollution and there are others, and the reasoning supports a much broader interpretation. Then we get the European Parliament, as I read their latest statement, on the same lines, coming in alongside the Commission. Why should the Parliament, the MEPs, have these very strong views supporting the Commission, whereas the actual governments of the Member States take a strongly held opposite point of view. What is the explanation?

Mr Sutcliffe: Certainly, going back to my experience again on the Working Time Directive, we were in the position where Member States wanted the flexibility of being able to apply flexible working arrangements within Member States and the Commission did not want that to happen, they wanted to have, in the UK's case, our opt-out of the Working Time Directive removed. The MEPs supported that position because they wanted to see their overall position improved in the sense that what was the point to their purpose, if you like, if they were not able to deliver a Community-wide approach. That is the tension that exists and, certainly, our concern is

that if this widens too greatly the roles of national Parliaments in terms of being able to deliver what the basis of the agreements of the treaties are—we would be in a position where we would lose lots of the control and flexibility that we are able to put through in national standards, through national Parliaments. I do not think the MEPs see it in that way, they are protecting if you like their environment in terms of the European Parliament.

Q213 Lord Neill of Bladen: They are promoting their own position.

Mr Sutcliffe: Yes, and that is general in one sense because clearly there are constraints on MEPs in terms of their accountability within national bodies.

Q214 Lord Clinton-Davis: You said, Minister, that the court's view should be interpreted narrowly. Who among the Member States supports that view and who opposes it?

Mr Sutcliffe: Roderick may be able to help there, is it 18 Member States?

Mr Macauley: Thank you, Minister, a large number of Member States—I think it is 18 but I am not absolutely certain about it—including the United Kingdom have intervened in support of the Council in the Ship source pollution case.

Q215 Chairman: Is there anybody in support of the Commission except no doubt the Parliament?

Mr Macauley: I do not think anybody has in fact intervened in support of the Commission. There are a number of Member States who have stayed out but no one has intervened in support of the Commission's position.

Q216 Chairman: But the Parliament has, as it did in the original case?

Mr Macauley: I do not think the Parliament has yet intervened, but I could be corrected by my colleague Mr Norris.

Mr Norris: I am not sure is the answer.

Mr Sutcliffe: We will get the information, My Lord Chairman.

Chairman: Thank you very much. Lord Tyler.

Q217 Lord Tyler: It is really supplementary to Lord Neill and Lord Clinton-Davies; you mentioned in your opening statement, Minister, that there had been discussion in Council on procedural safeguards. Can we assume from that that the 18 which have been referred to have proved to be staunch allies in this situation because, as we all know, in a horse-trading situation the nature of your allies and the extent to which they could fall away is perhaps a bit more difficult and rather critical.

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Mr Sutcliffe: Certainly, I am informed that the previous Home Secretary in an informal meeting with the Austrian Presidency met in January with the Austrians to explain the position, and I understand that that was with the support of the allies that were there, but you make the point quite well that you have to make sure that the allies are supportive—stepping-up is the word that comes to mind—and the numbers and the approach here from my perspective have strengthened the position. We think that they are allies and will be with us.

Mr Macauley: If I might add something with your leave, My Lord Chairman, the indications within the Council's legislative structure are that a large number of Member States are very keen to limit this competence as much as possible. As you will be aware, at the moment there is a proposal before the experts on criminal law to enhance the protection of intellectual property rights.

Q218 Chairman: We are scrutinising it.

Mr Macauley: Certainly, during those negotiations my colleagues in that working group have made it plain that they generally do not support the Commission in their view of the scope of the EC competency in criminal law.

Q219 Chairman: Thank you very much. Question 2 you have really already dealt with, the “quick and easy solution” originally proposed is a dead letter now and things are being looked at on a case by case basis. Question 3 records it, but in fact it was your responses to questions 1 and 11 originally dealing with the new procedure, so that you actually have JHA experts looking at the proposed new measures. I wonder if you are able perhaps to help with the last sentence under question 3; in relation to what proposed measures has the new procedure been triggered and with what results?

Mr Sutcliffe: Thank you, My Lord Chairman. The Presidency recently referred a proposal for a directive on the control of the acquisition and possession of weapons to COREPER under the new arrangements agreed at the JHA Council on 21 February and COREPER endorsed the Presidency suggestion that the proposal be considered by the multi-disciplinary group on organised crime.

Q220 Chairman: That is a particular measure; with what result? As you say, it has been referred to the JHA experts and that has all worked satisfactorily, has it?

Mr Macauley: My Lord Chairman, the instrument has been referred to the multidisciplinary group but as yet negotiations have in fact not commenced. The point is that having agreed this procedure it was encouraging to see that when a new proposal in the

First Pillar came forward, the Presidency immediately referred it to COREPER in line with these proposals in order to ensure that the proposal was scrutinised by JHA experts where necessary.

Q221 Chairman: I see. Perhaps I might pursue this, does that leave unanswered the question of where the competence lies? Does that remain outstanding as a question for that particular measure?

Mr Macauley: Yes, it does. The procedural arrangements that were agreed were purely that, procedural, they were not intended in any way—

Q222 Chairman: So to speak without prejudice to the rival positions on where the competence lies.

Mr Macauley: That is right, yes.

Q223 Chairman: I see. Question 4 refers to the Resolution, which I understand is now adopted, of the Parliament, that “there is an urgent need to define a coherent political strategy with regard to the application of criminal sanctions in European law”. Do you agree and what should the strategy be? Minister, what is your view on that?

Mr Sutcliffe: I have tried to outline the Government's view that there is a great deal of concern about what is taking place, that we tactically have made representations and built allies in terms of trying to make sure that we are not in a position where this can develop with the Commission being unaware of the sense that there is amongst Member States of the concern about how this could develop. We are actively pursuing those strategies in discussions with the Presidency, in discussions with other Member States to make sure that the Commission are fully aware of the concerns that we have. In more detail I do not know whether there is anything that Roderick might want to add to that.

Mr Macauley: No.

Q224 Chairman: The last sentence of your original written response to question 8, “It is up to the Council for the time being to provide guidance on the way forward until such time as a firm legal position is forthcoming”; that is from the ECJ under the Ship pollution case. What are we envisaging here by way of guidance, any thoughts?

Mr Macauley: Perhaps I can come in again there, My Lord Chairman. Obviously, to a certain extent we must accept that we have now intervened on behalf of the Council in defence of the Commission's challenge to the Ship source pollution case. As we have said in that intervention, we are asserting that the scope of the judgment in the environment case should be limited to measures to protect the environment. So to that extent it must be recognised therefore that the scope for political agreement to proceed in a way that

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is any further than the *status quo* at the moment would be very difficult indeed.

Q225 Chairman: Really then we are in a state of stagnation until the court clarifies the position.

Mr Macauley: Effectively that is right.

Q226 Chairman: Does the court realise the extent to which further guidance is sought and needed, before really any progress can usefully be made—we are coming to the possibility of the *passerelle* in a minute, but subject to that has anybody explored with the court any possibilities of accelerating this hearing?

Mr Norris: The indications are that the proceedings are moving relatively quickly. They have now reached virtually the end of the written procedure, but even on a relatively accelerated procedure we are unlikely to have a decision from the court before a year's time at the earliest. I do not think anyone is envisaging a judgment much before that, I am afraid.

Q227 Chairman: Thank you very much. Can we then pass to the *passerelle* which you touched on very briefly in your response to question 14, crossing the bridge; there is as yet no formal proposal but question 5 records that the Commission in an earlier communication did suggest using the bridge and paragraph 10 of the Presidency conclusions, of last week's Council, said that "in the context of the review of the Hague Programme the European Council called on the incoming Finnish Presidency to explore, in close collaboration with the Commission, the possibilities of improving decision-making and action in the area of freedom, security and justice on the basis of existing treaties." What do you understand by this exploration of the possibility; is that likely to include looking at a draft text of a *passerelle* decision?

Mr Sutcliffe: My personal view, My Lord Chairman, with the qualifications and caveats that I stated at the outset in terms of my experience in these matters, would be that the difficulty we have got is that because there are no formal proposals that are there it is very difficult then to respond to that, but in terms of Commission creep or where things are developing where the Commission feels it is going, it would be important for us on the one hand to say that, yes, we support the idea of effectiveness of conditions in terms of policy, development and administration of the Community working well, but we would be very negative and would object to a position where Pillar Three is used extensively. We certainly want to have further discussions with Member States around this, but the difficulty we have got is that because there are no firm proposals on the table it is hard then to get the strategy in place to deal with that. Claire, I do not know whether you want to add anything to that.

