Statewatch Analysis
EU Lisbon Treaty
Analysis no 4:

UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law

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Version 3: 26 June 2009

1. Introduction

The changes to EU Justice and Home Affairs (JHA) law (which concerns immigration and asylum, civil law, policing and criminal law) in the Lisbon Treaty are more far-reaching than the changes which that Treaty would make to any other areas of EU law.

As described in detail in the Statewatch Reform [Lisbon] Treaty analysis no. 1, these changes entail a shift to qualified majority voting (QMV) of the Member States in the EU Council as regards legal migration and most areas of criminal law and policing, along with much increased powers for the Commission, the European Parliament and the Court of Justice in this area, as well as revised EU competences in this field – which will in many cases increase the EU's powers.

Since JHA subjects are all areas of great public concern, and JHA law raises important questions about where to strike the right balance between the protection of civil liberties on the one hand and effective immigration controls and law enforcement on the other, the changes to JHA law are among the most controversial changes which the Lisbon Treaty would make to the existing Treaties.

However, the debate on this issue in the **UK, Ireland and Denmark** should not ignore the fact that these three countries would, if the Treaty is ratified, have **opt-outs** from the entire area of EU Justice and Home Affairs law (although this analysis does not examine the Danish opt-out, which differs in some respects from the opt-out which the UK and Ireland would have).

The purpose of this *Statewatch* analysis is first of all to describe how these opt-outs will work and their likely impact, and secondly to make available an annotated text of the three Protocols which would govern the UK and Irish opt-outs, following the amendment of these Protocols by the Lisbon Treaty.

The **key points** explained in this analysis are as follows:

a) the UK and Ireland will be able to choose whether to **opt-in or opt-out** of **any individual proposal** of in all areas of JHA law under the Lisbon Treaty;

b) the UK and Ireland **already have an opt-out** from any individual proposal regarding **immigration, asylum and civil law**;

c) the UK and Ireland are therefore **not 'giving up a veto'** as regards **immigration, asylum and civil law**, since they already gave that veto up, in return for an opt-out, at the time of the Treaty of Amsterdam;

d) the UK and Ireland will get a **new opt-out** from any individual proposal regarding **policing and criminal law**;

e) there are **new specific rules** in the new Treaty to govern the situation where the UK or Ireland seeks to **opt out of an amendment** to legislation which it already participates in;

f) in the areas of **policing and criminal law**, the UK and Ireland are in most cases **giving up a veto in return for an opt-out** in the Lisbon Treaty;

g) the UK and Ireland **secured the opt-out from policing and criminal law** proposals as **part of the deal to negotiate the Lisbon Treaty**; this opt-out was **NOT part of the Constitutional Treaty** and at no point was such an opt-out even the subject of discussion as part of negotiations for the Constitutional Treaty;

h) the UK and Ireland will be subject to the **expanded jurisdiction of the Court of Justice** as regards **asylum and civil law** legislation which they have already opted into (or will opt into in future), as well as any **future policing and criminal law** legislation which they opt into;

i) the UK and Ireland (and, in fact, other Member States) will **not** be subject to the expanded jurisdiction of the Court of Justice as regards **existing policing and criminal law** legislation, for a period of five years after the entry into force of the new Treaty; after five years, the UK will have to make a choice between accepting the Court's jurisdiction on such measures or opting out entirely of those measures – although it could subsequently opt back in to some of them if it accepted the Court's jurisdiction over them.

This analysis looks in turn at:

1) UK and Irish JHA opt-outs prior to the Treaty of Amsterdam

2) UK and Irish JHA opt-outs in the Treaty of Amsterdam

3) The current UK and Irish JHA opt-outs in practice

4) UK and Irish JHA opt-outs in the draft Reform Treaty

5) The likely impact of the UK and Irish JHA opt-outs in the draft Reform Treaty

6) The JHA jurisdiction of the Court of Justice and the UK and Irish optouts

1. Opt-outs prior to the Treaty of Amsterdam

Prior to the Treaty of Amsterdam – which entered into force on 1 May 1999 – the UK and Ireland had no opt-out from EU Justice and Home Affairs cooperation, as it was originally provided for in the Maastricht Treaty of 1992, also known as the original version of the Treaty on European Union (TEU), which entered into force on 1 November 1993.

Instead, most of the other Member States had set up the 'Schengen' system for taking forward JHA cooperation amongst themselves, starting with the Schengen Agreement of 1985 and as further detailed in the Schengen Convention of 1990, which was applied in practice by some Member States from March 1995, with other Member States applying it later. This Convention abolished internal border controls on persons between the participating States, and also provided for harmonised rules on visa policy, external border control, and aspects of illegal migration, as well as rules on criminal and police cooperation and the creation of the Schengen Information System (SIS), a database containing policing, criminal law and immigration information to be shared between Member States.

2) UK and Irish JHA opt-outs in the Treaty of Amsterdam

The Treaty of Amsterdam attached to the TEU and the Treaty establishing the European Community (TEC) three separate Protocols setting out overlapping optouts for the UK and Ireland from aspects of EU JHA law.

a) The Schengen 'acquis'

The Treaty of Amsterdam brought the Schengen treaties, along with the measures implementing them (the Schengen *acquis*), into the EU legal order, by means of a Protocol on the Schengen acquis. This Protocol allows the UK and Ireland to participate in part or all of the Schengen acquis, subject to the unanimous approval of the Member States fully participating in that acquis (ie, the 'Schengen States'). The text of this Protocol, with the amendments which would be made to it by the Lisbon Treaty, can be found as Annex I to this analysis.

Applying this Protocol, the UK applied to participate in parts of the Schengen acquis in 1999 and the Schengen States approved this in 2000 in the form of an EU Council Decision. This Council Decision provides that the UK participates in the Schengen rules concerning illegal immigration, policing and criminal law (except for cross-border 'hot pursuit' by police officers) and the policing and criminal law parts of the Schengen Information System (which provide for a database on extradition requests, wanted persons, missing persons, persons to be kept under surveillance and stolen objects, for example stolen cars). It has applied since 1 January 2005, except for the UK's participation in the Schengen Information System, which is not likely to apply in practice until 2010 at least.

A further Council Decision of 2002 admits Ireland to participate in all the same parts of the Schengen acquis as the UK, except Ireland does not participate in crossborder undercover surveillance by police officers. However, none of this Decision has yet been applied in practice.

Both of these Decisions require the UK and Ireland to opt in to all further measures which 'build upon' the measures which the UK and Ireland have opted into by means of each Decision.

b) Border controls

A second Protocol specifies clearly that nothing can oblige the UK and Ireland to abolish their border controls with other Member States. The text of the Protocol, with the amendments which would be made to it by the Lisbon Treaty, can be found as Annex II to this analysis.

c) Immigration, asylum and civil law legislation

A third Protocol allows the UK and Ireland to choose whether or not to opt in to proposed EC immigration, asylum and civil law legislation. Since the Treaty of Amsterdam, these subjects have been dealt with in a special section of the EC Treaty (Articles 61-69 in Title IV of Part Three of that Treaty, known in practice as 'Title IV').

When a legislative proposal is made, the UK and Ireland have three months to decide whether they wish to opt in to discussions. If they do not opt in, they are deemed to have opted out, and discussions simply go ahead without them. Any legislation which is adopted then binds the other Member States.

If the UK and Ireland opt in, then discussions go ahead with their full participation. But if the UK and Ireland block agreement on the proposed text, then the other Member States can go ahead and adopt the proposed legislation without them. For that reason, it **cannot be said that the UK and Ireland have a veto** over the adoption of EC immigration, asylum or civil law legislation, **or that they ever had one**, since the entry into force of the Treaty of Amsterdam.

Finally, if legislation is adopted without the participation of the UK and Ireland, those Member States can still opt in to that legislation at any time afterwards, with the permission of the European Commission (the other Member States do not have a vote on this issue).

