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Consequences of the UK's and Ireland's Opt-Outs in the Area of Freedom, Security and Justice after the Lisbon Treaty

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Since the Treaty of Amsterdam, the idea of a common internal market of identical shape in all Member States of the EU gave more and more way to the idea of flexible integration. One part of that progress is the UK's and Ireland's rights to opt-out. With the entry into force of the Lisbon Treaty, these rights and other instruments of flexible integration like enhanced co-operation and emergency brakes will be changed substantially. The Lisbon Treaty extends the scope of the Schengen Protocol and the Title IV Protocol and introduces the possibility to impose on the non-participating Member State the liability for the practical and financial consequences of an opt-out from measures amending the existing acquis communautaire. *Sensibly used, the newly negotiated opt-outs may contribute together with enhanced co-operation and emergency brakes to a more coherent and adjustable progression of EU law. The idea of flexible integration however threatens the Union's uniform development in every Member State overall in the Area of Freedom, Security and Justice.*

1. Introduction

After the failure of the draft Constitutional Treaty of 2004, the UK[1] took advantage of the political pressure to conclude the Reform Treaty[2] and renegotiated its opt-outs in the Area of Freedom, Security and Justice (FSJ). The UK was conceded a strengthening of its right to refuse participation in legislative acts in order to compensate for the loss of its former veto under unanimity voting, caused by the extension of qualified majority voting (QMV) in that area[3] with the coming into force of the Lisbon Treaty.[4]

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[1] In the following paragraphs, if Ireland is not mentioned explicitly, then whenever the UK is referred to the law and presented arguments apply to *both* the UK and Ireland.

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C306/01; available at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML. This article is written on the assumption that the Lisbon Treaty will come into force. Therefore, articles are cited as foreseen in the consolidated versions of the Treaty on European Union, the Treaty on the Functioning of the European Union and the annexed Protocols, [2008] OJ C115/01; see http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML.

[3] S. Peers, "EU Reform Treaty: Analysis 1: Version 3 – JHA provisions" (2007) Statewatch Analysis; available at http://www.statewatch.org/news/2007/oct/eu-refrom-treaty-jha-anal-1-ver-3.pdf.

[4] The veto under unanimity voting is not 'stronger' or 'better' than an opt-out under QMV, unless the UK is interested in participation, as the veto provides the UK with more influence in the legislation procedure, see S. Peers, "EU Reform Treaty Analysis no.4: British and Irish opt-outs from EU Justice and Home Affairs (JHA) law" (2007) Statewatch Analysis, Version 2, p. 11; available at http://www.statewatch.org/news/2007/oct/eu-reform-treaty-uk-ireland-opt-outs.pdf

In particular, the merging of the pillars together with the EU's growing competences in the highly politicised area of Justice and Home Affairs (JHA) focus attention on the prospective shape of these rights to opt out/in as regulated by the Schengen Protocol[5] and the FSJ Protocol[6]. The Protocol related to border controls[7] is merely updated but not changed substantially.[8]

In some areas like asylum law, civil law and in relation to most measures concerning illegal immigration, the changes may not be substantially relevant as, to date, the UK and Ireland (except for one asylum measure) in practice opted in to most of the legislative acts.[9] The UK used its right of non-participation especially regarding measures concerning legal migration, visa and border controls.[10]

The new opt-in provisions in the Schengen and FSJ Protocol are complicated, leave room for interpretation, and may contain surprises regarding their political, constitutional and legal effects. Therefore, it is difficult to overlook their advantages and disadvantages for both the UK and the EU. In addition, the Lisbon Treaty extends their scope and introduces a new procedure which allows the Council to charge the Member State opting out of amendments of parts of the existing *acquis communautaire* with the financial consequences of the non-application and to exclude it from the existing measure. At the same time, the new provisions increase the possibility to use other instruments of flexible integration[11] by strengthening the development of enhanced co-operation and expressly incorporating emergency brakes into the Treaties.

This paper outlines the major changes to the Protocols regarding the UK's right to opt out in the Area of FSJ brought about by the Lisbon Treaty. It focuses *inter alia* on the legal problems regarding criminal law competences, the relationship between the Protocols and the binding character of a declared opt-in. Thereafter, a brief summary is given on the provisions on alternative instruments of flexible integration such as enhanced co-operation and emergency brakes. Finally, the paper discusses the impact of these instruments and of the rights to opt-out on the legal, constitutional and political development of the Area of Freedom, Security and Justice.