Ms Fielder: Just a bit of further information about the timing of the likely proposal; the latest information is that there will be some sort of discussion paper issued by the Commission in time for the informal Council under the Finnish Presidency, but a formal specific proposal from the Commission will not come out until probably the end of the year, and that will be very much based on the initial discussions within the Council. That is the latest information I have at the moment.

Q228 Chairman: Yes, I see. The shape of the actual decision and what precisely it suggests should be transferred, whether the whole of the Third Pillar or certain selected parts of it and on what terms, all that is for discussion before even there is a proposal on the table, is that it?

Ms Fielder: Yes, at the moment, as we understand it, that seems to be the case.

Q229 Chairman: No doubt part of the discussion will be looking at Article 42, what should be the relevant voting conditions; that is part and parcel of any decision to invoke that bridge possibility, is it not?

Ms Fielder: Yes, we expect that that would be a fairly crucial part of any proposal that came forward and part of any discussions that are held on it.

Q230 Chairman: It is not specifically one of the questions, but what do you sense is the general feeling amongst your colleagues in other Member States with regard to this possibility of transferring at least some Third Pillar matters to the First Pillar? Is there any enthusiasm for it?

Mr Sutcliffe: I do not think there is, My Lord Chairman, on the basis that in the Prime Minister's discussions at the various councils and meetings with heads of government, his concern is about how development takes place and what responsibilities and what roles Europe has. I believe that on the issue of the First Pillar—because we have qualified majority voting in the First Pillar and in the Third Pillar unanimity—there would not be a wish to change direction on that in any great way. I believe that the politics of this issue will arise quite sharply, given the attention that Member States are paying to this and that then in discussions with allies and other Member States, yes, everybody wants to be progressive and to promote a better understanding, a better relationship and a more effective European view—or the majority do anyway—but the negativity around some of these issues in the consciousness of politicians and the public will cause many problems, and I am sure that is what the Committee are finding in terms of the evidence that they received.

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Q231 Chairman: The very fact that so many Member States are opposed to any wide application of the Court's decision last year rather suggests that they will not too readily invoke the *passerelle* which would of course effectively accomplish that which they are resisting anyway.

Mr Sutcliffe: That is true.

Q232 Chairman: Of course, the problem is that in the meantime not only are there difficulties under the Third Pillar where you require, is it right to say, unanimity of actually getting effective anti-terrorism, anti-international crime measures, but you have also got the blockage or the stagnation that we have just discussed of upwards of a year, even in regard to what hitherto would have gone forward as Third Pillar measures. You cannot even get those enacted for the next year because there is a dispute as to where competency lies.

Mr Sutcliffe: That is true and, as Mr Norris has said, the difficulty is that even though the pace of the court is progressing, we are in that position in terms of the outcome. We are also though, in discussions with Member States, making clear to the Commission the view that most Member States have got, and it is a dilemma that we face because there are issues that we do need to address across Member States for the very reasons that you have outlined in terms of counter-terrorism measures and a whole range of things where we do want to see closer co-operation, but we have to be very careful about the impact on the national position in terms of the ability of national governments to be able to deliver what they think they ought to be able to deliver.

Q233 Chairman: Is there a possibility of selective use of the *passerelle* to transfer those Third Pillar measures that specifically are calculated to address the great threats of terrorism and criminality?

Mr Sutcliffe: We would have to wait to see what was going to come out in terms of what actually were the areas where the Commission feel that that is what they would want to see, and until we have that detail it is very difficult to make any judgment.

Q234 Chairman: As a Government you are not concerned meantime that actually there is a lack of co-operative measures which might improve the fight against terrorism, criminality etc.

Mr Sutcliffe: I do not think there is a lack of co-operation, there is a great deal of co-operation that takes place. What we are talking about here in the context is actually laws changing and the impact of laws on national governments or on Member States. There is a great deal of co-operation that takes place already with other Member States on a whole range of issues in the different pillars, but what we are

wrestling with this afternoon is that it is possible to promote a proposal from the Commission on the *passerelle* which we have not seen yet so we do not know the detail of it. It would be wrong to say, therefore, that we are not co-operating, that we are not looking at all these issues in a serious way; we certainly are, and there are ways in the existing positions to deal with that and we are looking at the legal position in terms of laws that may be applied to the UK.

Mr Macauley: My Lord Chairman, I just wanted to add that of course the stagnation that we were discussing earlier only applies of course to First Pillar measures in support of Community policies, there is no stagnation in areas where it is firmly agreed, and where the court was clear in the environment case that judicial co-operation matters, for example, should continue to be agreed in the Third Pillar. For example, measures that address organised crime or terrorism are rightly to be agreed in the Third Pillar, and they will continue to be so.

Q235 Chairman: Then what do you perceive to be the value of the *passerelle*? What is its supposed advantage, why is it that there are those in the Commission and the Parliament who do see its desirability in order to get measures through which are blocked by the unanimity provision of the Third Pillar?

Mr Macauley: That is a different issue really, that is an issue about the extent to which certain parties, such as the Commission and the Parliament, perhaps view the unanimity arrangements of the Third Pillar as being somewhat slow and cumbersome in providing what they see as the requirements of EU citizens in those areas. All I was seeking to say was that as far as the legal position is concerned, the position as regards the effect of the judgment in the environment case by the European Court of Justice is that it does not reach into what are Third Pillar matters; Third Pillar matters will continue, subject to anything that is agreed on the *passerelle* to be agreed in the Third Pillar.

Q236 Chairman: Thank you. Question 6 makes the point that there it is, the UK enjoys the right of a selective opt-in, which is in a sense an advantageous position; does that not make in a sense more attractive the possibility of the use of the *passerelle* because even if you do then transfer Title IV to the First Pillar, you still have your right of selective opt-in so you are not necessarily therefore stuck with anything that QMV might achieve that you would not want?

Mr Sutcliffe: We are in a healthy position in the sense that we are looking at the issue of the opt-in as part of the things that we want to see, but until the proposals

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come forward, again, it is very difficult for us to put forward our response and our preferred position until you actually see what is being proposed. It is also very much what Lord Tyler says about looking at what messages you are giving out to other Member States in terms of what you want to see in the best interests of effectiveness; the messages are very clear in what we are trying to achieve and we are looking to have always the best and most advantageous position from the UK perspective, and we will consider all of these things as we move along.

Q237 Chairman: Assuming you were allowed to keep your opt-in, can you see any disadvantage then in the use of the *passerelle*, would you stand in the path of it?

Mr Sutcliffe: My Lord Chairman, it is setting down a route in the sense of giving a view without knowing exactly what is on offer in terms of what the Commission are going to put forward. Clearly, we would want to retain the opt-in—again, you have to forgive me my confusion because for the last three years we have talked about the opt-out rather than the opt-in—it is a useful tool for us so we would want to protect the position that we have got, but we need to look at what is going to be put to us in terms of a Commission proposal, with the sound knowledge that we discuss these things with other Member States to try and get the most advantageous solution.

Q238 Chairman: You say until we get a proposal, but I understand the proposal itself is going to be based on a certain amount of prior discussion because it is intended to be a proposal that reflects some of the thinking that you will already have shared.

Mr Sutcliffe: That is how these proposals come forward in terms of the Commission. What we are trying to argue is that we want to be supportive of the best way forward, but we want to do that from a position of the Commission understanding what the majority of Member States' views are.

Q239 Chairman: In principle can you actually think of any basis for stopping other Member States, if they wished to operate the *passerelle*, given that you would retain the opt-in?

Mr Norris: 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 and participate in negotiations we may well achieve a result which we want to participate in, so there is a clear difference in the negotiation positions.

Q240 Chairman: I see. Question 7 turns to the question of Qualified Majority Voting, and it has been suggested that unless you have Qualified Majority Voting there would not be much point in using the *passerelle*; do you agree with that?

Mr Sutcliffe: Claire is our expert on this.

Ms Fielder: Obviously, one of the advantages being put forward is that QMV would speed up the decision-making within the Council and therefore there is a case to be made that it would speed it up. It is another fairly complicated area and we need to look very carefully as to whether it would be worth using a *passerelle* without QMV, and without it what the actual benefit would be? It is something that we will look at much more carefully and in much more depth, but it would certainly be legally possible under the terms of Article 42 to decide it. Given that it was included as an option at the time of negotiating the Treaty then there must have been a good reason for it, and it may be an option to have slightly different voting arrangements applying to different parts of any measures transferred.

Q241 Chairman: The number of possibilities is legion under that provision in Article 42 and, as you rightly say, you can have different voting arrangements for different issues, you can have a brake, you can have all the existing opt-ins, you can have no doubt special arrangements as to co-decisions, special arrangements as to who has the right of initiative in terms of promoting an issue. There are all these variables, but you have not yet so to speak as a Government fixed on any particular pattern that you think might be profitable?

