

SPEAKING NOTES

Re: Certain aspects of the impact of the Lisbon Treaty on decision-making in the area of Freedom, Security and Justice - Committee on Civil Liberties, Justice and Home Affairs of 5 October 2009 - oral presentation - speaking notes

I. Introduction

1. At the meeting of the Committee on Civil Liberties, Justice and Home Affairs of 5 October 2009, the Legal Service made an oral presentation on certain aspects of the impact of the expected entry into force of the Lisbon Treaty on decision-making in the area of Freedom, Security and Justice. The present information note has been prepared, at the request of the committee, on the basis of the speaking notes for that presentation, with footnotes added.¹ The more colloquial style of such notes has largely been retained and the present text does not pretend to provide an exhaustive analysis of, still less a legal opinion on, the subject.

II. The Lisbon Treaty and the area of Freedom, Security and Justice

- (1) The "communitarisation" of the third pillar
 - a) *Overview*
2. The Lisbon Treaty would complete a process started by the Treaty of Maastricht, in 1993, of applying the "Community method" of making and applying policy in the area of Freedom, Security and Justice.
3. At present, these measures can be adopted under either the first pillar of the EC Treaty, as Community measures,² or Title VI of the European Union Treaty, depending on the material content and particularly the objectives the measure seeks to achieve. This uncomfortable cohabitation of Community and intergovernmental means of policy-making is made even more difficult to handle because of the variety of legislative procedures which may currently apply to measures in the same area of regulation, and the fact that some legislative procedures have been modified with the passage of time,

¹ "TEU" refers to the Treaty on European Union in its post-Lisbon version, and "TFEU" to the accompanying Treaty on the Functioning of the European Union.

² Title IV of Part Three, EC Treaty (Articles 61 to 69 EC).

as a result of the adoption of other measures, or via the *passserelle* mechanism.³ Moreover, the usual mechanisms of judicial review of such measures and of supervision of their implementation are not fully applicable in this area under either pillar.⁴

4. This new Treaty would significantly simplify and democratise decision-making in the area of Freedom, Security and Justice. Simplify, in that there will be one legislative procedure which will be more or less universally applicable; democratize, in that both the European Parliament and the national parliaments will have a significant role to play in the adoption and application of these measures. While the institutional landscape of the area of Freedom, Security and Justice will retain a few specific features, for the most part these are of limited scope.
 5. In future, the codecision procedure, renamed the "ordinary legislative procedure", will apply to *all* areas of decision-making, including those where simple consultation of Parliament now applies or is even excluded such as the proposed SWIFT Agreement with the United States which the committee examined last month. Matters which were previously dealt with under the third pillar, such as judicial cooperation in criminal matters and police cooperation, will henceforth be treated under the same kind of rules as those of the single market.⁵ Union and Member State measures in this area will also be subject to the judicial review of the Court of Justice.
 6. The Lisbon Treaty would also lay down a number of new objectives for the Union and general rules and principles, such the requirement of solidarity between Member States which is fair to third-country nationals, in policies on asylum, immigration and external border controls, or the objective of facilitating access to justice.⁶
- b) *Specific features of the area of Freedom, Security and Justice of horizontal application*
7. There are two specific institutional features in this field which apply horizontally, that is, to the whole area of Freedom, Security and Justice.
 8. The first is that the national parliaments will play an enhanced role, both as regards the adoption of Freedom, Security and Justice measures, through the application of the Protocols the role of the National Parliaments and on the application of the principles of subsidiarity and proportionality,⁷ and as regards the evaluation of the implementation of the Union policies in this area, including cooperation on internal security and the activities of Eurojust and Europol.⁸
 9. The second feature is that, as before, Denmark, Ireland and the United Kingdom benefit from a special opt-out regime under Protocols to the Treaties.⁹

³ The correct choice of legal basis in this area was also influenced by the judgment of the Court of Justice in Case C-133/06 *Parliament v Conseil* [2008] ECR I-03189.