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[5] Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union (former Protocol No 2) integrating the Schengen *acquis* into the framework of the European Union (1997).
[6] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (former Protocol No 4) on the position of the United Kingdom and Ireland (1997) ('Title IV Protocol').
[7] Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland (former Protocol No 3) on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland (1997).
[8] Cf. S. Peers (n 4 above), Annex II.
[9] See S. Peers (n 4 above), p. 4. In the case of civil law this may have changed substantially over the last three years, cf. D. Wallis, House of Lords, European Union Committee, 10th Report of Session 2007-08, The Treaty of Lisbon: an impact assessment, Volume II: Evidence (2008), E84; this report can be downloaded at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62ii.pdf.
[10] See S. Peers (n 4 above) p. 4 and Annex IV; S. Peers, "Vetoes, Opt-outs and EU Immigration and Asylum law" (2004) Statewatch briefing, p. 4; http://www.statewatch.org/news/2004/oct/eu-immig-opt-outs.pdf.
[11] For a definition of the term and a general overview see F. Dehousse, W. Coussens and G. Grevi, "Integrating Europe, Multiple Speeds – One Direction?" (2004) EPC Working Paper, p. 4; http://www.epin.org/pdf/CoussensIRRI-KIIB160404.pdf.

2. The Protocols Before and After the Lisbon Treaty

The Treaty of Amsterdam attached to the TEU and to the EC Treaty two separate protocols setting out overlapping opt-outs for the UK in Justice and Home Affairs, the Schengen Protocol and the Title IV Protocol. With the abolition of the pillar structure, the Treaty of Lisbon replaces the old Title IV with the new Title V of Part Three of the Treaty on the Functioning on the European Union (TFEU) 'Area of Freedom, Security and Justice', which also contains competences previously forming part of the Third Pillar. Annexed to the TFEU, the FSJ Protocol renames the current Title IV Protocol and deals with the UK's opt-outs in those matters based on Title V TFEU.

In addition to the broader scope of the Protocols, the Lisbon Treaty brought about an extension of the UK's right to opt-out/in to amendments of existing Title IV measures and to measures building upon the existing Schengen *acquis*.[12] At the same time, a further right to opt-out is incorporated in Article 10, Title VII of the Protocol (No 39) on Transitional Provisions concerning acts adopted on the basis of Titles V and VI TEU prior to the entry into force of the Treaty of Lisbon.

A. The Schengen Protocol

(i) Status quo

According to Article 2(1) Schengen Protocol, the Schengen *acquis* applies only to the Member States referred to in Article 1 of the Protocol but not to the UK or to Ireland. The status quo of the UK's opt-in to the Schengen *acquis* is defined by Article 4 Schengen Protocol. Thereafter, the UK or Ireland, primarily not bound by the Schengen *acquis,* may at any time request to participate in some or all of the provisions of the *acquis*, subject to the approval of the Council with the unanimity of its members fully participating in the *acquis* and of the representative of the Government of the State concerned. The same rule applies under Article 5(1) of the Protocol to all measures building upon the *acquis,* i.e. measures constituting merely an implementation or further development.[13]

In case of the UK's refusal to opt in, the participating Member States may proceed through enhanced co-operation under Article 11 EC or Article 40 of the current TEU. The European Court of Justice (ECJ) held in *United Kingdom* v *Council*[14] that the UK cannot be allowed to take part in the

[12] The content of the *acquis* is listed in the Annex to the current Schengen Protocol (No2). The Annex is repealed by the Lisbon Treaty.
[13] Case C-77/05 *United Kingdom* v *Council* [2007] ECR I-11459, para 60.
[14] Case C-77/05 *United Kingdom* v *Council*, paras. 63 and 68, concerning FRONTEX; confirmed in Case C-137/05 *United Kingdom* v *Council* [2007] ECR I-11593, para 50, concerning the standards for security features and biometrics in passports and travel documents.

adoption of a measure under Article 5(1) of the Schengen Protocol without first having been authorised by the Council under Article 4 to accept the area of the *acquis* on which that measure is built.[15]

In 1999, the UK applied to take part in Schengen measures regarding illegal immigration, policing and criminal law (except cross-border 'hot pursuit' by police officers) and the policing and criminal law parts of the Schengen Information System (SIS). In 2000, the Council approved the request through a Council Decision which has applied since 1 January 2005, with the exception of the participation in the SIS.[16] Since 2002, another Council Decision provides that Ireland participates in the same parts of the Schengen *acquis*, except cross-border undercover surveillance by police officers.[17]