Mr Sutcliffe: No, as Claire has said and as I said earlier, even taking your point, My Lord Chairman, that the proposals will come about through discussion and development between Member States and the Commission over a period of time, we are saying that we are not prepared to make any decisions until we have seen what the proposals are and how they are going to be eventually formulated, even though the discussions as you say are taking place, and what the impact is on the UK. As you quite rightly pointed out, we have a strong negotiating position in place so it is a case of keeping our options open in terms of how we will address this in the climate we have outlined when we see the final proposals come to us.

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Q242 Chairman: The last part of question 7 is could the Constitutional Treaty provide a useful precedent? What is your reaction to that?

Mr Sutcliffe: It could. The difficulty that we have got at the moment is that we are trying to be supportive of being effective and efficient in terms of how we take these matters forward, looking at the impact of proposals and the risks to our national system. We will try and use any vehicle that enables us to retain our ability to protect, to look after the UK position, in the context of trying then where we are able to be supportive where it has to be across Member States, giving support to the Commission within that context. It is a very difficult area for us to be in at the present time.

Q243 Chairman: It is not one of our suggested questions but I am tempted to ask do you see any present problem with the Third Pillar; with the arrangements under it; with the need for unanimity?

Mr Sutcliffe: It is my understanding, as we have outlined before, that the Third Pillar is working well and the concerns are the use of the Third Pillar in the First Pillar areas, that the proposition of the *passerelle* may offer attractiveness but we would want to see the detail before we commit ourselves.

Q244 Chairman: You do not actually at the moment, therefore, see any problem to be solved?

Mr Sutcliffe: I do not think that is true. We understand the Commission's thinking and the way that they want to develop; we are responding by putting our concerns in the discussions that are taking place, but until those discussions formalise into actual proposals it is very difficult for us to react and look at matters in addition to that.

Q245 Chairman: I really wonder, because put aside what ambitions the Commission or Parliament may have in terms of transferring from the Third to the First Pillar, but as far as the UK Government is concerned is it all for the best in the best of all possible worlds as Pillar Three is operating at present? You are happy, you are getting unanimity where it is necessary, in the cases you want and all the rest of it?

Ms Fielder: There is always room for improvement, and it is certainly the case that some Third Pillar measures are taking an awfully long time to get to agreement under the Third Pillar, so there is certainly room to speed up. One of the things we will be looking at is whether using the *passerelle* would speed up the process. There are arguments on either side of course, whether co-decision would negate any speeding up of the Council's decisions, but certainly I do not think anyone would claim that the Third Pillar is perfect in getting to a speedy conclusion on

negotiations, because certainly there have been cases where negotiations have taken an awfully long time.

Q246 Chairman: So there is an improvement to be made.

Ms Fielder: Yes. Whether the use of the *passerelle* is the way to do it is something that we need to think about.

Q247 Chairman: What is going to be the stance of the UK Government in these discussions that are going to be leading up to any draft *passerelle* decision?

Mr Sutcliffe: The position could be that we want to protect, we want to promote the interests of the UK in terms of the way that we operate, the way that we handle our various responsibilities, but we also want to be positive in terms of trying to assist the process where it can be assisted, and as Claire said in terms of the Third Pillar that might be in timetables, in how quickly things are done. I personally feel that it would be better for us to look at what the Commission are going to come up with, given that all of these discussions have been going on for some time now, and see how we should react once the proposals are on the table.

Q248 Chairman: I see. As to co-decision, generally speaking what is your view of the European Parliament's involvement? Is it generally speaking a good thing to have co-decision?

Mr Sutcliffe: Where that is achievable I think that is what you would want to achieve and across the various areas we would welcome that because that would show that there has been a great deal of commonality in outlook in what we were trying to achieve. If we could achieve co-decision, that is what we would want to do.

Q249 Chairman: You would largely in the ordinary way achieve that if you transferred to the First Pillar.

Mr Sutcliffe: Not always, in the sense that again our opening viewpoint about transferring Pillar Three to Pillar One activities, we are concerned about that for the reasons that we outlined. What we want to achieve is where we can get co-decisions on issues certainly we would want that, but we would also want to protect the UK's position in terms of how we apply, how we develop, our policies and our laws.

Q250 Chairman: Very well. Question 9 passes to the question of who has the right of initiative; under First Pillar of course it is for the Commission alone and under the Third Pillar it is for Member States too. How would you like that to operate?

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Mr Macauley: Perhaps I could come in here, My Lord Chairman. The position is that a straight transfer from Title VI into Title IV would in fact result in sole right of initiative with the Commission, so if there is to be a right of initiative for Member States there would have to be an exception to that, a special provision would have to be included. This is likely to be one of the issues that forms a major part of the debate over the proposals.

Q251 Chairman: Have you got a view as to whether that would be something that could be achieved under Article 42?

Mr Norris: For it to be achieved we would have to describe it as relating to part of the relevant voting conditions and I would say it is probably a grey area whether that could be achieved. I can imagine it is the kind of thing that if it is what Member States were insisting upon before exercising the *passerelle* sufficient legal flexibility would be found to allow the decision to provide for initiatives by Member States.

Q252 Chairman: It would either have to fall within that, otherwise they would have to amend the Treaty I suppose.

Mr Norris: Yes.

Q253 Lord Tyler: Just as a supplementary, is there any precedent for that sort of sweetener? It is quite a sweetener, is it not, for Member States but can you do it, has it been done before?

Mr Norris: I do not know of any precedent for it and it clearly does not fall fairly and squarely within Article 42, but we are now, as I say, within this grey area and if it was going to be a show-stopper then we might find that that kind of measure fell the right side of the powers within Article 42.

Q254 Chairman: What about the further consequence of any transfer into the First Pillar? The European Court of Justice would then have jurisdiction to interpret the Directives and rule on whether the Member States have correctly implemented them, and we are talking here of course of criminal law provisions. Is that regarded as a good thing, or are you a little sceptical about that?

Mr Norris: The effect clearly is that there would be the infraction procedure and preliminary reference jurisdiction, although of course there is already some preliminary reference jurisdiction under the Third Pillar. As to whether it is a good thing, whenever we are negotiating under the Third Pillar, Council decisions or framework decisions, we always take the view that if we sign up to them we implement them properly, so I do not think we would take a view that we would have anything to fear from the infraction procedure.

Q255 Chairman: Although we always implement them properly, are we as confident that all our colleagues do across the Union?

Mr Sutcliffe: That is one of the considerations, My Lord Chairman, that we have to take and my experience shows that that is not always the case and there is difficulty then in getting Member States to play the game. Some of the difficulty is around interpretation and that is why it is important for us to look at what proposals are going to be forthcoming and then determine what the risks are of those proposals and act accordingly from there. The difficulty we all face is that we want to see the proposals and then we will react to the proposals in terms of what the risks and possibilities are, and until those proposals come forward, yes, we will keep discussing and keep trying to be of assistance, but until there is an impact on us in terms of the proposals being put in front of us, it is very difficult for us to respond.

Chairman: Thank you very much. Lord Lester.

Q256 Lord Lester of Herne Hill: I was just wondering on this question what would be the argument against giving the Court of Justice jurisdiction. Your answer is that it would be a good thing, but in what sense could it be a bad thing for the Court of Justice to have jurisdiction to interpret and to reference criminal law provisions and rule on whether Member States correctly implemented them? At the moment I do not see the negative side of that so I would be grateful if you could comment.

Mr Sutcliffe: I am sure the officials will want to comment further, but from my perspective it would really be the application of allowing issues to be agreed and then for there not to be consistency of approach on those issues. I do not think we would be against the principle of the Court being involved but if you then give way on a whole range of issues to be transferred, that is where the difficulties are created and that is the problem that we have at the moment in terms of a lack of confidence about the application of issues that may be moved from one Pillar to the next.

Q257 Lord Lester of Herne Hill: I do not think I put my question properly. What I am trying to say is if your concern is about a lack of consistency across the Member States, would it be right that the way of ensuring a greater consistency is to give the European Court of Justice the power to rule upon whether another Member State has or has not infringed the directive in this area? That seems to me a thoroughly good thing to achieve, but is there anything I am missing about what is bad about that because you were asked whether it is a good thing. My own view

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is that it would be a good thing, but what are the arguments against that?

Mr Norris: I do not think there is particularly an argument against it. Two points: firstly, of course, there is already power to get the interpretation of Third Pillar measures before the European Court of Justice; secondly, it is not an objection but if there is going to be greater European Court of Justice involvement in interpreting measures which are affecting somebody's liberty then obviously we are going to have to think of fast track measures to get the issue before the Court of Justice and get decisions very quickly. I am not saying that is an objection, but it is a matter which is going to have to be considered if the Court's jurisdiction is extended.