⁴ See Articles 68 EC and, for the third pillar, Article 35 EU; for the relationship between the pillars, see Article 47 EU.

⁵ See Articles 82(2) and 87(2) TFEU respectively.

⁶ Solidarity principle, Articles 67(2) and 80 TFEU; access to justice, Articles 67(4) and 81(2) (e) TFEU.

⁷ Protocols Nos 1 and 2 to the Treaties, and Article 69 TFEU.

⁸ See Articles 70, 71, 85(1), third subparagraph, and 88(2) second subparagraph, TFEU.

⁹ See Protocols Nos 21 and 22 to the Treaties.

c) Specific features of limited application

10. There are also five specific features of the Lisbon regime which are limited to specific decisions or categories of decision, rather than whole areas of policy-making and/or are limited as regards either the persons to whom it applies or their application in time.
11. The first is the application of a special legislative procedure which only requires consultation of Parliament to certain decisions, such as provisional Council measures where a Member State is faced with a sudden influx of third country nationals, family law matters with cross-border implications, or measures in the area of operational police cooperation and police operations in the territory of other Member States.¹⁰
12. Some of these measures also require unanimity in Council rather than the normal qualified majority vote.¹¹
13. As regards judicial cooperation in criminal matters and police cooperation, the Commission will share its right of initiative, though this time with one quarter of the Member States (at present 7), and not individual Member States as now.¹²
14. The fourth special feature is the possibility for a Member State to apply a so-called "emergency brake" in respect of the adoption of measures on judicial cooperation in criminal matters which "would affect fundamental aspects of [the Member State's] criminal justice system".¹³ The draft measure would be referred to the European Council; if there is no consensus at that level, the Member States who wish to may initiate enhanced cooperation.
15. The last specific feature which could be mentioned is limited in both time and material scope, and concerns Union acts concerning police cooperation and judicial cooperation in criminal matters adopted before the Lisbon Treaty enters into force. For a period of five years from the entry into force of this Treaty, the Commission will be unable to initiate infringement proceedings for Member States' failure properly to implement these measures, and the Court of Justice will only be able to provide preliminary rulings on the interpretation and validity of these measures under the same conditions as at present, i.e. depending on the degree of acceptance by each Member State of the Court's jurisdiction.¹⁴
16. Chairman, while I have dwelt at length on the exceptions, it should be clear that the general rule is that the area of policy-making in the area of Freedom, Security and Justice is fully communitarised, subject to these few and limited exceptions.

¹⁰ Articles 78(3), 81(3), 87(3) and 89 TFEU respectively.

¹¹ Article 81(3), 87(3), and 89 TFEU.

¹² Article 76(b) TFEU.

¹³ Articles 82(3) and 83(3) TFEU.

¹⁴ Article 10, Protocol No 36 on transitional provisions.

(2) The Charter of Fundamental Rights of the EU

17. One other major legal result of the entry into force of the Lisbon Treaty would be the attribution to the Charter of Fundamental rights of "the same legal value as the Treaties".¹⁵ Members are presumably fairly familiar with the content of the rights it guarantees, which are to a large extent the consolidation of rights already granted in the Community legal order, though these are now to be applied to the subject areas currently dealt with under the second and third pillars. Once again I have to emphasize the limits of the application of the Charter, rather than the substance of the rights it safeguards.
18. In the first place, it is very clear that in itself the Charter does "*not extend in any way the competences of the Union as defined in the Treaties*".¹⁶ It means that the first matter to look at is the extent of the Union's legislative competence as it derives from the relevant legal basis in the TEU or TFEU. The Charter will then influence the way in which that competence is exercised by the institutions "*in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*".¹⁷
19. Just to give a simple example, in any data protection rules the Union adopts it will have to take into account the three requirements of Article 8 of the Charter. These are that
- everyone has a right to the protection of her or his personal data,
 - fair processing for specified purposes is allowed but only on the basis of consent or "some other legitimate basis laid down by law", and
 - the Union rules would have to provide for an independent authority to ensure compliance with those rules.
20. This brings me to the material scope of application of the Charter rights themselves. Though these rights are drafted in unqualified terms, Article 52 of the Charter provides that their exercise *may* be limited, but only:
- in accordance with law;
 - in so far as the essence of the right is respected;
 - where the restriction is necessary, and
 - where the restrictions "*genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*".