The UK and Ireland do not have to act together, but can take separate decisions on opting into discussions on proposed legislation, or into legislation which has been adopted.

The text of the Protocol on the UK and Irish opt-out from proposed immigration, asylum and civil law legislation (the 'Title IV Protocol'), with the amendments which would be made to it by the Lisbon Treaty, can be found as Annex III to this analysis.

3) The current UK and Irish JHA opt-outs in practice

Usually the UK and Ireland take the same view about opting in or out of proposals concerning immigration, asylum or civil law, but in several cases they have taken different views. In practice, to date the UK and Ireland have opted into most civil law measures, almost all asylum measures, and some measures concerning irregular (illegal) migration. But they have opted out of most measures concerning legal migration or visas and border controls.

Annex IV to this analysis presents a complete record of the UK and Irish decisions to opt in or out of all adopted or currently proposed measures covered by the 'Title IV opt-out'.

There has been no case where after the UK or Ireland opted in to a proposal, they

blocked agreement on that proposal, resulting in the other Member States going ahead without them. It is understood that the UK Home Office is particularly keen to avoid this ever happening, and so far it has succeeded.

The dynamics of this issue have changed since qualified majority voting (QMV) has been introduced into most areas of immigration, asylum and civil law, from 2003-2005 (unanimous voting still applies to legislation on legal immigration and family law). If the UK or Ireland opt in to discussions where QMV applies, then it is impossible for either Member State, or both Member States together, to block a legislative proposal (they would only have about a third of the votes needed to form a 'blocking minority'). They would have to hope that they could put together a blocking minority with other Member States, and that this coalition would stay together.

So it is riskier for the UK or Ireland to opt in where QMV applies, as they might well be outvoted and forced to accept legislation they do not want -- not just because of the views of the other Member States, but because of the position of the European Parliament, which usually has 'co-decision' (joint decision-making) powers where QMV applies. In fact, the UK has already been outvoted in two cases concerning EU funding legislation (the Refugee Fund and the Return Fund), although in these cases the UK only voted against the legislation for technical reasons (because the House of Commons still maintained a parliamentary scrutiny reserve), not because of any substantive objections to the text of the measures.

In contrast, where unanimity applied and the UK or Ireland opted in and then objected to the text, then either a) the text would be considered blocked or b) the other Member States would go ahead without the UK and/or Ireland or c) the other Member States would compromise so that the UK and Ireland would vote in favour of the text, and it could be adopted with their participation. In practice the latter happened. Certainly it was impossible, where unanimity applied, for the UK and Ireland to be bound by legislation without their consent.

It appears that, perhaps because of the risk of being outvoted now that QMV applies, the UK and Ireland have been generally less willing to opt in to proposed legislation in the last two years. But it should be emphasized that the decision to opt out of proposed legislation means that the UK and Ireland cannot possibly be bound by a proposal (if it is adopted) without their consent. That risk only applies if the UK or Ireland choose to opt in to a proposal – and that decision is up to them. However, it is sometimes suggested that under the 'opt-out' system, the UK and Ireland will be pressured to opt in to legislation by other Member States, and this pressure might prove politically impossible to resist. But the evidence of ten years of applying the Title IV opt-out system is that this is simply not true. **There is no evidence whatsoever that the UK and Ireland have ever been pressured to opt in to proposed or adopted legislation against their will.** It could be added that the UK and Ireland have also not been pressured to abolish border controls, or to adopt other aspects of Schengen cooperation, or (outside the field of JHA) to adopt monetary union (in the UK's case) without their consent. No doubt the other Member States, and the EU institutions, would *prefer* the UK and Ireland to opt fully in to all JHA measures, and (in the UK's case) to opt in to monetary union too. But they have been willing to live with the UK's and Ireland's non-participation in many measures, just as the UK and Ireland have been willing to live with other Member States going ahead without them.

On the contrary, there are some cases where the UK wished to participate in EU measures, and was denied the ability to do so. So there has been **forced exclusion, not forced inclusion**. This happened in two cases: the Regulation

establishing a European borders agency, and the Regulation establishing security standards for national passports (within the context of the standard EU format for these passports). The reason for the exclusion was that, in the view of the Council and the Commission, the UK could not opt in to these measures because they were adding to parts of the Schengen acquis in which the UK did not participate (ie, standard external border controls).

Put another way, in the Council's and Commission's view, the rules on participation in the Schengen acquis (the unanimous consent of the Schengen States) applied, rather than the rules on participation in the Title IV Protocol (the will of the UK alone). And anyway, the UK would have to opt in to all the Schengen rules on external border controls (with the consent of all the Schengen States) before it could opt in to the legislation building on those rules.

The alternative argument, made by the UK, was that the Title IV Protocol applied rather than the Schengen Protocol, so the UK should have been able to opt in to these two measures without previously applying the Schengen external border control rules following the consent of all the Schengen States.

This dispute went to the Court of Justice (Cases C-77/05 and C-137/05 *UK v Council*), and the Court's judgments of December 2007 backed the position of the Council and the Commision, rather than the UK.

Furthermore, the UK has expressed an interest in greater access to SIS immigration data (ie, data on individuals who are in principle to be refused entry into all of the Schengen States), and data held in the Visa Information System (holding information on applicants for Schengen visas) which will soon be set up. The Council and Commission argue that this is not legally possible under the current Treaty framework, because the UK has not opted in to the Schengen policy on visas and common border controls. The Court judgments of December 2007 (mentioned above) upheld the Council and Commission position.

Finally, it should be noted that the decision by the Irish government to opt in to individual Title IV proposals is subject to approval by the Irish parliament (Article 29(4)(6) of the Irish Constitution). In contrast, that decision in the UK is up to the government alone.

4) UK and Irish JHA opt-outs in the Lisbon Treaty

The **Constitutional Treaty**, as signed in 2004, included all three of the Protocols referred to above. It **made only made minor substantive amendments** to those Protocols, to give the UK and Ireland power also to opt out of measures concerning the exchange of police information and the evaluation of JHA policies. Although the Constitutional Treaty extended majority voting to most aspects of criminal law and policing, the UK and Ireland did not press for their opt-out to be extended to these areas of law. Rather they argued for the creation of so-called **'emergency brakes'** – rules that would allow a Member State with a fundamental objection to a draft text to stop discussion and refer the issue to the EU leaders (the 'European Council'). After that discussion, the legislation would either be adopted by the Council and European Parliament and be applicable to all Member States (if the dispute had been solved), or (if the dispute had not been solved), the Council and European Parliament could adopt the legislation to cover only *some* Member States who were willing to go ahead with the legislation without the participation of the objectors.

These ‘emergency brakes’ did not apply to all areas of policing and criminal law. They applied only to the harmonization of domestic criminal procedure and the harmonization of substantive criminal law. They did not, on the other hand, apply to legislation concerning cross-border criminal procedural measures (ie measures such as the European arrest warrant), Europol (the EU’s police agency), Eurojust (the EU’s prosecutors’ agency), or those aspects of police cooperation that would have been subject to QMV. All those measures could therefore have been adopted by QMV with no prospect of an ‘emergency brake’. Also, the ‘emergency brakes’ did not apply to legislation that would have had to be adopted by *unanimity* (other aspects of police cooperation, and the European public prosecutor), simply because the ‘emergency brake’ system was unnecessary – where unanimity applied, an objecting Member State would simply veto a proposal instead.

On the other hand, in the **Lisbon Treaty negotiating mandate** agreed in June 2007, the EU leaders clearly agreed that **the current UK and Irish opt-out from immigration, asylum and civil law will be extended to cover policing and criminal law for the UK** (section III, point 12 of the mandate). Considering that, as pointed out in the introduction, the extension of QMV, co-decision and enhanced powers for the Commission and the Court of Justice into the area of policing and criminal law is the biggest single change to the existing Treaties which would result from the Lisbon Treaty (or which would have resulted from the Constitutional Treaty), it is clear that **the introduction of a British and Irish opt-out from this area of law is a major change from the text of the Constitutional Treaty**.

