



The Member States' Initiatives: An Inter-Institutional Turf War after the Treaty of Lisbon

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With the introduction of the Treaty of Lisbon came the possibility for Member States to launch an initiative under the Ordinary Legislative Procedure. This came into being as the scope of co-decision was expanded to cover the more sensitive issues of the third pillar (such as judicial cooperation in criminal matters and police cooperation). It was considered necessary that Member States have a shared right of initiative with the European Commission. One case in which the right of initiative was invoked was the Initiative for a European Protection Order (EPO). This dossier is one of the first and few cases in which the Member States' Initiative after the Treaty of Lisbon was used. It resulted in a turf war between the Presidency and the Commission regarding the scope of the Member States' Initiatives. This article looks into the Member States' Initiative as it was introduced after the Treaty of Lisbon and the debate that took place on the EPO.

Introduction

With the entry into force of the Treaty of Lisbon several changes in the domain of Freedom, Security and Justice (FSJ) took place. Amongst the changes made, the shared right of initiative in the Ordinary Legislative Procedure (OLP), as is presented in Article 76 of the Treaty on the Functioning of the European Union (TFEU), is one of the novelties in which the Commission shares with the Member States the prerogative of presenting legislative proposals in the field of police and judicial cooperation in criminal matters (Chapter 4 TFEU) and Policy Cooperation (Chapter 5 TFEU). In terms of decision-making, the Article presents a junction from which two separate forms of decision-making procedures in the field of FSJ sprout, pending upon the actor(s) who seize the legislative initiative. This article will examine the role of the institutional actors in a Member State's Initiative, the policy scope on which it applies, as well as reflecting on some of the future developments. The article will use the case of the initiative on the European Protection Order (EPO) to analyse some of the more practical implications of a shared initiative as it sparked an institutional debate on the limitation of a Member State's Initiative.



Commission, the Commission will also no longer be able to withdraw it. Additionally, Article 294(15) TFEU further restricts the Commission. In the first indent it is stated that the opinion given by the Commission at the end of the second reading is no longer part of the OLP. According to the normal OLP, should the Commission issue a negative opinion on the amendments, the Council has to adopt its decision by unanimity instead of Qualified Majority Voting (QMV). By removing this requirement the Council will always make decisions using QMV when dealing with Member States' Initiatives. Possibly, this was done to ensure that the Commission would not categorically give negative opinions on Member States' Initiatives, thus making it virtually impossible to arrive at an agreement on the basis of a Member States' Initiative on such sensitive matters as criminal matters and police. According to the second indent of Article 294(15) TFEU, the only role of the Commission in the whole process is restricted to giving advice should the Council or European Parliament ask for it or should the Commission want to present it at its own initiative. Thus, any policy initiated under Article 76b TFEU will significantly reduce the formal legislative powers of the Commission.

Sharing the Initiative

When the Treaty of Lisbon entered into force, the pillars of the EU were abandoned except for some of the special rules and procedures that remain in place for the Common Foreign and Security Policy (CFSP). For FSJ, this meant that co-decision would be further extended into this domain and that the EU would now use the same legal instruments and decision-making procedures as the community had been using over the years. Yet, there is a notable exception to this general rule. Decision-making regarding cooperation in criminal matters and police cooperation does not always follow the standard OLP procedure as outlined in the TFEU: instead, it is governed by two different procedures. The starting point of either procedure can be found in Article 76 TFEU which specifies that the right of initiative is to be shared between the Commission and the Member States. The first procedure stated in Article 76 TFEU is the OLP which starts on a proposal from the Commission. The second procedure deals with the Member States' Initiative and requires a quarter of the Member States to support the initiative: this means that the support of seven Member States is needed in order to launch the initiative.

Article 294 TFEU, which outlines the decision-making procedure, includes some special provisions to cover the matter of the Member States' Initiative in paragraph 15. Consequently, it can be stated that there are two decision-making procedures that govern the cooperation in criminal matters and police cooperation. If the Commission presents a proposal under Article 76a TFEU, the OLP will apply. Yet, if the Member States present an initiative under Article 76b TFEU, the OLP with the special provisions outlined in Article 294(15) TFEU will apply.