¹⁵ Article 6(1), first subparagraph, TEU.

¹⁶ Article 6(1), second subparagraph, TEU; Article 51(2), Charter.

¹⁷ Article 51(1), Charter.

21. As regards their scope of personal application, the Charter is fully binding on all the institutions, bodies, offices and agencies of the Union in all their activities.¹⁸ It also binds the Member States, but only when they are implementing Union law, subject to any legal effects of the Protocol on the application of the Charter to Poland and to the United Kingdom (see paragraph 25, below).¹⁹
- (3) EU accession to the European Convention on Human Rights
22. The last matter I would like to draw to the committee's attention also concerns the protection of fundamental rights, and that is the Union's power and obligation to accede to the European Convention on Human rights laid down in Article 6(2) TEU. At present, the Community does not have the necessary competence, as the Court ruled in 1996.²⁰
23. After Lisbon, the Commission will be able to negotiate accession and the Council acting unanimously will be empowered to conclude the necessary agreement, conclusion will require the consent of the European Parliament and the approval of the Member States in accordance with their respective constitutional requirements.²¹
24. The added value of this exercise is to institute a procedure of individual complaint, even against decisions of the Court of Justice, to the substantive rights already protected, and of course the Union may always provide more extensive protection than that under the European Convention.²²

III. Replies to Members' Questions

25. A number of Members enquired about the legal effects of the Protocol on the application of the Charter to Poland and to the United Kingdom, particularly after the Union has acceded to the European Convention on Human Rights. This question will be the subject of a separate examination.
26. On the question of the sensitivity of family law matters which had surfaced regularly in the referendum debate on the Lisbon Treaty in Ireland, it was pointed out that family law does not feature amongst the exclusive, shared or supporting, coordinating or supplementary competences of the Union.²³ However, the Council may, acting unanimously and after consulting the European Parliament, adopt "*measures concerning family law with cross-border implications*".²⁴

¹⁸ Article 51(1), Charter.

¹⁹ Protocol No 30 to the Treaties, on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

²⁰ Opinion 2/94 [1996] ECR I-01759.

²¹ Article 218(6)(a)(ii) and (8), second subparagraph, TFEU.

²² Article 52(3), Charter.

²³ Articles 3, 4 and 6 TFEU.

²⁴ Article 81(3), first subparagraph, TFEU.

27. On the question of whether the Lisbon Treaty would open up the way for the exercise of new competences for the European Union, it was suggested that the Treaty clarified the scope of the Union's competences in many areas (at present spread over three pillars), while in effect limiting these to the competences specified,²⁵ and that the "fall-back clause" of Article 352 TFEU could prove to be more difficult to operate than the current Article 308 EC.
28. On the possibility for a Member State which benefits from an opt-out from measures in the area of Freedom, Security and Justice applying an "emergency brake", it should be pointed out that this procedure only applies where the Member State concerned considers that the measure proposed would affect its criminal justice system. If the measure would not apply to the Member State concerned, it follows that it could not affect that Member State's criminal justice system. Moreover, the Member States opting out do "*not take part in the adoption by the Council of [the relevant] proposed measures*", and would not therefore be able to request referral of the proposal to the Council.
29. The question of the possible withdrawal of a ratification previously deposited with the Government of the Italian Republic is not dealt with anywhere in the Lisbon Treaty.²⁶

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²⁵ Compare, for example, Article 81(2) TFEU, which lays down an exhaustive list of subjects for judicial cooperation in civil matters, and Article 65 EC, which provides a non-exhaustive list.

²⁶ Article 357 TFEU.