Q258 Chairman: You say there is already provision for making references to the Court in respect of Third Pillar matters, but as I understand it that is merely an option; 14 Member States have accepted it but the UK is not one of them.

Mr Norris: Yes, that is true.

Q259 Chairman: You cannot make references from this country therefore.

Mr Norris: No, there are no references from this country but the point I was trying to make is that you do not need to exercise the *passerelle* provision in order to get the measures, create the possibility.

Q260 Chairman: I see, if you wanted to you could do it under the existing provisions.

Mr Norris: Yes, and as you say there are already various situations where there is jurisdiction already.

Q261 Chairman: Passing to question 11, we have already discussed to an extent how flexible the *passerelle* could be. There are many permutations as to the arrangements one could make and you could include a brake, but once again one ends the question by asking whether the Government would be in favour, but perhaps the Government has no view on it. Minister, is there any response to question 11 that is going to assist us?

Ms Fielder: I suppose the question of whether there we need an emergency brake depends on things like what voting arrangements apply and other factors.

Q262 Chairman: These are all inter-relating considerations.

Ms Fielder: Absolutely. We think it is pretty certain that you could interpret voting conditions flexibly enough to include a brake, but whether other Member States would also want that sort of mechanism remains to be seen. There is no definitive position because of all the variables involved in terms

of what voting arrangements there might be and what other safeguards might possibly be included.

Q263 Chairman: Then can we pass to the last two questions. Question 12, how does it affect Member States' ability to reach agreements with non-EU States, and an obvious example of this is extradition agreements? How would it affect us and is this a matter of importance in our thinking?

Mr Norris: It is clearly something that we would need to take into account, that the normal Community rules on external competence would apply so Member States could find themselves no longer able to enter easily into extradition arrangements where there was a Community extradition agreement which purported to be exhaustive. So the position the Government takes would certainly have to take into account that there might be less flexibility if the *passerelle* clause is exercised.

Q264 Chairman: Of course it will have to take it into account; has it yet applied its mind to the realities? Has it actually gone through the process of saying is this a worry, are we going to be affected, would we mind if we cannot have our present arrangements with the United States, or has nobody yet applied their mind to it and come to any even tentative conclusions on it?

Mr Norris: My understanding is that we have not reached a definitive position on this, but it would not be something that would just affect the UK. Or just affect the Home Office, whatever we do in this area will have to involve consultation with the rest of Whitehall.

Q265 Lord Lester of Herne Hill: The way in which question 12 is phrased is as it were negative, but I suppose as a matter of legal and European public policy there is a more positive way of looking at it, is there not, which is that there will be circumstances in which it would be a very good thing to be able to have a common EU policy to be able to export suspected terrorists or serious criminals on a common basis to Third States rather than rely upon bilateral arrangements with all the difficulties that those can give rise to? There is as it were a more positive case than question 12 expresses for a common approach?

Mr Norris: I would agree with that, but I would like to point out that you can already have agreements under the Third Pillar arrangements where there is specific provision for the European Union as a body to enter into agreements in that area.

Q266 Chairman: The final question is with regard to the constitutional requirements that would have to be satisfied before we could subscribe to an Article 42 decision. How would that apply here and what would

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be required; in particular would we need to amend the 1972 Act?

Mr Norris: My own provisional view would be that we probably would seek to amend the 1972 Act and we would need an Act of Parliament for that. I would qualify that by saying that I have not yet spoken to my colleagues in the Foreign Office and it is probably an area that they will also have a view on. But I would anticipate some form of primary legislation.

Lord Lester of Herne Hill: Not a good idea, Minister.

Q267 Chairman: Unless any member of the Committee has any other question that completes the areas that we were concerned to seek your help on and it remains for me, therefore, to simply express

our thanks to you, Minister, for coming and bringing your expert team with you and answering all our questions. We are conscious of having caught you early in your new appointment.

Mr Sutcliffe: Thank you very much for the way you have received us this afternoon and thank you for your patience in terms of how we have responded to the questions. Anything that we have not responded to where we feel we need to do more, we will write to you.

Q268 Chairman: That would be most helpful.

Mr Sutcliffe: In closing I would thank the Committee for their interest in this matter which clearly is of great concern to all of us for the future.

Chairman: Thank you for coming.

**Letter from Mr Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Home Office,
to Lord Brown of Eaton-under-Heywood, Chairman of Sub-Committee E**

At the evidence session on 21 June, I agreed to write to you to confirm whether or not the European Parliament had made representations to the European Court of Justice in relation to the Commission's challenge to the Ship Source Pollution Framework Decision. I can now confirm that the European Parliament has intervened in the case in support of the European Commission.

I would also like to take this opportunity to reassure the Committee that although there is no formal proposal on the use of Article 42 of the Treaty on European Union to move measures on police and judicial co-operation, currently in Title VI, to Title IV of the Treaty establishing the European Community the Government is actively considering the implications in light of Commission recommendations on its use. It is working towards agreeing a position, based on careful analysis of all of the various options, to use as the basis for discussions during the Finnish Presidency of the European Union.

12 July 2006

Written Evidence

Letter from The Freedom Association

To say that the Freedom Association is apprehensive about the mooted proposal to surrender the veto on the Justice and Home Affairs pillar of the “*acquis communautaire*” is to understate our concern by a very wide margin.

In 2003 we lobbied Peers about the Extradition Bill, pointing out that the dilution of the principle of “*habeas corpus*” implicit in that Bill was the thin edge of a very large and significant wedge. We had previously made representations to members of Parliament whilst the Bill was in the Commons and I would in particular draw your attention to the speech (*not enclosed*) made by Shadow Home Affairs minister Nick Hawkins in Standing Committee D on 21 January 2003 when he put on record some of the essential differences between British Law and the system of criminal justice operating in continental European countries.

These differences are fundamental and we would like to be reassured that in any consideration of the Criminal Law Competence of the EU, members of the Sub-Committee appreciate that there is in fact no equivalence between systems of criminal justice based upon the Code Napoleon and those appertaining in what might broadly be described as the Anglosphere.

The nature of our individual freedom as British subjects is qualitatively different to that of citizens living in mainland Europe and to illustrate this point we would respectfully draw your attention to Appendix B in the enclosed copy of our recently published pamphlet entitled “*Freedom or Tyranny*” (item “B”).

We would appreciate the opportunity to give verbal evidence to your Committee and would welcome answering in person such questions as their Lordships might seek to ask.

31 May 2006

Memorandum by JUSTICE

INTRODUCTION

1. JUSTICE is an independent all-party law reform and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists. JUSTICE has been strongly involved in monitoring the development of a European area of freedom, security and justice. It is part of a research network on the European Arrest Warrant, headed by the T.M.C. Asser Instituut in The Hague.

2. We are grateful for the opportunity to submit our comments on the European Commission’s proposal to make use of the *passerelle* clause of the EU Treaty (art 42 TEU). As an all-party organisation, JUSTICE advocates neither for nor against a politically highly controversial proposal such as the use of the *passerelle*, we confine our comments to some of the anticipated consequences of a potential application of art 42 TEU as well as a retention of the *status quo*.

KEY OBSERVATIONS

3. JUSTICE believes that

- effective and coherent use of art 42 TEU may prevent an increasing resort to annulment actions by dissatisfied Member States, the European Commission or the European Parliament before the ECJ on grounds of lack of competence and choice of incorrect legal basis;
- where art 42 TEU is used to import qualified majority voting (QMV) into the area of police and judicial co-operation in criminal matters, this must not occur without the parallel extension of the European Parliament’s co-decision powers to those matters;
- when QMV and co-decision are introduced under art 42 TEU, the Council of the European Union and the European Parliament must legislate with the utmost circumspection, mindful of the special nature of the criminal law and the unintended effects an EC measure may have on respective national criminal justice systems.

A CLEAR LEGAL REGIME FOR EU CRIMINAL LAW AND JUSTICE

4. The ECJ's landmark judgments of 13 September 2005 in the Case *Commission v Council* (C-176/03) and on 30 May 2006 in *Parliament v Council* (C-317/4; C-318/04; the EU/US air passenger data case) have significantly increased the potential for confusion and uncertainty inherent in the continued co-existence of Third and First Pillar competencies and decision-making procedures.

5. The criterion the ECJ maintains determines the correct legal basis and competence *ratione materiae* of an EU/EC measure is its dominant actual purpose. Where the actual aim of a measure is to facilitate the prevention, investigation, detection and prosecution of terrorism offences, the ECJ is likely to hold that such a measure can only be adopted under the Third Pillar. However, where typical criminal law provisions are aimed at the furtherance of an express First Pillar policy (eg environmental protection, functioning of the internal market), these provisions will be regarded as ancillary to the main purpose of the instrument and thus share its legal basis under the First Pillar.