Under the later procedure (the Member State's initiative), the role of the Commission is weakened considerably. Firstly, if the Member States launch an initiative under Article 76b TFEU, the Commission is no longer the engine of the European integration process. Instead, a quarter of the Member States develop a proposal. As it is no longer the proposal of the

Scope

Secondly, there is the question of interpretation of Article 76b TFEU in relation to issues other than cooperation in criminal matters and policy cooperation. Policy issues do not always restrict themselves to one specific issue, but instead they tend to have overlaps with other domains. Each of these policy elements might be adopted on a different legal basis which might require a different decision-making procedure to be followed.

The main question, therefore, is how Article 76b TFEU should be read when overlaps occurs.

The EU has, since the Treaty of Maastricht and until the Treaty of Lisbon, separated the different pillars with each of their different decision-making procedures. Naturally, policy overlaps occur between these pillars. This raises the question of which policy pillar and which decision-making procedure should be used in case of such overlaps. The EU resolved this through the so-called 'double-text mechanism'. If the EU would consider it necessary that an EC policy proposal requires measures against criminal activities, a parallel third pillar proposal would be made. This mechanism would allow the Member States to guard their sovereign right on these

topics. Yet, problems emerged as soon as 'criminal-regulatory' policy issues were addressed. Here, both the Commission and the Council claim competence, resulting in a clash between the two¹.

The clash came when the Council adopted the Framework Decision 2003/80/JHA on the protection of the environment through criminal law. The Commission presented a proposal on the criminalising of environmental offences through Article 175(1) of the Treaty establishing the European Community (TEC). The Council felt that the Commission went beyond its competence which resulted in a Member State Initiative² from Denmark. The Commission, on the other hand, did not agree with the approach of the Council. It believed that the Council was using third pillar instruments to deal with first pillar policy issues. The issue came before the ECJ who ruled in favour of the Commission, stating that the Council has violated ex Article 47 TEU as the Framework Decision as it... encroaches on the powers which Article 175 TEC confers on the Community³. Even with regard to other TEC articles, the ECJ believed that such an encroachment should be prevented.



With the protection of ex Article 47 TEU, the Commission could combine Community legislation with legislation on cooperation in criminal matters, but the Member States could not establish Union legislation and apply it to the Community. Thus, the Community pillar is protected from any interference of the third pillar through Article 47 TEU. This provides for the safeguarding under TEU and it prevents the decision-making procedures of the Justice and Home Affairs (JHA) pillar from being dealt with by Community Policy.

Yet, with the Treaty of Lisbon, the JHA pillar structure disappeared. Article 40 TEU is the new article of the Treaty of Lisbon which has replaced the ex Article 47 TEU. The wording has been changed drastically as has its focus. Before the Treaty of Lisbon, ex Article 47 TEU covered second and third pillar issues in relation to first pillar legislation. The new article refers only to provisions dealing with CFSP. For the decision-making procedure regarding cooperation in criminal matters and police cooperation, the main question, therefore, is how Article 76b TFEU should be read when overlaps occur. Are Member States allowed to present initiatives if the topic is also related to matters on which the European Commission has the exclusive right of initiative? If so, the role of the Commission in the decision-making procedure dealing with Member States' Initiatives is much weaker than when the Commission presents a proposal. A broad interpretation of legislation in Chapter 4 TFEU and Chapter 5 TFEU would make it possible for the Member States to block the Commission from playing an effective role in the decision-making process. It would also mean the penalisation of EU policy as the Member States, probably under the leadership of the Council Presidencies, will be more eager to propose initiatives on matters outside the scope of the Member States' Initiative, but add a component dealing with criminal matters or police cooperation to give it the appropriate legal basis.

European Protection Order

Political drive of the Presidency

This eagerness of Member States to use the provision of Article 76b TFEU became obvious when, just two months after the entry into force of the Treaty of Lisbon, the initiative of Belgium, Bulgaria, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania, Finland and Sweden to establish a European Protection Order (EPO) was launched. Victims of a crime (e.g. sexual assault, harassment, domestic violence) can receive protection from a state by means of a protection order (e.g. a restraining order). Yet, an order issued in one EU Member State might not be recognised by another EU Member State. Consequently, the victim's right of free movement through the EU is restricted to the territory which recognises the protection order. It is the purpose of the initiative to rectify this situation.