The final text of the **Lisbon Treaty**, as signed in December 2007, puts the **British opt-out agreed as part of the negotiating mandate into clear legal language** (see Annex III). In fact, the Lisbon Treaty **extends the policing and criminal law opt-out to Ireland**, whereas the Treaty negotiating mandate had earlier left open the question of whether Ireland wished to join the UK in partaking of the extended opt-out. The Irish government had confirmed in October 2007, during negotiation of the Lisbon Treaty, that it wanted to join the UK in this extended opt out, except as regards anti-terrorist sanctions, where Ireland would not have an opt-out but the UK would. Also the Lisbon Treaty would amend the rules on the ‘emergency brake’ that would apply to most criminal law legislation, and furthermore provide for an easier process for some Member States to go ahead without the others in the event that a proposal concerning the European Public Prosecutor or aspects of police cooperation is vetoed.

But these changes do not matter as much to the UK and Ireland now that these countries would have an opt-out from all proposed legislation in this area. These changes do have a limited relevance in case the UK and Ireland opt in to a proposal and then find they have objections to the text as it is amended during the negotiations, or in case a new government takes office in either country that has greater misgivings about the proposed text. In that case the UK or Ireland could pull the emergency brake, where one exists, or block a decision to proceed by unanimity, as regards the European public prosecutor or aspects of police cooperation. In the former case, other Member States would go ahead without the UK and Ireland, if there was no agreement on settling the dispute at the level of EU leaders. In the latter case, other Member States would go ahead without the UK and Ireland without any referral of the dispute to the EU leaders’ level.

In one case it is **not entirely clear whether the UK and Ireland in fact have an opt-out** or not. This is the provision allowing for substantive criminal law measures to be adopted where this is necessary for the implementation of another Union policy, where harmonization measures have been adopted (Article 69f(2) of the TFEU).

Since this paragraph says that the relevant decision-making procedure is found elsewhere in the Treaty (ie the rules on adopting environmental law generally will apply to the adoption of a Directive establishing criminal sanctions to combat environmental crime), it might be arguable that the UK and Irish opt-out from criminal law measures will not therefore apply (although even if this interpretation is correct, if the proposals relate to immigration law or, in the case of the UK, monetary union, the UK or Ireland could still rely on *other* opt-outs if they wish).

Under the current Treaty rules, the Court of Justice has confirmed that the EC has competence under the current TEC to adopt legislation on environmental crime using EC environmental law powers, and the Court has confirmed that this principle applies to measures with an environmental objective adopted in any area of EU policy (judgment of 23 October 2007 in Case C-440/05, *Commission v Council*). However, the Court has not yet confirmed whether this principle applies to any area of EC law where criminal law sanctions are necessary to enforce a Community policy, even in the absence of an environmental objective. This would mean that under the *current* Treaties, the UK or Ireland could be outvoted on such criminal law matters without an opt-out *or* an emergency brake (unless the opt-outs relating to immigration or monetary union apply). At least, under the Lisbon Treaty, the UK and Ireland (like any Member State) will be able to pull an 'emergency brake' to stop discussions on any proposal in this area, which they cannot do at present. There are several such proposals currently under discussion and others are planned by the Commission.

On two issues, the Lisbon Treaty mandate left open the *possibility* of discussing **further substantive changes to the UK and Irish opt-outs** during the Treaty negotiations. The first such point was clarifying the ability of the UK and Ireland to opt out of proposed legislation which would amend earlier legislation which the UK and/or Ireland have already opted into. This issue is relevant, for instance, to the question of whether the UK and Ireland must participate in the second phase of legislation to establish the Common European Asylum System, even though they have largely participated in the first phase of legislation. In practice, the UK and Ireland have already in several cases opted out of proposed legislation which amends legislation which they have already opted into.

The final text of the Lisbon Treaty contains amendments to the Schengen Protocol and the Title IV Protocol addressing this issue. As regards the Title IV Protocol, the new amendment (a new Article 4a in the Protocol) confirms that the UK or Ireland can opt out of amendments to legislation from which they have already opted in. However, the Council can 'urge' the UK or Ireland to opt in to such a measure if it considers that the UK's non-participation would make the existing measure (as amended) 'inoperable' for the EU or the Member States. If the UK or Ireland does not then opt in to a proposed measure at around the time the measure is adopted, then the existing measure will no longer apply to the UK or Ireland. The Council may also decide to charge the UK with the financial consequences of this disapplication.

This revised system would perhaps operate as an incentive for the UK and Ireland to opt in to measures amending a pre-existing law which the UK and Ireland are already bound by. However, conversely in some cases the UK and Ireland might see this as an opportunity to rid themselves of their existing obligations. The UK and Ireland are also free to opt back in to the legislation later. An identical amendment has also been added to the Protocol on Danish participation in JHA measures.

It should also be recalled that the process is not automatic, as the Council may decide *not* to urge the UK or Ireland to opt in to an amendment (or its decision might be successfully challenged before the Court of Justice) if the amendment is

sufficiently severable from the original legislation. For example, if an amendment to the European Arrest Warrant simply takes away some grounds for non-execution of the European arrest warrants, it should still prove possible for the UK to continue to participate in the prior legislation, but with a wider list of grounds for non-execution of warrants. After all, the EU has agreed a treaty with Norway and Iceland which takes exactly this approach.

As regards the Schengen acquis Protocol, it would be amended to give the UK and Ireland a right to opt out of measures building upon those parts of the Schengen acquis which they have already opted out of. This would therefore be a new right which they do not enjoy at present. However, there would be a procedure for the Council, or the European Council or the Commission to decide possibly on the partial disapplication of the UK's or Ireland participation in the existing Schengen acquis, if the UK's or Ireland's non-participation in the amending measure makes it inoperable or incoherent. This would not always be the case though – in particular since the UK and Ireland do not participate in the core provisions of the Schengen acquis (common external border controls and visa policy, abolition of internal border controls). Again, the UK or Ireland might even welcome the change to escape from their existing obligations in some cases.

A final point to mention is that even when the UK and Ireland opt out of legislation, the Members of the European Parliament from those countries can still vote on legislation. It is possible in theory that the MEPs from those states could even make the difference in a close vote. This could be compared to the controversial issue of Scottish MPs voting on 'English' legislation in the UK Parliament.

5) The likely impact of the UK and Irish JHA opt-outs in the Lisbon Treaty

The likely impact of the UK and Irish opt-outs is that the UK and Ireland (not always together) will opt out of some (but probably not all) proposed policing and criminal law measures, and will continue their current practice as regards asylum, immigration and civil law opting out.

It should be emphasized that all proposed criminal law and policing measures which have not been adopted at the time of the entry into force of the Lisbon Treaty, if the Treaty is ratified, will simply lapse at that time (this was the case with the Treaty of Amsterdam, since, like the Lisbon Treaty, it terminated the 'third pillar' as it had previously existed). So, if any of these lapsed proposals are reintroduced after the entry into force of the Lisbon Treaty, the UK and Ireland would have the opportunity to opt out of them, whereas they did not have this opportunity under the current legal framework.

It is difficult to guess in advance of any concrete proposals when the UK and Ireland are likely to opt in and opt out of those proposals, but **two concrete examples** can be imagined.