6. Not always will there be a clear dividing line between those criminal law provisions contained in an EU/EC legal instrument that are ancillary to measures at EC level (ie in furtherance of a First Pillar policy) and those provisions which contain purely criminal justice and co-operation provisions unconnected to First Pillar policies.

7. This uncertainty may lead to an increase of annulment actions under the TEC or TEU by a Member State, the Commission or, in the case of EC annulment proceedings under art 230 TEC, the European Parliament on grounds of incorrect legal basis and consequent lack of competence. A such action has apparently just been brought by the Republic of Ireland against the Council for annulment of the Data Retention Directive on grounds not dissimilar from those relied on by the ECJ in its air passenger data decision (*Parliament v Council* (C-317/4; C-318/04)).

8. Were art 42 TEU used to apply the Title IV voting procedures and competencies uniformly so as to bring legislation on police and judicial co-operation in criminal matters in line with the general First Pillar procedures, this would bring to an end disputes over voting rights and the correct legal basis for certain measures. However, where the *passerelle* would be used in a fragmented, instrument-specific way, laying down different *regimes* for different areas of criminal justice legislation, very little clarity, if any, would have been gained. It would therefore seem sensible, where use of art 42 TEU is contemplated, to do so in a rather radical, clear-cut fashion. Only one voting procedure should apply to all Third Pillar instruments and this should be the one provided for in Title IV TEC. This would limit the scope for fruitless and disruptive litigation over the exact nature of a European criminal law and justice measure.

MEMBER STATES' VETO, QMV AND THE ROLE OF THE EUROPEAN PARLIAMENT

9. Obviously, the most crucial aspect of the use of the *passerelle* is the effect on the voting procedure and thus the Member States' veto powers under the unanimity provisions in Title VI TEU. While Ireland and the UK enjoy the right to opt-in any measure adopted under Title IV TEC and will thus enjoy the same privilege under measures transferred from the Third Pillar to the First, all other Member States will feel the effect of a change in voting *regimes* more acutely and inescapably.

10. Yet, use of art 42 TEU will only improve the decision-making process in the Council as called for by Commission President Barroso in early May, where the Title IV TEC QMV provisions were applied across the board and without subject-related modifications.

11. JUSTICE is disinclined to propagate either the retention of present voting procedures or the application of QMV to all Third Pillar measures. Our experience has shown that, where sensitively applied, a Member State's veto (or even the threat of its use) may protect European citizens from the adoption of ill-conceived or draconian measures in the field of police and judicial co-operation in criminal matters. Conversely, the present voting conditions in the Third Pillar had the effect of stalling the adoption of instruments beneficial to the cause of fundamental rights protection in the EU, as under the unanimity rule consensus could not be reached (eg in case of the draft Framework Decision on certain procedural rights in criminal proceedings in the EU).

12. We are adamant, however, that where, under an art 42 decision, QMV would be applied to transferred Third Pillar matters, this abolition of Member State's veto right would have to occur in tandem with the extension of the European Parliament's current Title IV TEC co-decision powers. It is at present unclear if art 42 TEU empowers the Council, when deciding on the use of the *passerelle*, to lay down rules on the powers of the European Parliament in the legislative process which deviate from the normal Title IV TEC process of co-decision under arts 251, 67(2) TEC. The term "voting condition" used in art 42 TEU leaves open the question, whether it only refers to the actual voting procedure in the Council or is meant to cover the whole legislative process, thereby granting the Council the power to unanimously determine the involvement of the

Parliament in the adoption of transferred Third Pillar measures. JUSTICE would prefer a restrictive interpretation of the powers given to the Council in art 42 TEU, so that the co-decision procedure would apply automatically to measures transferred under the *passerelle*. We endorse the statement made by Commission President Barroso in his speech at the Joint Parliamentary Meeting on the “Future of Europe” on 9 May 2006 in Brussels where he said that “*we must improve democratic accountability. We must ensure democratic control inside normal Community procedures, with European Parliament scrutiny.*” Only where it is ensured that proposed measures receive thorough scrutiny in a Parliament that has the power, if need be, to block a given measure, could a relinquishing of Member States’ veto under the TEU be contemplated. JUSTICE thus strongly supports the introduction of the co-decision procedure in Third Pillar matters in case use is being made of art 42 TEU.

13. We are concerned, however, that the use of art 42 TEU, when read restrictively, could end the right of individual Member States to initiate legislative measures under art 34(2) TEU, as under the normal First Pillar procedure the right to initiate legislation lies exclusively with the European Commission under arts 67, 251 TEC. 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 Constitution Treaty. Again, it is far from clear whether or not art 42 TEU mandates the Council to decide on the right to initiate the legislative process as part of the “voting conditions” decision.

14. However, in light of our warning above (para 8), it will have to be borne in mind that any rules under art 42 TEU laying down a legislative procedure deviating from the standard Title IV TEC procedure may expose measures adopted under these special legislative provisions to annulment proceedings before the ECJ brought by dissatisfied Member States, the Commission or Parliament under art 230 TEC on grounds of choice of incorrect legal basis and thus deficient legislative process. Such a situation could only be avoided by adopting “voting conditions” under art 42 TEU identical with those under Title IV TEC.

LEGISLATING WITH A SENSITIVITY FOR THE NATURE OF THE CRIMINAL LAW

15. We firmly believe that the ECJ should enjoy the regular powers provided for in the TEC (with the modifications laid down in art 68 TEC). In our opinion, an art 42 decision would automatically make the Title IV TEC provisions applicable to those Third Pillar measures covered by the art 42 decision. This includes the competence to pronounce on whether or not a Member State has implemented a directive correctly.

16. Such competence, which the ECJ does not enjoy under the present Title VI TEU provisions, would mean that correct implementation and actual application of provisions contained in police and judicial co-operation instruments laying down procedural safeguards for individuals (such as those provided for in the Framework Decision on the European Arrest Warrant) could be more effectively controlled. The ECJ could thus play a significantly greater role in safeguarding fundamental rights in the context of EU police and judicial co-operation, which JUSTICE would warmly welcome. Moreover, use of the *passerelle* would allow *all* Member States’ courts of last resort to avail themselves of the preliminary reference procedure of art 234 TEC (as modified by art 68 TEC), which so far is reserved to those courts whose states have made a declaration under art 35(2) TEU.

17. Yet, we consider criminal law and procedure to have a special place in Member States’ legal orders. Great harm could be done by measures taken at EC level that, while regulating or harmonising certain specific aspects of Member States’ criminal justice systems, do not pay sufficient attention to the effects these measures might have on national legal systems’ internal coherence. With QMV in the Council and the ECJ’s stronger role in watching over the implementation of transferred Third Pillar measures under art 42 TEU, it will be all the more important for those involved in the legislative process to ensure that criminal justice measures taken at EC level are carefully tailored to the aim they are meant to achieve. Council and Parliament will have to legislate with the utmost circumspection, mindful of the special nature of the criminal law and the unintended effects an EC measure may have on respective national criminal justice systems.

8 June 2006

Memorandum by The Law Society of England and Wales

INTRODUCTION AND GENERAL REMARKS

1. The Law Society of England and Wales (“the Society”) is the regulatory body for more than 121,000 solicitors in England and Wales. It also represents the views and interests of solicitors in commenting on proposals for better law and law making procedures in both the domestic and European arenas. The Society welcomes this opportunity to submit comments on the question of the criminal law competence of the

European Community. This submission from the EU Committee offers comment both on the broad question of the use of the *passerelle* procedure under Article 42 of the Treaty on European Union as well as the judgment of the European Court of Justice in Case 176/03 *Commission v Council*.

CASE 176/03 COMMISSION V COUNCIL

2. We note the ruling of the European Court of Justice (ECJ) in *Commission v Council C-176/03* and the Commission's subsequent Communication¹. We also note that another case pending before the ECJ may help to clarify further the scope of the Court's initial ruling². In this subsequent case, the Commission asks the ECJ to annul Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, in light of its ruling in Case C 176/03.

3. The ECJ in its ruling concerning the Framework Decision on the protection of the environment through criminal law³ confirmed that "as a general rule neither criminal law nor the rules of criminal procedure fall within Community's competence". It goes on to state that any acts adopted under the provisions of Title VI of the EU Treaty must not encroach on the powers conferred by the EC Treaty and that neither the Treaty nor its case law prevent the legislature:

"when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."

4. As a consequence of the ruling, measures adopted within the Community sphere (first pillar) are not prevented from including provisions that pertain to the criminal law, when these are considered necessary to ensure observance or the effective enforcement of Community rules of environmental protection. A number of first pillar measures do already make reference to criminal law but as a matter of general law, directives would normally stipulate only the need for Member States to ensure effective, proportionate and dissuasive sanctions/penalties. For instance Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, which accompanies the Framework Decision in question in Case C-440/05, states at Article 8(1):

"Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties."