In particular, Spain was very eager to move ahead with this subject. Under the Franco regime, domestic violence was not considered a criminal offence. Awareness grew in the decades after Franco as more field studies and institutions were created. A milestone was reached when the Parliament unanimously approved the Act for Comprehensive Protection against Gender Violence and it has been a policy priority ever since. Considering this background, Spain wanted to combat domestic violence on a European scale and used its term in Presidency for this. According to its Presidency programme:

*'The Union's capacity to eradicate gender-based violence should be improved. The creation of a European Observatory to draw up a common diagnosis of this terrible problem, as well as the adoption of a European Protection Order for the victims, will be two essential initiatives that will be advanced by the Spanish Presidency to achieve concrete progress on this matter.'*⁴

Consequently, the European Protection Order became one of the policy flagships of the Spanish Presidency and Spain aims to have it adopted in June 2010 at the end of its term.

The decision-making process

Spain started the implementation of its programme by sending a questionnaire⁵ to the various delegations on 23 September 2009, which appears to serve as an alternative to an impact assessment of the Commission. The Spanish Presidency presented the Member States' Initiative⁶ at the Council meeting on 22 January 2010. Overall there was general political support in the Council for the ideas of the Spanish Presidency. Yet, several questions still remained to be answered.

It was the Commission who pointed out in the first Council meeting on the EPO that the legal base Article 82 TFEU does not cover civil matters which are covered by Article 81 TFEU. From the questionnaire sent out by the Presidency, it appeared that not all Member States had adopted their protective measures through criminal law. In most Member States, civil courts can also issue protective measures. Only in a few countries are protective measures restricted to criminal law. Nevertheless, covering both criminal and civil matters will bring forth various difficulties, amongst them an incomplete legal basis of only Article 82 TFEU. The Commission presented some possible alternatives. Firstly, the initiative would restrict itself to criminal matters and would later be combined with other legislative measures. Secondly, the Commission had

already started working on a legislative package which will be presented at the beginning of 2011 under the Hungarian Presidency. The package will be based on an impact assessment and public consultations. However, to maintain the momentum, the Commission suggested giving a strong formulation in the Council Conclusions on this matter. Yet, though it would send a strong political signal, it would not be binding. At the end of the meeting the Presidency agreed with other delegates that binding measures were needed and discarded the idea of the non-binding conclusions.



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During the second meeting of the JHA Council on the initiative, it became clear that the Council was divided. The first group agreed with the opinion of the legal service of the Council that Article 82 TFEU is sufficient as a legal base and that this could be applied before both civil and criminal courts. The second group, on the other hand, agreed with the opinion of the Commission which stated that the text had to be limited to criminal matters and that civil matters should be excluded. During this meeting, the Commission once again reiterated its views that the Article 82 TFEU needed to be limited to criminal matters. As guardian of the treaty, the Commission also announced that it would bring the matter before the ECJ should the adopted directive also cover civil matters. The sharpening of the tone of the Commission, including the threat of going before the ECJ, shows the increasing friction between the Commission and the Spanish Presidency and would set the stage for the time to come.

This friction came to a boiling point at the last JHA Council meeting under the Spanish Presidency. It became clear that neither side was willing to budge. In the period leading up to the Council meeting the legal service of the European Parliament gave an oral presentation on the scope of the EPO. The Commission responded very sensitively during the Council meeting to findings of the legal service on the Parliament. The EP legal service stated that Article 82 TFEU in itself was not sufficient but should be read in combination with Article 3 TEU. The Commission believes that such an interpretation will make it possible to create criminal law using Article 82 TFEU regarding all domains of Article 3 TEU (e.g. internal market). This would thus also mean that Article 76b TFEU can be used to make legislation covering the matters of Article 3 TEU and thus vastly extending the rights of initiative for the Member States. The Presidency, on the other hand, believes that the Commission's opinion is a minority and wants to push for an agreement to move ahead in the talks with the European Parliament.

In the end, the issue was not put to a vote. The Presidency stated that this was not the right stage to make such a decision. Instead, a formal decision would take place under the Belgian Presidency. Commissioner Reding gave her views at the end of the Council meeting on the whole procedure so far and

considered it 'a mess'⁷. The Presidency on the other hand, in its final statement claimed to have not received 'the sincere cooperation of the Commission'⁸ and voiced its frustration about the reluctance of the Commission to change its views on the interpretation of Article 82 TFEU. Consequently, the final meeting of JHA Council under the Spanish Presidency ended with the Commission and the Presidency falling out with each other during a public meeting.