The first is a proposed **Framework Decision on the rights of criminal suspects**. The UK led about six Member States (including Ireland) in opposition to this measure, blocking any change of its adoption under the current legal framework (which, of course, requires unanimity of all Member States). The German EU Council Presidency suggested informally, in June 2007, that instead it might be possible to adopt this measure by means of the general rules on 'closer cooperation' (or 'flexibility'), which allow some Member States to go ahead without the others to adopt EU measures. These general rules are distinct from the *specific* rules on flexibility in specific areas (the UK and Danish opt-outs from monetary union, the UK, Irish and

Danish opt-outs concerning immigration, asylum and civil law, and the rules on the Schengen acquis) and are currently set out (as regards the third pillar) in Articles 40, 40a and 40b TEU.

Such general rules have existed since the Treaty of Amsterdam, and were amended by the Treaty of Nice, in force 1 February 2003. They have never been used. For the 'third pillar', the use of these provisions requires a qualified majority vote of Member States in favour. However, in the case of the suspects' rights proposal, there was not enough support to obtain a qualified majority of Member States in favour of adopting the measures *under the general flexibility rules*, even though there *was* a qualified majority in favour of *adopting the legislation*. Presumably some of the Member States which supported the proposal did not want to adopt it without a fuller participation by all (or at least more) Member States.

What if the Commission proposed this measure again after the Treaty of Lisbon entered into force? If the UK and Ireland still had misgivings about it, they could opt out. The other dissenting Member States, lacking any facility to opt out, could potentially be outvoted on the measure, since qualified majority voting would apply. These Member States would have greater difficulty obtaining a 'blocking minority', since the UK and Ireland would not be voting (in fact, there would not be a blocking minority even if the UK and Ireland participated and voted against the proposal, but at least in that case the dissenters would be closer to obtaining a blocking minority, if they could convince more Member States to join their point of view). One or more of the remaining dissenters, if they wished, could pull the 'emergency brake' and insist that the issue be discussed by EU leaders. In the event of 'consensus', the legislation would go ahead with the participation of all Member States except the UK and Ireland, but in the event of 'disagreement' the legislation would not be adopted by all of those Member States.

But then there is a new twist: the Treaty of Lisbon would provide that in this scenario (continued disagreement after the emergency brake is pulled and the EU leaders have discussed the issue) authorization for as few as nine Member States to go ahead and adopt the legislation so that it was applicable between them, according to the general flexibility rules, would *automatically* be granted if at least nine Member States wanted to go ahead with this. So those Member States would *not* have to obtain a qualified majority of all Member States to support their desire to go ahead without the others. Nor would they have to obtain the consent of the European Parliament, which is a new requirement that would apply to the use of the general flexibility rules under the Lisbon Treaty (this new rule would also have applied under the Constitutional Treaty). The same rules apply if the 'emergency brake' is pulled as regards substantive criminal law.

Under the Constitutional Treaty, the UK and Ireland would have been in a weaker position, since they would not have had an opt-out and would have had to pull the 'emergency brake' instead. The consequences of pulling the emergency brake were also less clear under the Constitutional Treaty than under the Lisbon Treaty. The second example concerns the **European Public Prosecutor**, which would be the subject of an express clause in the Treaties if the Treaty of Lisbon were ratified.

The power to create a European Public Prosecutor does not exist at present, and so no legislative proposal has ever been made on this issue (although there have been Commission discussion papers). Under the Constitutional Treaty, the UK and Ireland would not have had an opt-out on this proposal, but would have had a veto. If they used the veto, it is possible that those Member States who supported the idea of the

Public Prosecutor would have used the general flexibility rules instead to adopt legislation on this issue.

It is sometimes argued that that the UK's and Ireland's opt-out is 'weaker' than a veto, because a veto can terminate any prospect of legislation being adopted, whereas an opt-out cannot – it can only prevent that legislation applying to the UK or Ireland. But this example demonstrates that this argument is incorrect – the UK or Irish veto would just have meant that the other Member States, if they were sufficiently interested, could have used the general flexibility rules instead to adopt that legislation. It might be argued that to prevent this from happening, the UK should never have agreed to general flexibility rules in the Treaties; but if there were no such rules, then groups of Member States would just go ahead and reach agreements between themselves *outside* the EU legal framework, as they did with Schengen and other cases. Such agreements usually entail less transparency, less involvement of national and European parliaments and less judicial control than flexibility within the EU legal system, and provide less protection for the rights and interests of non-participants.

However, it is probably accurate to say that if the UK and Ireland are potentially interested in *participating* in proposed legislation in a particular field (rather than simply *blocking* it, as would perhaps be the case for the European Public Prosecutor), then a veto provides them with more capacity to influence the legislation to their liking than an opt-out does. Of course, in this scenario, every other Member State has a veto too, and some of those Member States could have a different view on key issues than the UK and Ireland.

While it is therefore accurate to say that **an opt-out is weaker than a veto** where the UK and Ireland are interested in participating in legislation, it should also be recognized that **an opt-out is stronger than 'pure' qualified majority voting** – for the opt-out obviously still enables the UK and Ireland to avoid being bound by legislation against their will. And if the UK and Ireland had refused to accept qualified majority voting on criminal law and policing issues in the Lisbon Treaty, even with the safeguards of opt-outs and emergency brakes, then it is possible that other Member States would again have contemplated setting up another parallel system for cooperation on this issue outside the EU legal framework, which would involve qualified majority voting for participating States.

What would happen under the Lisbon Treaty? The UK and Ireland would probably opt-out of a proposal to establish the European Public Prosecutor rather than opt in to it. If the UK and Ireland *did* opt-in, and then blocked the adoption of legislation, the other Member States could just go ahead without them. If, following a British and Irish opt-out, *other* Member States had misgivings and issued a veto, then in the Lisbon Treaty (but not in the Constitutional Treaty), this is treated as a form of 'emergency brake', entailing discussion by EU leaders, and then (in the event of continued disagreement) the same simplified process for other Member States, if at least nine of them are interested, to apply the general flexibility rules (again, authorization for this would be granted automatically, avoiding the need to obtain a qualified majority vote of all Member States and consent of the European Parliament).

Then there is a *further* twist: if the Treaty of Lisbon is ratified, the participating Member States could decide to *change the voting rules* relating to legislation concerning the European Public Prosecutor, so that (for them) the legislation in this area would be adopted by a *qualified majority vote*, or alternatively by a qualified majority vote along with the co-decision of the European Parliament. The participating Member States would have to be unanimous to agree on this, but they

would not need the consent of the non-participating Member States, or the European Parliament, and there would be no requirement to inform national parliaments and give them a chance to block the decision (as there would be, in the Lisbon Treaty, if *all* Member States decide to change voting rules set out in the Treaty to extend majority voting and co-decision). The same rules apply to operational police cooperation. This further twist only applies if the 'emergency brake' is pulled, not if the UK or Ireland simply opt out from a proposal. Also, it is not possible via this route to change the requirement of unanimous voting in order to give the European Public Prosecutor powers over areas besides fraud against the EU.

6) The JHA jurisdiction of the Court of Justice and the UK and Irish opt-outs

A final issue is the jurisdiction of the Court of Justice as regards the opt-outs. At present there is a distinct set of rules for the Court's jurisdiction over immigration, asylum and civil law, and another set of rules for its jurisdiction over criminal law and policing. Both these sets of rules are different from the normal rules on the Court's jurisdiction.

For immigration, asylum and civil law, the normal jurisdiction applies, except as regards references from national courts on the validity and interpretation of Community acts. Under the normal rules, any court or tribunal can send such questions; for immigration, asylum and civil law, only the final courts can send questions. In practice, this has meant that the Court has received only a small number of references to date on immigration or asylum law, and only about a dozen civil law cases a year in recent years.

This Court's jurisdiction in this area applies equally to all Member States, so the UK and Ireland are covered by it – but only to the extent that they have opted into the legislation. So, for instance, the final British and Irish courts cannot ask the Court of Justice questions concerning the family reunion of third-country nationals, since the UK and Ireland have opted out of the Directive on this issue – but they can ask (and have asked) the Court of Justice about civil jurisdiction issues (for instance).