5. Despite the ruling in C-176/03, the crux of the matter remains the extent to which criminal law measures can be adopted as Community (first pillar) measures. In other words can the totality of provisions that, until the ruling, would have been contained in a Framework Decision now be contained in a Directive? The Commission has given the ECJ ruling a broad, permissive interpretation—a green light to adopting under the first pillar all substantive criminal law measures intended to pursue a Community objective.

6. While the Commission has been keen to stress that it is not insisting on setting criminal sanctions at EU level for all policy areas, but only in cases where Community level rules are necessary to ensure effective enforcement, a minimum EU harmonisation of the maximum level of criminal sanctions available in the Member States clearly goes beyond the scope of the ruling in C-176/03.

7. It does however conclude in its Communication that the ECJ's reasoning in C-176/03 "can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated", that "the Court makes no distinction according to the nature of the criminal law measures" and that "[t]his system brings to an end the double-text mechanism (directive or regulation and framework decision)".

8. We believe that the situation is more nuanced and requires further clarification by the ECJ. The Court's ruling did not, as such, specify that all substantive criminal law provisions pursuing "Community" objectives should henceforth be adopted within first pillar measures. It merely stated that the Community legislature is not prevented "when the application of effective proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."

¹ COM (2005) 583, Communication to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (C-176/03 *Commission v Council*).

² Case C-440/05 *Commission v Council*.

³ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32003F0080:EN:HTML>

9. Even on a most extensive meaning of the ruling, the Community can only require a particular type of penalty to be imposed. And that very extensive reading is contrary to the Advocate General's views and also remains unsupported by the ruling of the court which was focused on the subject matter of the proposal.
10. In Case C-176/03 the Court decided to annul the entire Framework Decision because it was indivisible and because it encroached on Article 47 TEU. The Court did not examine in detail the arguments of the Commission that only parts of the Framework Decision should be annulled. Neither did it examine the extent to which measures could be adopted under the first pillar.
11. Furthermore, Advocate General Colomer in his Opinion did conclude that only certain provisions of the framework decision need be annulled. For instance, he concluded that Article 5(1) should not be adopted within a framework decision, but rather a Community measure, with the exception of the reference to "sanctions involving the deprivation of liberty and extradition".
12. It could also be argued that the ruling is limited to the Community's competence in relation to environmental protection. The Court's decision is in the specific field of environmental protection and relies upon the unique Community competence for areas with Member States' own sovereign powers in Article 175(2) EC. Nevertheless the Commission concludes that a number of existing other Framework Decisions need to be reviewed and that the provisions therein whose correct legal basis is the first pillar should be transferred into a first pillar measure without any substantive change.
13. We are concerned that the Commission has been overzealous in its interpretation of the ruling—already it has used it as a justification for amending its proposal for a directive on criminal measures aimed at ensuring the enforcement of Intellectual Property rights⁴ and is considering the use of criminal sanctions in other first pillar areas, such as consumer protection⁵. We hope that the ECJ's ruling in Case-440/05 will provide greater guidance on the first pillar/third pillar division, given that a Framework Decision and a sister Directive are under consideration. We also note that the European Parliament is due, during the week of 12 June to give its own views on the implications of the ruling in C-176/03.

USE OF THE PASSERELLE PROCEDURE

14. The Society has previously considered the question of the transfer of police and judicial co-operation in criminal matters from the third pillar to the first pillar during the debates on the Convention on the Future of Europe and the Constitutional Treaty. The Society expressed concern that the creation of a pillar structure in the European Union had allowed certain areas of European activity, notably Justice and Home Affairs, to develop outside a framework of democratic accountability and judicial control. The Society therefore offered strong support for the fusion of the pillar structure.
15. The Society considers that that the full incorporation of the Justice and Home Affairs pillar into the Community structure offers the best guarantees that rights and freedoms that are in the interests of individuals will be balanced against the security concerns of the Member States. Europe's Justice and Home Affairs policy must be based on due process and must protect the individual's rights as well as facilitate cross-border law enforcement. It is essential that the principles of transparency and democratic accountability be at the core of all developments in the Union, be it legislation, policy or practice.
16. It is for these very reasons that the Society would support any move to invoke the passerelle procedure under article 42 of the Treaty on European Union. We agree that this would improve decision-taking and accountability in the area of police and judicial co-operation. It could also serve as a mechanism through which to speed up the decision-making process—although this may not be the case if the co-decision procedure involves a number of readings and leads to conciliation.
17. We note that the provisions of article 42 state that the Council would determine the "relevant voting conditions relating to" any transfer of policy, thus leaving the Council the possibility of retaining unanimity in certain areas. This reflects the situation as regard civil judicial co-operation where unanimity voting has been reserved for family law matters. We do not wish to state whether, as a rule, qualified majority voting or unanimity would be preferable but would like to offer the following examples to reflect the two sides of the argument.
18. Limiting the use of national veto and putting an end to blocking tactics currently employed on certain proposals could be a beneficial outcome of any transfer of competence. For example, the Society regrets that the draft Framework Decision on certain procedural rights in criminal matters has been held hostage to national veto and notes that this is one of a number of proposals that might benefit from a process of qualified

⁴ COM(2006) 168 final.

⁵ See the public consultation of the Commission's DG for Health and Consumer Affairs on the review of the Timeshare Directive, published 2 June 2006.

majority voting. However, on the other hand, the concern is that without unanimity voting certain more repressive proposals may be adopted, notwithstanding the concerns of some Member States—we would refer here to the political debate surrounding the framework decision, now Directive, on data retention for law enforcement purposes upon which some Member States expressed concerns in relation to the rights of the individual. We would also refer to the European Evidence Warrant, the subject of recent political agreement, which might have been very different in substance and scope were it not for unanimity voting. We also have concerns that proposals vehemently opposed by certain Member States would also be pushed through, for example the European Public Prosecutor.

19. The voting mechanism will no doubt be the topic of lengthy debate. It is possible that the “emergency brake procedure” as envisaged under the Constitutional Treaty could be an option or there would be a focus on enhanced co-operation.

20. Another question specific to the position of the United Kingdom and Ireland would be in relation to the Protocol to the Treaty of Amsterdam and the right to exercise an “opt-in” in relation to matters under Title IV of the Treaty establishing the European Community, notably asylum, immigration and judicial co-operation in civil matters. Denmark would similarly be affected by their decision to remain outside the scope of all measures in this area. The question would be whether by exercising the *passerelle* clause and introducing police and criminal matters into Title IV this right of “opt-in” would extend to legislative proposals relating to police and judicial co-operation in criminal matters. Whilst this may serve as a tool by which to protect national interests it could be regarded as a step backwards in terms of a coherent approach to the development of an area of freedom, security and justice.

COMMUNITY METHOD AND CRIMINAL LAW MATTERS

21. Notwithstanding the voting procedures to be assigned to matters in this area, if the *passerelle* procedure were to be invoked and police and judicial co-operation in criminal matters were to be subject to the “standard” Community method the Society would see a number of benefits to this; sole right of initiative of the European Commission, co-decision with the European Parliament and full jurisdiction of the European Court of Justice.

22. The Society supports a sole right of initiative for the European Commission in the area of police and judicial co-operation in criminal matters, removing the Member State right of initiative. By giving the European Commission the sole right of initiative in this area the development of the “area of freedom, security and justice” is more likely to be undertaken in a co-ordinated and coherent manner. Both by taking into account other relevant Community policies such as those arising in fields of activity like social policy, equality policy or external relations, and in terms of achieving a better balance between freedom, security and justice. In our view the balance between the different elements in this mix is crucial. To date, Europe has found itself developing too far in the direction of an “area of security” with freedom and justice lagging far behind.

23. Moreover limiting the rights of the Member States to bring forward legislative proposals should put an end to proposals based on purely domestic priorities and prevent knee jerk political reactions to the latest justice crises. Such initiatives have often hampered the creation of a long term strategy for Justice and Home Affairs at a European level and have led to activity without continuity and, on occasion, contradictory outcomes. In our view, the European Commission is a better guarantor of the development of coherent policy in this crucial area. We do not see any necessity for the continuation of a shared right of initiative as the experience to date does not appear to have yielded particularly positive results.

24. Furthermore, unlike the Member States, the Commission has the explicit role of “guardian of the treaties” and can be held to account both by the European Parliament and European Court of Justice if it fails to give due weight to the rights of individuals as set out at a European level. This role also gives the European Commission the important responsibility of holding the Member States to account should they fail in their obligations or commitments. The current lack of enforcement power in relation to Member States’ implementation of framework decisions tends to make a mockery of implementation deadlines and again limits the effectiveness of coherent European Union action. For example the delays and differences in the implementation of the European Arrest Warrant lead to a two-tier extradition system for over a year.