(ii) The Treaty of Lisbon

Apart from technical changes due to the renaming of the Treaties, the changes regarding the fact that the Schengen *acquis* has already been integrated in the framework of the EU by the Treaty of Amsterdam and the opt-in of the UK in the above mentioned parts[18] of the *acquis*,[19] the major change brought about by the Lisbon Treaty concerns the new Article 5(2) of the Schengen Protocol. It explicitly provides the UK with the right to refuse to opt into measures building upon an existing part of the *acquis* that the UK has already opted into under Article 4 Schengen Protocol.[20] Strictly speaking, the UK can escape from a further development of a part of the *acquis* in which it is already participating.

However, an opt-out from amending measures causes a division of the EU into Member States applying the new legislation and Member States which do not. Such a situation can affect the functioning and success of the existing *acquis communautaire*. Therefore, the Protocol must provide a procedure or mechanism that prevents the blockade of a functioning part of community law emerging from the amendment not being supported by all Member States.

Hence, in case the UK does not wish to participate, the procedure for adopting the measure will be suspended until the extension of the application of the existing measure to the UK is determined under Article 5(3) to (5) of the Protocol or until the notification of non-participation is withdrawn under paragraph 2. According to Article 5(3) Schengen Protocol, this can result in a limitation of the application to or even a complete exclusion of the UK from the relevant existing part of the *acquis*, which shall 'cease to apply to the extent considered necessary by the Council and under

[15] These cases did not concern the question to what extent the UK can be forced to participate; cf. J. Shaw, House of Lords, 10th Report of Session 2007-08, Vol. II, E3, Q18.
[16] See S. Peers (n 4 above), p. 3.
[17] *Ibid*.
[18] See 2.A.(i).
[19] See Recitals 1, 2 and 4 of the Schengen Protocol.
[20] Whether this right exists under the status quo of Article 5 Schengen Protocol is controversial. In favour of a duty to opt-in also in the amending measure, S. Peers, House of Lords, 10th Report of Session 2007-08, Vol.II, E19, Q90.

the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission'. In other words, the UK has gained the possibility to opt out of a measure building upon a part of the *acquis* the UK has already opted into, although with the risk of being partly or fully excluded also from the existing part. Thereby, Article 5(3) provides a high threshold for a complete exclusion of the UK because it shall be sought to retain the widest possible participation of the UK without seriously affecting the practical operability of the various parts of the existing Schengen *acquis*, while respecting their coherence. If the Council does not adopt a decision, the matter may be referred to the European Council according to Article 5 (4) of the Protocol. If the European Council has not adopted a decision by QMV either, it is the Commission deciding on the application of the existing measure under paragraph 5. Nevertheless, the UK is free to opt into all measures at a later stage.[21]

The ECJ's case law regarding Article 5[22] applies in the same way after the entry into force of the Lisbon Treaty. The UK is still locked out of measures building upon the part of the existing Schengen *acquis* it is not participating in, until an opt-in in both measures is declared. As a result, the Lisbon Treaty provides the UK with more flexibility than the present veto arrangement[23], but the amendment does not promote cherry-picking in the form of opting-in to amendments without accepting the basic measure. Article 4 Schengen Protocol remained unchanged and opting-in for the UK to measures building upon the *acquis* will not be easier than under present case law.[24]

B. The FSJ Protocol

(i) Status Quo

The Title IV Protocol currently provides the UK with a right to opt-out of measures regarding Articles 61 to 69 EC which concern visa, asylum, immigration and other policies related to and aiming at ensuring the free movement of persons set up in relation to the development of the internal market under Article 14(2) EC. Opting out of legislation in that area means limiting the scope of this fundamental freedom in JHA. It constitutes a prevention of the extension of the internal market with an initially purely economic focus to a rather general idea embracing other fields of action like FSJ introduced with the Treaty of Amsterdam.[25]

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[21] S. Peers (n 4 above), p. 9.
[22] See above 2.A.(i), Case C-77/05 *United Kingdom* v *Council* and Case C-137/05 *United Kingdom* v *Council*.
[23] S. Peers, House of Lords, 10th Report of Session 2007-08, Vol.II, E18 and 19, Q88 and 90; A. Dashwood, House of Lords, 10th Report of Session 2007-08, Vol.II, E66 and 67, Q306 and 307; C.-F. Durrand, House of Lords, 10th Report of Session 2007-08, Vol.II, E80, Q364.
[24] See S. Peers, House of Lords, 10th Report of Session 2007-08, Vol.II, E18 and 19, Q89 and 91.
[25] For the development of the internal market see V. Mitsilegas, "A market to a demos? The development of the EU as an 'area of freedom, security and justice" (2007) Outline for Seminar series on the 50th Anniversary of the Treaty of Rome, Europa Institute, University of Edinburgh; see http://www.law.ed.ac.uk/europa/files/mitsilegasoutline.pdf.