As for policing and criminal law, Member States have an option as to whether they permit their national courts to send references to the Court of Justice. Twelve of the first fifteen Member States have done so (all except the UK, Ireland and Denmark), as have five of the newer Member States (the Czech Republic, Hungary, Slovenia, Latvia and Lithuania). Of the seventeen Member States accepting such jurisdiction, sixteen have decided that all their courts can send questions to the Court of Justice, while only one has opted to limit that power to final courts only (Spain). Under these rules, the Court has received over twenty references from national courts on EU criminal law measures. It is worth emphasizing that clearly the widespread belief that the Court has no current jurisdiction over criminal law is undoubtedly wrong. However, the Court has no jurisdiction over infringement actions (actions brought by the Commission against Member States to argue that they are breaching EU law) in the area of policing and criminal law.

Under the Lisbon Treaty the Court would have its normal jurisdiction concerning all JHA areas, except for a restriction on ruling on national police operations. There would no longer be any capacity for Member States to opt out of the Court's jurisdiction (as they currently can in relation to references from national courts in the area of policing and criminal law), and moreover any court or tribunal in any Member State would be able to send questions to the Court on JHA matters.

This would apply equally to the UK and Ireland, except of course that their capacity

to opt out of legislation – which would be extended to policing and criminal law legislation – would mean that the Court's jurisdiction would only be relevant to them when they have opted in to the legislation.

An important question arose in respect of the Court's jurisdiction over third pillar measures adopted before the entry into force of the Lisbon Treaty (like, for instance, the Framework Decision on the European arrest warrant). In order to address this issue, the Lisbon Treaty contains a provision in the Protocol on transitional issues. Article 10 of this Protocol first of all provides that the current Court of Justice jurisdiction over policing and criminal law matters would be retained for pre-existing measures for five years after the Lisbon Treaty enters into force. This would likely take us to some time in late 2014 or early 2015, if the Treaty is ratified in late 2009 or early 2010. This is important because the current Court jurisdiction is limited compared to its normal jurisdiction (see further above), although the normal jurisdiction would apply to all new measures on policing and criminal law adopted after the Treaty enters into force.

So ten Member States, including the UK and Ireland, would be able to maintain for five years the existing position that their national Court cannot send references to the Court of Justice over pre-existing third pillar matters. It would still be open to those States to give the Court such jurisdiction before the Lisbon Treaty entered into force – but obviously it is unlikely that the UK and Ireland would do so.

Also, there would be no way in which the Commission would be able to use 'infringement' actions to sue Member States for violation of pre-existing policing and criminal law measures for this period of five years.

However, during the period of five years, the Court's 'normal' jurisdiction would apply as soon as a pre-existing act is amended. There might be a dispute in some cases as to what precisely constituted an amended act. And it should be recalled that the UK, Ireland and Denmark would have an opt-out over amended acts – subject to the conditions which have been inserted into other Protocols (see above).

After five years, the Court's normal jurisdiction would apply, except that the UK (and no other Member State) could refuse to accept it – in which case all third pillar legislation which existed before the Lisbon Treaty, and which had not been amended in the meantime, would cease to apply to the UK. The Council would have the power to decide on transitional rules (for example, the validity of European arrest warrants issued by the UK, or issued by other Member States which the UK might execute) as well as on the financial consequences for the UK.

The UK would then be able in turn to apply to opt back in to some of the measures it has been excluded from, although at the price of accepting the Court's normal jurisdiction. This would be subject to the approval of the Council or the Commission (depending on the applicable rules), although they would be obliged to seek the widest possible participation of the UK, subject to the principle of coherence. This provision means that the UK would be able, if it wished, to 'escape' from all its obligations under pre-existing third pillar acts, and then opt back in to only certain of them – subject (as regards the opt in) to the Council's or the Commission's approval. Or in fact, it could decide not to opt back in to any of them.

Annex I

Protocol ~~integrating the Schengen acquis into~~ on the Schengen *acquis* integrated into the framework of the European Union

THE HIGH CONTRACTING PARTIES,

NOTING that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, ~~are aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice,~~ **have been integrated into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997;**

~~DESIRING to incorporate the abovementioned agreements and rules into the framework of the European Union,~~

DESIRING to preserve the Schengen *acquis*, as developed since the entry into force of the Treaty of Amsterdam, and to develop this acquis in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders,

~~CONFIRMING that the provisions of the Schengen acquis are applicable only if and as far as they are compatible with the European Union and Community law,~~

TAKING INTO ACCOUNT the special position of Denmark,

TAKING INTO ACCOUNT the fact that Ireland and the United Kingdom of Great Britain and Northern Ireland ~~are not parties to and have not signed the abovementioned agreements~~ **do not participate in all the provisions of the Schengen acquis**; that provision should, however, be made to allow those Member States ~~to accept some or all of the provisions thereof~~ **to accept other provisions of the acquis in full or in part**,

RECOGNISING that, as a consequence, it is necessary to make use of the provisions of ~~the Treaty on European Union and of the Treaty establishing the European Community~~ **the Treaties** concerning closer cooperation between some Member States and that those provisions should only be used as a last resort,

TAKING INTO ACCOUNT the need to maintain a special relationship with the Republic of Iceland and the Kingdom of Norway, ~~both States having confirmed their intention to become bound by the provisions mentioned above, on the basis of the Agreement signed in Luxembourg on 19 December 1996~~ **both States being bound by the provisions of the Nordic passport union, together with the Nordic States which are members of the European Union**,

HAVE AGREED UPON the following provisions, which shall be annexed to ~~the Treaty establishing the European Community and to the Treaty on European Union~~ **the Treaty on European Union and the Treaty on the Functioning of the European Union,**

Article 1

~~The Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of~~

~~Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden, signatories to the Schengen agreements, are authorised to establish closer cooperation among themselves within the scope of those agreements and related provisions, as they are listed in the Annex to this Protocol, hereinafter referred to as the 'Schengen acquis'.~~

The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden shall be authorised to implement closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen *acquis*.

This cooperation shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of ~~the Treaty on European Union and of the Treaty establishing the European Community~~ **the Treaties**.

Article 2

~~1. From the date of entry into force of the Treaty of Amsterdam, the Schengen acquis, including the decisions of the Executive Committee established by the Schengen agreements which have been adopted before this date, shall immediately apply to the thirteen Member States referred to in Article 1, without prejudice to the provisions of paragraph 2 of this Article. From the same date, the Council will substitute itself for the said Executive Committee.~~

~~The Council, acting by the unanimity of its Members referred to in Article 1, shall take any measure necessary for the implementation of this paragraph. The Council, acting unanimously, shall determine, in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions which constitute the Schengen acquis.~~

~~With regard to such provisions and decisions and in accordance with that determination, the Court of Justice of the European Communities shall exercise the powers conferred upon it by the relevant applicable provisions of the Treaties. In any event, the Court of Justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security.~~

~~As long as the measures referred to above have not been taken and without prejudice to Article 5(2), the provisions or decisions which constitute the Schengen acquis shall be regarded as acts based on Title VI of the Treaty on European Union.~~

~~2. The provisions of paragraph 1 shall apply to the Member States which have signed accession protocols to the Schengen agreements, from the dates decided by the Council, acting with the unanimity of its Members mentioned in Article 1, unless the conditions for the accession of any of those States to the Schengen~~

~~acquis are met before the date of the entry into force of the Treaty of Amsterdam.~~

The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.