25. Using the *passerelle* procedure to bring the third pillar into the Community structure would also alter the respective roles of the European Parliament and European Court of Justice and this would be a welcome development.

26. Involving the European Parliament as a key partner enjoying the right of co-decision would go some way to remedying the democratic deficit that exists to date and improve accountability and transparency. Notwithstanding the debate as to the low levels of participation in European Parliamentary elections, it is the

Society's view that as the only democratically elected EU institution it remains the best place in which to conduct an open debate about the decisions that are to be taken. We believe that it is important that developments in European Justice and Home Affairs policy that affects individuals and their fundamental rights are properly debated and seen to be based on more than political compromises sealed behind closed doors. Moreover, we are confident that the European Parliament will be an effective player in ensuring the balance between security, freedom and rights and we consider that it could provide a positive counterbalance to the "lowest common denominator" decisions taken by the Council of Ministers.

27. We also consider that the European Parliament is the best placed institution to provide oversight and public scrutiny of the actions of other institutions involved in European Justice and Home Affairs, notably Europol and Eurojust. The Society is concerned that these institutions, particularly Europol have been created outside the normal institutional framework. This leaves them in an accountability "limbo"—they are neither scrutinised fully by the European Parliament, nor are they accountable for their activities in the European Court of Justice.

28. The European Court of Justice would also take on a new role under a unified first and third pillar arrangement. Rather than the court's jurisdiction being limited to preliminary rulings in relation to those Member States who have chosen to confer jurisdiction on it, the European Court of Justice would be given a similar scope of action to that which it has under the First Pillar. One of the major guarantees of proper institutional accountability is the possibility for judicial review of both the legislation passed on police and criminal matters and its implementation. Enhancing the role of the European Court of Justice should facilitate consistency, clarity and legal certainty.

PROPORTIONALITY AND SUBSIDIARITY

29. The Society continues to support the main principles of European decision-making elaborated over the last twenty years: subsidiarity, proportionality and transparency. Whilst supporting the transfer of police and judicial co-operation in criminal matters to the first pillar, and having noted the number of benefits that this would bring, we would like to reinforce the need for the principles of subsidiary and proportionality to be paramount in all actions in this area.

30. The creation of an area of freedom, security and justice is an ambitious project, one that must be developed step-by-step and with an acute awareness of the different legal traditions and jurisprudential heritage of each and every Member State. The use of the passerelle procedure should not be an excuse to expand Community competence or to promote harmonisation over approximation. We would recall the provisions of the Constitutional Treaty which state that: "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

7 June 2006

Memorandum by The Law Society of Scotland

The Criminal Law Committee of the Law Society of Scotland ("the Committee") welcomes the opportunity to comment on the proposal regarding the transfer of the criminal law competence of the EU from the third pillar under the Treaty on European Union to the first pillar under the Treaty creating the European Community. These comments are necessarily brief as the details of proposals have not yet been released and it is therefore difficult to make any detailed commentary on them. However, the Committee does have a number of general points.

PRELIMINARY REMARKS

The Committee recognises that criminal law is an area of increasing importance for the EU and that it is a natural corollary of the single market that there will require to be greater co-ordination of national criminal justice systems to ensure both efficiency of cross-border functioning and, just as significantly, fairness in the treatment of those affected by these systems. Despite the limits of the legislative powers of the EU under the third pillar, the EU has nevertheless already taken notable steps in proposing and putting in place changes to the criminal law in Member States. Legislation as important as that relating to the European Arrest Warrant has already been brought into force, and areas as central to national criminal justice systems as bail and the presumption of innocence are the subject of current proposals.

Criminal justice is a matter which is considered to be at the core of the State's relationship with its citizens and the Committee recognises that it is essential that specific issues can be dealt with at a local level by specific measures of criminal law. Due regard must be had for the specificities and traditions of national criminal

justice systems. However, because of the nature of the single market, there is a need for further cross-border co-operation and, indeed, harmonisation in this area. The Committee does not consider that these two objectives must always be mutually exclusive: carefully drafted legislation with appropriate levels of pre-legislative consultation can provide the framework for useful harmonisation implemented in a way that is compatible with national systems. In addition, the criminal law competence of the EU can potentially be used not only to ensure the smooth operation of the criminal justice system across borders, but also as a useful tool to raise procedural standards in criminal matters across the EU. An essential facet of all of the proposals regarding mutual recognition in various areas of criminal law is that the safeguards in place for individuals in the different Member States are robust and sufficiently high. The Committee also considers that one of the concrete benefits of the transfer to the first pillar would be greater democratic scrutiny by the European Parliament and increased judicial oversight by the European Court of Justice.

CURRENT POSITION

EU legislation relating to policing and criminal justice is presently dealt with under a procedure which is essentially inter-governmental. All decision-making powers—and to a certain extent, the right to initiate the legislative process—lie in the hands of Member States. The European Parliament has only the right to be consulted on proposals. Similarly, the jurisdiction of the European Court of Justice is very limited and requires Member States to permit issues arising under this pillar to be referred to the Court.

The legal instruments provided for under the third pillar—common positions, Framework Decisions, decisions and conventions—are also specific to this area.

PROPOSAL FOR TRANSFER

Article 42 of the Treaty on European Union States:

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

The European Commission and the Finnish Government have indicated that they will seek to have the Council act to transfer policing and criminal justice powers to title IV as envisaged by Article 42.

SPECIFIC COMMENTS

In specific terms, the Committee is of the view that if and when the criminal law competence of the EU is transferred to the first pillar of the EU Treaty, consideration must be given to the following.

System of voting within the Council and the role of the European Parliament

It is unclear whether a transfer to the first pillar would entail a wholesale move to qualified majority voting in the Council, or whether there would be some element of unanimity remaining, another system altogether or indeed a mixture of these. The Committee considers that, where qualified majority voting is introduced, it should be accompanied by the co-decision procedure in the European Parliament. In an area of law of such central importance to EU citizens, it is essential to ensure proper democratic input through the Parliament, especially where there is no right of national veto.

The Committee notes that the UK already has an opt-out under Title IV regarding civil law, visas, borders, immigration and asylum. It is possible that if the criminal law competence was also transferred into Title IV that the UK opt-out would also apply to this area, although this is a matter which requires clarification. Clearly, in that the case, the issue of the national veto would be less crucial.

European Commission

A transfer of criminal competence to the first pillar would place the power of initiative in legislation-making entirely within the Commission's hands. The Committee considers that this should provide the basis for more coherent decision-making as it would ensure that Member States cannot be able to bring forward proposals for legislation based only on specific domestic issues.

European Court of Justice

Under Title IV, the European Court of Justice would have more significant powers to review legislation, and to deal with references for preliminary rulings from by national courts under Article 234 of the Treaty. This can only be a positive development and is a natural consequence of the change in legislative powers. In particular, the jurisdiction of the European Court of Justice under Title IV allows for all relevant persons (natural and legal) to bring annulment proceedings against decisions of the EU institutions and for infringement actions to be brought against Member States which are not currently possible under third pillar arrangements.

Decision-making and Legislative Instruments

There is the potential for quicker and more effective decision-making under the first pillar with the national veto providing less of an obstacle to such important proposals as a Framework Decision on procedural safeguards. This, of course, could have the concomitant disadvantage of permitting the passing of more repressive legislation, although it can be expected that this would be balanced by greater democratic scrutiny by the European Parliament. The legislative instruments available under the first pillar are also those which are familiar to other areas of EU law: Regulations, Directives and Decisions. There needs to be clarity, however, on whether current legislative proposals could be transferred to a new system and the Title IV legislative instruments.