After the Spanish Presidency, the file entered into calmer waters. The council reconfigured the initiative to only cover criminal matters. In the final adopted version of the European Protection order, recital 10 states that 'This Directive applies to protection measures adopted in criminal matters, and does not therefore cover protection measures adopted in civil matters'⁹. With these modifications a position of the Council at first reading was adopted on 24 November 2011 and sent to the European Parliament. With no amendments of the European Parliament to the Council's position on the EPO initiative and the Commission proposal

on civil matters on the table, the initiative was adopted as an early second reading agreement on 13 December 2011¹⁰. With this, the Commission was successful in its turf war against the Council.

Conclusions

From the EPO case, several conclusions can be drawn regarding the role of the actors and the scope of the decision-making process. Firstly, the Presidency plays a pivotal role. The Member States' Initiative is driven by the political desire of the Presidency. It also shows that the innovation of the Treaty of Lisbon to make sure that the Member States' Initiative is supported by a quarter of the Member States appears to be lowered as the submission of an initiative will most likely need the support of the whole trio. This support is needed not only to ensure a good cooperation between the Trio Presidency but also because an Initiative might last longer than one Presidency period. As a result, it can be seen that to initiate the right of initiative for the Member States the formula is rather the Trio Presidency plus four other Member States. So it appears that the threshold is low enough to make the Member States' Initiative a feasible instrument.

Having said that, the role of the Commission – which no longer is the engine – is by no means weak. Even though it virtually no longer plays a formal role in the decision-making process, it has many friends sitting around the table. In the EPO case, it was possible for the Commission to gather a blocking minority for the EPO proposal. When the Spanish Presidency tried to gain a majority by opting out the UK (the UK opted in but was not in favour of the proposed form of the proposal), other Member States which initially supported the Spanish proposal started to back down in their support. The support for the Presidency is therefore by no means fixed and the Commission can through informal channels always influence positions. As a final measure the Commission can at all times approach the ECJ as guardian of the Treaties.

Finally, with the EPO, the battle appears to be won in favour of the Commission. With the Council limiting the initiative to

just criminal matters, the Commission successfully defended its ground. However, the main question on ex Article 47 TEU remains unanswered as it is still unclear as regards to what extent the Member States can use the initiative to wander into the domains of OLP. Most likely a future court case will have to provide clarity.

Nevertheless, considering the inter-institutional debate and outcome of the EPO case, it is not likely that many more controversial Member States' Initiatives will be presented soon. For a Presidency to push a policy initiative, it requires a significant political impulse and the political costs of failure are high. Instead it is easier and politically safer to contact the Commission directly and ask them for a proposal. In most cases, the Commission will act upon these requests. Yet, as long as the instrument is available in the treaty, it will remain a usable option and at some point new inter-institutional conflicts are bound to occur as the dust has still not settled around the edges of FSJ.

Notes

- ¹ Fletcher, M., R. Lööf and B. Gilmore (2008) *EU Criminal Law and Justice*. Cheltenham: Edward Elgar.
- ² Under TEU it is possible for any Member State of the EU to launch an initiative. No quorum is needed.
- ³ ECJ (2005). *Commission of the European Communities v. Council of the European Union*, (C-176/03), para. 53.
- ⁴ Spanish Presidency (2010). *The Programme for the Spanish Presidency of the Council of the European Union*. Published on 14 January 2010.
- ⁵ Spanish incoming Presidency (2010). *Questionnaire to delegations in view of the possible presentation by Spain and other Member States of an initiative for a Council Framework Decision on the European Protection Order*, (13577/09). Published on 23 September 2009.
- ⁶ Council (2010b). *Initiative for a Directive of the European Parliament and of the Council on the European Protection Order*, (PE-CONS 2/10). Published on 22 January 2010.
- ⁷ Council Meeting (3018) in Luxembourg on 3-4 June 2010.
- ⁸ *Ibid.*
- ⁹ *Directive of the European Parliament and of the Council on the European Protection Order*, (PE-CONS 71/11).
- ¹⁰ *Ibid.*