Article 3

~~Following the determination referred to in Article 2(1), second subparagraph, Denmark shall maintain the same rights and obligations in relation to the other signatories to the Schengen agreements, as before the said determination with regard to those parts of the Schengen acquis that are determined to have a legal basis in Title IV of the Treaty establishing the European Community.~~
~~With regard to those parts of the Schengen acquis that are determined to have legal base in Title VI of the Treaty on European Union, Denmark shall continue to have the same rights and obligations as the other signatories to the Schengen agreements.~~

The participation of Denmark in the adoption of measures constituting a development of the Schengen *acquis*, as well as the implementation of these measures and their application to Denmark, shall be governed by the relevant provisions of the Protocol on the position of Denmark.

Article 4

Ireland and the United Kingdom of Great Britain and Northern Ireland~~, which are not bound by the Schengen acquis,~~ may at any time request to take part in some or all of the provisions of this acquis.

The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.

Article 5

1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties **of the Treaties**.

In this context, where either Ireland or the United Kingdom ~~or both have~~ **has** not notified the President of the Council in writing within a reasonable period that ~~they wish~~ **it wishes** to take part, the authorisation referred to in ~~Article 5a of the Treaty establishing the European Community or Article K.12 of the Treaty on European Union~~ **Article 280d of the Treaty on the Functioning of the European Union** shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.
~~2. The relevant provisions of the Treaties referred to in the first subparagraph of paragraph 1 shall apply even if the Council has not adopted the measures referred to in Article 2(1), second subparagraph.~~

2. Where either Ireland or the United Kingdom is deemed to have given notification pursuant to a decision under Article 4, it may nevertheless notify the Council in writing, within 3 months, that it does not wish to take part in such a proposal or initiative. In that case, Ireland or the United Kingdom shall not take part in its adoption. As from the latter notification, the procedure for

adopting the measure building upon the Schengen acquis shall be suspended until the end of the procedure set out in paragraphs 3 or 4 or until the notification is withdrawn at any moment during that procedure.

3. For the Member State having made the notification referred to in paragraph 2, any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by qualified majority on a proposal from the Commission.

That decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence. The Commission shall submit its proposal as soon as possible after the notification referred to in paragraph 2. The Council shall, if needed after convening two successive meetings, act within four months of the Commission proposal.

4. If, by the end of the period of four months, the Council has not adopted a decision, a Member State may, without delay, request that the matter be referred to the European Council. In that case, the European Council shall, at its next meeting, acting by qualified majority on a proposal from the Commission, take a decision in accordance with the criteria referred to in paragraph 3.

5. If, by the end of the procedure set out in paragraphs 3 or 4, the Council or, as the case may be, the European Council has not adopted its decision, the suspension of the procedure for adopting the measure building upon the Schengen acquis shall be terminated. If the said measure is subsequently adopted any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of that measure, cease to apply for the Member State concerned to the extent and under the conditions decided by the Commission, unless the said Member State has withdrawn its notification referred to in paragraph 2 before the adoption of the measure. The Commission shall act by the date of this adoption. When taking its decision, the Commission shall respect the criteria referred to in paragraph 3.

Article 6

The Republic of Iceland and the Kingdom of Norway shall be associated with the implementation of the Schengen acquis and its further development ~~on the basis of the Agreement signed in Luxembourg on 19 December 1996~~. Appropriate procedures shall be agreed to that effect in an Agreement to be concluded with those States by the Council, acting by the unanimity of its Members mentioned in Article 1. Such Agreement shall include provisions on the contribution of Iceland and Norway to any financial consequences resulting from the implementation of this Protocol.

A separate Agreement shall be concluded with Iceland and Norway by the Council, acting unanimously, for the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland on the one hand, and Iceland and Norway on the other, in domains of the Schengen acquis which apply to these States.

~~Article 7~~
~~The Council shall, acting by a qualified majority, adopt the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council.~~

*Article ~~8~~ **7***

For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.

~~ANNEX~~
~~SCHENGEN ACQUIS~~

~~1. The Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.~~

~~2. The Convention, signed in Schengen on 19 June 1990, between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, with related Final Act and common declarations.~~

~~3. The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) and Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations.~~

~~4. Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers.~~

Comments:

The amendments to this Protocol update it in light of the integration of the Schengen acquis to the EU legal order that took place with the entry into force of the Treaty of Amsterdam, as well as the accession of new Member States, the association of Norway and Iceland and the partial application of the acquis by the UK and Ireland.

The amendment to Article 5, which gives the UK and Ireland a new right to opt out of measures amending parts of the Schengen acquis upon which they already participate, subject to certain conditions, is discussed in detail above.

It should be emphasized that the special rules on the jurisdiction of the Court of Justice and the residual powers of the Council set out in Article 2(1) of the Protocol would be repealed.

Annex II

Protocol on the application of certain aspects of ~~Article 14 of the Treaty establishing the European Community~~ Article 22a and 22b of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the existence for many years of special travel arrangements between the United Kingdom and Ireland,

HAVE AGREED UPON the following provisions, which shall be annexed to ~~the Treaty establishing the European Community and to the Treaty on European Union~~ **the Treaty on European Union and the Treaty on the Functioning of the European Union,**

Article 1

The United Kingdom shall be entitled, notwithstanding ~~Article 14 of the Treaty establishing the European Community~~ **Articles 22a, 22b and 69 of the Treaty on the Functioning of the European Union**, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the ~~Community~~ **Union** or by the ~~Community~~ **Union** and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

(a) of verifying the right to enter the United Kingdom of citizens of ~~States which are Contracting Parties to the Agreement on the European Economic Area~~ **Member States** and of their dependants exercising rights conferred by ~~Community~~ **Union** law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and

(b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in ~~Article 14 of the Treaty establishing the European Community~~ **Articles 22a, 22b or 69 of the Treaty on the Functioning of the European Union** or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.

Article 2

The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories ('the Common Travel Area'), while fully respecting the rights of persons referred to in Article 1, first paragraph, point (a) of this Protocol. Accordingly, as long as they maintain such arrangements, the provisions of Article 1 of this Protocol shall apply to Ireland under the same terms and conditions as for the United Kingdom. Nothing

in ~~Article 14 of the Treaty establishing the European Community~~ **Articles 22a, 22b or 69 of the Treaty on the Functioning of the European Union**, in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them, shall affect any such arrangements.

Article 3

The other Member States shall be entitled to exercise at their frontiers or at any point of entry into their territory such controls on persons seeking to enter their territory from the United Kingdom or any territories whose external relations are under its responsibility for the same purposes stated in Article 1 of this Protocol, or from Ireland as long as the provisions of Article 1 of this Protocol apply to Ireland. Nothing in ~~Article 14 of the Treaty establishing the European Community~~ **Articles 22a, 22b or 69 of the Treaty on the Functioning of the European Union** or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the other Member States to adopt or exercise any such controls.

Comments:

This Protocol is merely updated as regards the cross-references to Treaty provisions.

Annex III

Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the Protocol on the application of certain aspects of ~~Article 7a of the Treaty establishing the European Community~~ **Articles 22a and 22b of the Treaty on the Functioning of the Union** to the United Kingdom and to Ireland,

HAVE AGREED UPON the following provisions which shall be annexed to the ~~Treaty establishing the European Community and to the Treaty on European Union~~ **the Treaty on European Union and the Treaty on the Functioning of the European Union,**

Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to ~~Title IV of the Treaty establishing the European Community~~ **Title IV of Part Three of the Treaty on the Functioning of the European Union**. ~~By way of derogation from Article 148(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 148(2). The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland, shall be necessary for decisions of the Council which must be adopted unanimously.~~

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.

Article 2

In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of ~~Title IV of the Treaty establishing the European Community~~ **Title IV of Part Three of the Treaty on the Functioning of the European Union**, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the ~~Community~~ **Union** pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the ~~acquis communautaire~~ **Community or Union *acquis*** nor form part of ~~Community~~ **Union** law as they apply to the United Kingdom or Ireland.

Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to ~~Title IV of the Treaty establishing the European Community~~ **Title IV of Part Three of the Treaty on the Functioning of the European Union**, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so. ~~By way of derogation from Article 148(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 148(2).~~ The unanimity of the members of the Council, with the exception of a member which has not made such a notification, shall be necessary for decisions of the Council which must be adopted unanimously. A measure adopted under this paragraph shall be binding upon all Member States which took part in its adoption.

Measures adopted pursuant to Article 64 of the Treaty on the Functioning of the European Union shall lay down the conditions for the participation of the United Kingdom and Ireland in the evaluations concerning the areas covered by Title IV of Part Three of that Treaty.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland. In that case Article 2 applies.

Article 4

The United Kingdom or Ireland may at any time after the adoption of a measure by the Council pursuant to Title IV of **Part Three of** the Treaty ~~establishing the European Community~~ **on the Functioning of the European Union** notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in ~~Article 11(3) of the Treaty~~

~~establishing the European Community~~ **Article 280f(1) of the Treaty on the Functioning of the European Union** shall apply mutatis mutandis.

Article 4a

1. The provisions of this Protocol apply for the United Kingdom and Ireland also to measures proposed or adopted pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing measure makes the application of that existing measure inoperable for other Member States or the Union, it may urge them to make a notification under Articles 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council.

If at the expiry of that period of two months from the Council's determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding or applicable upon it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating or having participated in the adoption of the amending measure. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that the United Kingdom or Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.

4. This Article shall be without prejudice to Article 4.

Article 5

A Member State which is not bound by a measure adopted pursuant to Title IV of **Part Three of** the Treaty ~~establishing the European Community~~ **on the Functioning of the European Union** shall bear no financial consequences of that measure other than administrative costs entailed for the institutions, **unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise**.

Article 6

Where, in cases referred to in this Protocol, the United Kingdom or Ireland is bound by a measure adopted by the Council pursuant to Title IV of **Part Three of** the Treaty ~~establishing the European Community~~ **on the Functioning of the European Union**, the relevant provisions of that Treaty, including Article 68, **the relevant provisions of the Treaties** shall apply to that State in relation to that measure.

Article 6a

The United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 15a of the Treaty on the Functioning of the European Union which relate to the processing of personal data by Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title IV of Part Three of that Treaty where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 15a.

Article 7

Articles ~~3 and 4~~ **3, 4 and 4a** shall be without prejudice to the ~~Protocol integrating the Schengen acquis into~~ **Protocol on the Schengen acquis integrated into** the framework of the European Union.

Article 8
Ireland may notify the President of the Council in writing that it no longer wishes to be covered by the terms of this Protocol. In that case, the normal treaty provisions will apply to Ireland.

Article 9

With regard to Ireland, this Protocol shall not apply to Article 67a of the Treaty on the Functioning of the European Union.

Comments:

Although the text of this Protocol continues to refer to Title IV of the TEC (updated to refer to Title IV of Part Three of the Treaty on the Functioning of the European Union), this amounts to widening the scope of the Protocol because Title IV will now include provisions relating to police and criminal law.

This can be compared to Protocol 19 of the Constitutional Treaty, which would have limited its scope as follows:

> *Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-260 thereof, insofar as that Article relates to the areas covered by those Sections, to Article III-263 or to Article III-275(2)(a) of the Constitution.*

This referred to measures concerning asylum and immigration law, civil law, evaluation of JHA policies, administrative cooperation, and the exchange of police information. There was no opt-out for the UK or Ireland regarding any other aspect of policing or criminal law.

Annex IV

UK and Irish opt-outs over immigration, asylum and civil law in practice

1. Asylum

a) Adopted measures (UK opt in to all; Ireland opt in to all except no. 4, including opt-in to 3 after its adoption)

1. Decision 2000/596/EC on European refugee fund (OJ 2000 L 252/12)
2. Regulation 2725/2000 on Eurodac (OJ 2000 L 316/1)
3. Directive 2001/55 on temporary protection (OJ 2001 L 212/12)
4. Directive 2003/9 on reception conditions (OJ 2003 L 31/18)
5. Dublin II Regulation 343/2003 (OJ 2003 L 50/1)
6. Directive 2004/83 on refugee/subsdiary protection definition and content (OJ 2004 L 304/12)
7. Decision on second European Refugee Fund (OJ 2004 L 252/12)
8. Directive 2005/85 on asylum procedures (OJ 2005 L 326/13)
9. Refugee Fund Decision (OJ 2007 L 144/1)

b) Proposed measures (UK and Ireland opt in to all except no. 3)

1) Dublin II Regulation – recast – COM (2008) 815, Dec. 2008
2) Eurodac Regulation – recast – COM (2008) 820, Dec. 2008
3) Directive on reception conditions – recast - COM (2008) 825, Dec. 2008
4) Reg on European asylum support office - COM (2009) 66, Feb. 2009
5) amendment to Decision on European Refugee Fund COM (2009) 67, Feb. 2009

2. Legal Migration

a) Adopted measures (UK opt in to 1, 2, 8, 9 and 10; Ireland opt in to 2, 6, 8, 9, 10 and later opt in to 1)

1. Reg. 1030/2002 on residence permit format (OJ 2002 L 157/1)
2. Reg. 859/2003 on 3rd-country nationals' social security (OJ 2003 L 124/1)
3. Directive 2003/86 on family reunion (OJ 2003 L 251/12)
4. Long-term residents Directive 2003/109 (OJ 2004 L 16/44)
5. Directive 2004/114 on migration of third-country students, pupils, trainees & volunteers (OJ 2004 L 375/12)
6. Directive 2005/71 on admission of researchers (OJ 2005 L 289/15)
7. Recommendation on admission of researchers (OJ 2005 L 289/26)
8. Decision on asylum and immigration information exchange (OJ 2006 L 283/40)
9. Decision establishing European integration Fund (OJ 2007 L 168/18)
10. Reg. 330/2008 amending Reg. 1030/2002 to insert biometrics (OJ 2008 L 115/1)
11. Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment – 'Blue Card' Directive – OJ 2009 L 155/17

Proposed measures (UK opt out of all; Ire opt out of all except 2)

1. Directive extending Dir. 2003/109 to refugees and beneficiaries of subsidiary protection (COM (2007) 298, 6 June 2007)
2. Regulation extending Regulation 883/2004 on social security for EU citizens to

third-country nationals who move within the EC (COM (2007) 439, 23 July 2007):
3. Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (COM (2007) 638, 23 Oct. 2007)

3. Borders and Visas

a) Adopted measures [UK & Ireland have opted out of all measures except UK opt in to 6, 7]