June 2006

Memorandum by Mrs Anne Palmer

1. **EU Commission Document “A Citizens’ Agenda” (COM (2006) 211 final)** This paper begins by extolling the virtues of the European Union, its great success and it delivers unprecedented peace, prosperity and stability and “a strong wish by Europe’s citizens for more EU action in many areas”. Also, “despite the absence of agreement on the Constitutional Treaty, the EU has taken a number of significant steps forward”. The Documents states that the “principles and values of the EU have not changed—freedom, democracy, the rule of law, tolerance, solidarity”, etc, but if that was the case, I would not be writing this today.
2. If the people had had a referendum in the nation state’s where governments had ratified the Treaty establishing a Constitution for Europe (meaning the Union), the results may have been some-what different.
3. This paper is about the lack of democracy, a body of people that if the people they allegedly represent do not like what is in a new Constitution and “get the right result in a referendum” the people’s representatives will bring the Constitution in over the people another way. They break that very rule of law they themselves make. There is then no “solidarity” and the freedom we have known, and yes taken for granted has been removed from us, not by an enemy, but by those the people trusted to protect the very freedom the people of this country once gave to so many others, by paying the ultimate price.
4. **Case C-176/03 Commission v Council (EU COM (2005) 583 final)** in which one of the Commission’s aims is to suggest ways of correcting the situations regarding the tests, which, according to the Courts ruling were not adopted on the proper legal basis. The Commission also aims at ensuring that the rights of the Commission are preserved, the appeal seeks to restore legality and provide the necessary legal certainty. I am sure then that the Commission would be among the first to understand why the people will also fight to preserve their rights and their way of life?
5. Whatever decision this Court makes, and it matters not what “implications” there may be for any “national government”, there is, as I understand it, no Court of Appeal.
6. At Paragraph 3 on the above EU COM Document, (I do not have a British interpretation of the event, only the Union’s version) re the Courts ruling, it can/may be interpreted in different ways to suit whatever meaning is required and for whatever purpose at any one time. (Eg “as a general rule”) In paragraph 6 of the document, it becomes quite clear that this is the intention regardless of the outcome of the particular specific case taken to Court.
7. At this point I respectfully draw attention to the existing “pillars”, which remain and must remain and have not been as yet collapsed as proposed under the EU Constitution. I also draw attention to paragraphs 12 (Necessity), and 13 (Consistency).
8. The paragraphs 14 to 19 I find particularly disturbing, totally opposite to the words written for the citizen’s benefit in the first paper mentioned. In the Commission’s efforts to “establish” (not re-establish) the correct legal basis for items mentioned in the “Annex”, it requires a foothold to strengthen the criminal law framework for the enforcement of the law against ship-source pollution. However, environmental law covers such a vast

field now and touches upon almost any piece of legislation, so what a foothold it will be for it is the foothold into the criminal law the Court found “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence”.

9. Paragraphs 16 and 17 appear to be “threatening”, and I would even suggest “menacing”. Most certainly “disturbing” at the way the Commission is intent to assert its authority. I find the paragraph, “This solution would work only if Parliament and the Council agree not to open discussions of substance during this special procedure. Such an approach accordingly requires the prior agreement of the three institutions”, difficult to accept in an alleged open and democratic organisation such as the Union professes to be.

10. That use might be made of the *passerelle* (bridge) under Article 42 of the Treaty on European Union. I first looked to the House of Lord’s EU Committee 15th Report on Clause 2 of the European Union Bill-the Constitution’s *Passerelle* Provisions. (13 May 2005) where it says that if the EU Council decided to invoke the *passerelle*, it could only do so unanimously and would first have to seek the consent of the European Parliament and notify national parliaments. Plus, any proposal for such a decision could (at that time) be blocked “if a national parliament makes known its opposition within six months of the date of such notification”.

11. There has been no Treaty change and the people of two nations have rejected the EU Constitution. Such an important constitutional change, I respectfully suggest, must be supported by ratification (by the people) in a Treaty. A request was made by the Committee who had expressed grave reservations about the *passerelle* and for the Treaty itself to set out those areas to which the *passerelle* might apply. The latter is most important, for not to have it so detailed, may lead to the *passerelle* being used for other than what our Parliament may have intended. It appears to me to be a deliberate attempt to be ambiguous for future use for just such an occasion.

12. The EU Committee’s Forty-first report on the *passerelle*, para 369 suggests that in spite of the safe guards, they oppose the *passerelle* provision for it could have the effect of allowing the Council to abolish unanimity in certain areas without any substantive involvement of national parliaments. They suggest too, and have noted that the Government is also unconvinced by what is proposed and the Committee urged the Government to secure the deletion of this provision at the IGC. The only way the Committee felt that the *passerelle* would be acceptable would be if the Treaty itself specified particular articles in relation to which a *passerelle* could be used. A rather sensible arrangement I think which, considering the length of time taken to bring forth the EU Constitution, it should have been a necessity in such an important document. Nothing should be left to chance in such a document of such constitutional significance.

13. Still with the Forty-first Report. I point out paragraphs 177 where the Committee oppose the *passerelle* because it would both weaken democratic accountability and undermine the role of Member States. Also paragraph 178, as stated above in paragraph 12. In Chapter 6 paragraph 303, there seems some agitation or concern regarding the extension of QMV in one proposal for a *passerelle* clause is suggested for CFSP. Such matters in fact ALL matters re our British Justice, British Police and British Forces are a matter for national Governments only.

14. Andrew Duff MEP submitted a Memorandum of Evidence to the House of Commons European Scrutiny Committee on the EU Constitution 26 July 2004, in which he mentions the *passerelle*. “The Italian presidency proposed to limit the Prosecutor to the EU’s financial interest, but installed a *passerelle* to widen his scope in future (by unanimous decision of the European Council and consent of parliament). However, this *passerelle* was linked to national ratification by all member states, thereby rather negating its purpose. The Irish presidency negotiated successfully at the IGC to remove the unfortunate and unnecessary stipulation about ratification”. End of quote. This, I believe shows how matters can be manipulated locking out, not only the people from having their say, but Parliaments and tragically, democracy.

15. The Italian presidency did put forward an amendment to allow any one national parliament to block use of the *passerelle* notwithstanding the unanimous decision of the EU Council that may still remain (IV-7a.3) (See Duff Report).

16. One of the major factors of the EU Constitution was the removal or collapsing of the “pillars”, which not only brought into the open the primacy of EU Law above national laws and constitutions but the removal of the pillars would give the European Court of Justice enhanced supervision over all aspects of justice and home affairs, plus over common foreign and security policy. This would mean the permanent loss of sovereignty and of our Constitution. This is why, we as a Country could never agree to any part of the Treaty ESTABLISHING a Constitution for Europe.

17. If no one in our Parliament has noticed thus far, I will mention in passing that all this is contrary to and completely incompatible with our Constitution and Her Majesty’s Coronation Oath. Quite apart from the fact that in the making and agreeing to these particular European Union Treaties, they are in violation of the Oaths

of Allegiance to the Crown we, as British born citizens have bestowed upon us from the moment we are born here in the United Kingdom and all Parliamentarians so swear as they take up their oaths of Office.

18. There is no doubt that the Commission, Council and National Parliaments are “Cherry picking” and applying certain Articles and new agencies from the EU Constitution, ignoring in so doing the wishes of the people. I am aware that certain Member States have already “ratified” the Constitution, but not all have allowed their people to have a vote in a referendum and on such an important constitutional issue that would not only affect this generation, it will have an effect on future generations for many years to come until the break up of the Union which will eventually come.

19. In making the decision to ignore the wishes of the people and to “cherry-pick” from the rejected EU Constitution it probably may drive people away from the EU, not towards it. Ministers speak of “respect”, “democracy”, at a time when, as a country we are losing young men and women in allegedly bringing this valuable “democracy” to the people of Iraq. What are these brave souls dying for, when the families they leave behind are fast losing their rights, laws and the precious “democracy” they are fighting for, for the people of Iraq?

20. One of the core proposals put forward involves implementing the “*passerelle*” clause, (The use of Art 42 TEU and 137.2 TEC) which would mean eliminating the national veto in Justice and Home Affairs (police and criminal justice cooperation).

21. Should all these matters be implemented without a Treaty or the EU Constitution, and **then there is absolutely no need for them to remain in any new Treaty or Constitutional Treaty**. The Charter of Fundamental Rights can be removed along with all other Articles and Agencies that have been “cherry picked” previously.

22. However, in agreeing to all of these proposals put forward by the Commission, there will be a heavy price to pay, for not only have they all been rejected by the people of two Countries, the people that have not had the chance to vote on the EU Constitution also will not take kindly to being ignored either. The whole makes rather a nonsense of the “Citizen’s Agenda” for obviously the EU has absolutely no regards for its citizens, yet it wants “loyalty” from them? This is not the way to get even recognition never mind “loyalty”.

23. I oppose most strongly anything that destroys our Constitution. Our involvement in the European Union has gone too far already. The *passerelle* clause is indeed a “bridge too far”. We have our own Constitution, we have a family of Commonwealth Countries and our friends from across the sea we are at present supporting and whose forces are dying along-side ours in Iraq as I write this, bringing that alleged democracy to a country that may make better use of it than our own politicians have here in the UK and most certainly better than the EU has for their alleged “citizens”. The Iraqi’s have decided on a constitution for themselves while our own politicians have ignored our long standing Common Law Constitution, yet it is to our Constitution we shall all be looking, and proudly so, very soon.

24. Here in the United Kingdom, it is the people that are sovereign. I look to where our true loyalty lies and it is not and never will be to the European Union. If our Members of Parliament ask themselves, “What would the people want us to do?” when looking at the three questions put before them today, they would know the answer without hesitation at all.

30 May 2006