In contrast to the Schengen *acquis*, the UK has to opt back in to legislative acts based on Title IV EC after having opted out generally in that area under Article 69 EC, Articles 1 and 2 Title IV Protocol, rather than just refuse to opt-in. The distinction is based on the different background of Title IV EC and the Schengen *acquis*. Every provision of the EC Treaty innately applies to all Member States except when a general opt-out is agreed. In contrast, the Schengen *acquis* is based on intergovernmental co-operation and a State's accession depends on having signed the agreement, i.e. opted in. A general provision of non-participation like Articles 1 and 2 Title IV Protocol was therefore never necessary in the Schengen Protocol.

The opt-in to measures under Title IV EC can be declared by the UK before the act is adopted under Article 3 Title IV Protocol by notifying the President of the Council in writing, within three months after a proposal or initiative has been presented, that it wishes to take part in the adoption and application of any such proposed measure. According to Article 4 Title IV Protocol, participation is also possible any time after adoption by notifying the Council and the Commission that the UK wishes to accept that measure, in which case the procedure provided for in the current Article 11(3) EC shall apply *mutatis mutandis*. Thereafter, the acts and decisions necessary for the implementation of the opt-in are subject to the relevant provisions of the EC Treaty, save as otherwise provided in Article 11 EC. In other words, the procedure under which an opt-in can be carried out generally follows the proceeding in relation to enhanced co-operation under Articles 11 and 11a EC. After notifying the intention to opt-in to the Council and the Commission under Article 4 Title IV Protocol, the Commission decides on participation; other Member States or the Council do not have a vote on that issue.[26]

According to Article 8 Title IV Protocol, Ireland may withdraw its general opt-out from Title IV matters by giving notification to the Council that it no longer wishes to be covered by the terms of the Protocol, in which case the normal Treaty provisions apply.

(ii) The Treaty of Lisbon

Apart from the broader scope of the new FSJ Protocol due to the extension to all aspects of FSJ under the new Title V of Part Three TFEU,[27] the major change is the incorporation of the new Article 4a(1) FSJ Protocol. This provides that the UK's possibility to opt back into or stay out of FSJ measures also applies to amendments of existing legislation by which the UK is already bound. Thereafter, the UK gained the possibility to opt-out of a further development of EU law in this area and the extension of

[26] S. Peers (n 4 above), p. 4.

[27] Except Article 75 TFEU, to which, with regard to Ireland, this Protocol shall not apply according to Article 9 FSJ Protocol; cf. A. Dashwood, House of Lords, 10th Report of Session 2007-08, Vol.II, E65, Q298.

existing legislation.[28] Article 4a FSJ Protocol therefore concerns a similar situation to that under Article 5 Schengen Protocol. Hence, comparable to Article 5(3) to (5) Schengen Protocol, Article 4a(2) provides the Council, acting on a proposal from the Commission, with the possibility[29] to decide by QMV in accordance with Article 238(3) (a) TFEU[30] to urge the UK to make a notification under Articles 3 or 4 Schengen Protocol indicating its desire to participate in case the non-participation of the UK in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union. If a positive notification under Articles 3 or 4 FSJ Protocol is not given, the existing measure shall cease to bind the UK. In that case, the Council on a proposal from the Commission may determine by QMV under Article 4a(3) FSJ Protocol that the UK 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.

In contrast to the Schengen Protocol, the consequence for the UK may therefore not only be a lock-out but also a financial burden. In addition, the FSJ Protocol does not provide for a partial exclusion of the UK from the existing *acquis*. As Article 4a FSJ Protocol does not ask the Council for retaining the widest possible participation of the UK and enables the Council to recover financial damages, the consequences of an opt-out under this Protocol may be even more severe.