1. Reg. 539/2001 establishing visa list (OJ 2001 L 81/1)
2. Reg. 789/2001 on procedure for amending CCI (OJ 2001 L 116/2)
3. Reg. 790/2001 on procedure for amending borders manual (OJ 2001 L 116/5)
4. Reg. 1091/2001 on freedom to travel for holders of long-term visas (OJ 2001 L 150/4)
5. Reg. 2414/2001 moving Romania to visa 'white list' (OJ 2001 L 327/1)
6. Reg. 333/2002 on visa stickers for persons coming from unrecognised entities (OJ 2002 L 53/4)
7. Reg. 334/2002 amending Reg. 1683/95 on common visa format (OJ 2002 L 53/7)
8. Reg. 415/2003 on visas at the border and visas for seamen (OJ 2003 L 64/1)
9. Reg. 453/2003 on visa list (OJ 2003 L 69/10)
10. Reg. 693/2003 on FTD and FRTD (OJ 2003 L 99/8)
11. Reg. 694/2003 on format for FTD and FRTD (OJ 2003 L 99/15)
12. Reg 1295/2003 re special rules for Olympic games (OJ 2003 L 183/1)
13. Decision on border crossing points (OJ 2004 L 261/119)
14. Decision establishing Visa Information System (VIS) (OJ 2004 L 213/5)
15. Reg. 2007/2004 establishing External Borders Agency (OJ 2004 L 349/1)
16. Reg. 2133/2004 on biometric features in EU passports (OJ 2004 L 369/5)
17. Reg. 2252/2004 requiring stamping of passports at ext. borders (OJ 2004 L 385/1)
18. Reg. 851/2005 on reciprocity for visas, amending Reg. 539/2001 (OJ 2005 L 141/3)
19. Recommendation on visa issuing for researchers (OJ 2005 L 289/23)
20. Reg. 2046/2005 on Olympic visas: OJ 2005 L 334/1
21. Reg. 562/2006, borders code: OJ 2006 L 105/1
22. Two decisions on transit through new MS, Switzerland (OJ 2006 L 167)
23. Reg on local border traffic (OJ 2006 L 405)
24. Reg amending visa list (OJ 2006 L 405)
25. Border Fund Decision (OJ 2007 L 144/22)
26. Reg 863/2007 on border guard teams (OJ 2007 L 199/30)
27. Reg. 296/2008 amending Borders Code (OJ 2008 L 97/60)
28. Decisions on transit through Romania, Bulgaria, Switzerland (OJ 2008 L 161)
29. Reg. 767/2008 establishing Visa Information System (OJ 2008 L 218/60)
30. Reg. 856/2008 amending visa format Reg. (OJ 2008 L 235/1)
31. Reg. 1104/2008 on migration from SIS to SIS II (OJ 2008 L 299/1)
32. Reg. 81/2009 amending Borders Code (OJ 2009 L 35/56)
33. Reg. 390/2009 on biometric visas (OJ 2009 L 131/1)
34. Reg. 444/2009 amending Reg. 2252/2004 (OJ 2009 L 142/1)
35. Reg. establishing visa Code (not yet published)

4. Irregular Migration

a) Adopted measures [UK opt-in to all except 5, 9, 10, 14, 16 and 17; Ire opt-in to all except 1 ,2, 3, 5, 8, 9, 10, 14, 16 and 17; Ire will participate in 1-3 when the decision on Irish part-participation in Schengen is applicable]

1. Directive 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34)
2. Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45)
3. Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4)
4. Directive 2002/90 on facilitation of illegal entry and residence (OJ 2002 L 328)
5. Directive 2003/110 on transit for expulsion by air (OJ 2003 L 321/26)
6. Reg. 378/2004 on procedure for amendments to Sirene manual (OJ 2004 L 64)
7. Reg. 377/2004 on ILO network (OJ 2004 L 64/1)
8. Decision on costs of expulsion (OJ 2004 L 60/55)
9. Dir. 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19)
10. Reg. 871/2004 on new functionalities for SIS (OJ 2004 L 162/29)
11. Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64)
12. Decision on joint flights for expulsion (OJ 2004 L 261/28)
13. Decision on early warning system (OJ 2005 L 83/48)
14. SIS II Regulation (OJ 2006 L 381)
15. Return Fund Decision (OJ 2007 L 144/45)
16. Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98)
17. Directive on sanctions for employers of irregular migrants (not yet published)

5. External treaties

Readmission
- Hong Kong *[UK opt in]* (OJ 2004 L 17/23): in force 1.3.04 (OJ 2004 L 64/38)
- Macao - *[UK opt in]* (OJ 2004 L 143/97); in force 1.6.2004
- Sri Lanka *[UK opt in]* (OJ 2005 L 124/43); in force 1.5.2005
- Albania – *[UK opt in]* (OJ 2005 L 124); in force 1.5.2006
- Russia – *[UK opt in]* (OJ 2007 L 129)
- Ukraine, Serbia, Montenegro, Bosnia, Former Yugoslav Republic of Macedonia and Moldova – [UK opt in] (OJ 2007 L 332 and 334)
- Pakistan – proposal for signature, March 2009 (COM (2009) 106) [UK opt in]

Other external treaties

- EC/Norway/Iceland re: Dublin Convention (OJ 2001 L 93): UK, Ire opt in
- EC & Switzerland treaties re Schengen, Dublin: not yet in force; UK, Ire position not clear
- 'Approved Destination Status' treaty with China: (OJ 2004 L 83/12); in force 1.5.2004: UK, Ire opt out
- Dublin treaty with Denmark: in force, 1 April 2006 (OJ 2006 L 66/38): UK, Ire opt in
- visa facilitation agreement with Russia OJ 2007 L 129: UK, Ire opt out
- visa facilitation agreements with Ukraine, Serbia, Montenegro, Bosnia, Macedonia, Albania and Moldova: OJ 2007 L 332 and 334 – in force 1 Jan. 2008 – UK, Ire opt out

6. Institutional Decision

Decision changing decision-making rules on immigration and asylum (OJ 2004 L 396/47): UK, Ire opt in

7. Other

- ARGO Decision 2002/463, OJ 2002 L 161/11; amended Dec. 2004 (OJ 2004 L 371/48): UK opt in, Ire opt out
- Decision establishing migration network: OJ 2008 L 131/7 – UK opt in, Ire opt in later

8. Civil law

a) adopted measures (UK, Ire opt in to all; UK opt-in to 18 and 20 only after adoption)

1. Regulation 1346/2000 on insolvency proceedings (OJ 2000 L 160/1)
2. Regulation 1347/2000 on jurisdiction over and enforcement of matrimonial and custody judgments (OJ 2000 L 160/19)
3. Regulation 1348/2000 on service of documents (OJ 2000 L 160/37)
4. Regulation 44/2001 on jurisdiction over and enforcement of civil and commercial judgments (OJ 2001 L 12/1)
5. Regulation 290/2001 on Grotius programme for civil law in 2001 (OJ 2001 L 43/1)
6. Regulation 1206/2001 - evidence in civil and commercial matters (OJ 2001 L 174/1)
7. Decision 2001/470 on European Judicial Network on civil and commercial matters (OJ 2001 L 174/25)
8. Regulation 743/2002 - civil law funding (OJ 2002 L 115/1)
9. Directive 2003/8 on legal aid (OJ 2003 L 26/41)
10. Regulation 2201/2003 on parental responsibility (OJ 2003 L 338/1)
11. Regulation 805/2004 on European enforcement order (OJ 2004 L 143/15)
12. Regulation 1896/2006 - European order for payment procedure (OJ 2006 L 399/1)
13. Regulation 861/2007 - European small claims procedure (OJ 2007 L 199/1)
14. Regulation 864/2007 on the law applicable to non-contractual obligations ('Rome II') (OJ 2007 L 199/40)
15. Decision establishing European 'Civil Justice' programme (OJ 2007 L 257/16)
16. Regulation 1393/2007 on the service of documents (OJ 2007 L 324/79)
17. Directive 2008/52 on mediation (OJ 2008 L 136/3)
18. Regulation 593/2008 on 'Rome I' (choice of law for contractual obligations) (OJ 2008 L 177/6)
19. Regulation 1103/2008 revising 'Dublin II' Regulation and civil law measures (OJ 2008 L 304/80)
20. Regulation 4/2009 on maintenance obligations (OJ 2009 L 7/1)
21. Decision amending Decision on judicial network (not yet published)

b) Proposed Measures (UK and Ire opt-in to 2 and 3)

1. 'Rome III' Regulation on choice of law and jurisdiction in divorce proceedings (COM (2006) 499, 17 July 2006)

2. Regulation on Member States' negotiation and conclusion of external treaties relating to maintenance, divorce and parental responsibility (COM (2008) 894, 19 Dec. 2008)

3. Regulation on Member States' negotiation and conclusion of external treaties relating to conflict of laws as regards contractual and non-contractual obligations (COM (2008) 893, 23 Dec. 2008)

See: Statewatch Observatory: **on the EU Constitution-Reform-Lisbon Treaty:**

http://www.statewatch.org/euconstitution.htm