Article 6a FSJ Protocol provides the UK with an opt-out from all measures based on Article 16 TFEU[31] concerning the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5, Title V, Part Three TFEU concerning judicial co-operation in criminal matters and police co-operation. This applies only if the UK is not bound by the rules governing the forms of judicial co-operation in criminal matters or police co-operation which require compliance with the provisions laid down on the basis of Article 16 TFEU.

C. The Protocol on Transitional Provisions

Title VII of the Protocol on Transitional Provisions annexed to the TEU and the TFEU contains transitional provisions concerning acts adopted on the basis of Titles V and VI TEU, the so-called Second and Third Pillars.

Article 9 of the Protocol provides that the legal effect of all these measures adopted before the entry into force of the Lisbon Treaty shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. For a period of five years, the ECJ's jurisdiction on these

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[28] Under current law, it is not clear whether the UK disposes of such a right, see A. Dashwood, House of Lords, 10th Report of Session 2007-08, Vol.II, E65, Q298.

[29] The procedure is not mandatory and the Council may decide not to request the notification in case the amending measure is severable from the existing *acquis*, see S. Peers (n 4 above), p. 9.

[30] Former Article 205 EC.

[31] Former Article 286 EC.

measures will remain within the limits set out in the TEU[32] and the Commission cannot exercise its powers under the new Article 258 TFEU[33] pursuant to Article 10(1) and (3) Protocol on Transitional Provisions. In order to maintain these limitations for the UK beyond the transitional period of five years, Article 10(4) provides the UK with the right to opt-out of existing measures it is already participating in by notifying to the Council at least six months before the expiry of the transitional period that it does not accept the extension of powers of the ECJ and the Commission as set out in the new Treaties.

Similar to Article 4a(3) FSJ Protocol, in the case of notification, the Council may adopt a decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts. Article 10(5) of the Protocol on Transitional Provisions provides the UK with the right to opt back in to an act which has ceased to apply to it under paragraph 4 and accept the Court's jurisdiction. In that case, the relevant provisions of the Schengen Protocol or of the FSJ Protocol, as the case may be, shall apply. This means that the opting back in to measures under the Protocol on Transitional Provisions is subject to an approval of the Council or the Commission which shall seek to re-establish the widest possible participation of the UK, while respecting the coherence of the *acquis*.

D. Relationship between the Protocols

The scope of the current Title IV Protocol is limited. In the case of a conflict, the Schengen Protocol assumes the nature of *lex specialis* because Article 7 Title IV Protocol provides that Articles 3 and 4 shall be without prejudice to the Schengen Protocol.[34] The Lisbon Treaty expands the scope of Article 7 FSJ Protocol to Article 4a FSJ Protocol. Hence, if all provisions of a legislative act are based on different legal basis of both areas, Article 7 FSJ Protocol gives way to the application of the Schengen Protocol.

Apart from the fact that the determination of the provisions' character may not be easy, problems emerge in the case of double identity of the measure if some parts are based on FSJ and others on the Schengen *acquis*. As a partial opt-out from a legislative act is not foreseen[35], the measure has to be broken up into two acts in order to apply both Protocols. If not, the opt-out rule for the whole act follows the definition of its major part. In this case, it may occur that the UK exercises the

[32] For a detailed report on the ECJ's jurisdiction and the UK's opt-outs, see S. Peers (n 4 above), pp. 12-14.
[33] Ex Article 226 EC.
[34] Cf. Opinion of Advocate General Trstenjak, delivered on 10 July 2007 in Case C-77/05 *United Kingdom* v *Council*, para 71. As the directives in question in Cases C-77/05 *United Kingdom* v *Council* and C-137/05 *United Kingdom* v *Council* represent a development of the Schengen *acquis*, but do not constitute an ordinary Title IV measure, Article 7 was not addressed in the ECJ's judgments (see Case C-77/05, para 86 and Case C-137/05, para 67).
[35] The wording of the Protocol is not clear: Articles 4 and 4a FSJ Protocol refer to 'a measure' on the whole but without giving a legal definition of a 'measure'. Section 1 of Chapter 2 of Part 6 TFEU does not help as it only speaks of 'acts'. However, the aim of the opt-out rule is clear: no cherry-picking but rather a 'take it or leave it' concept regarding the whole project.

opt-out under only one of the Protocols either because the measure is based on both Protocols and Article 7 FSJ Protocol applies or because the act combines FSJ and Schengen parts. The Protocols do not provide a special procedure for that situation.

For instance, in the case of opting-out only under the FSJ Protocol, the new provisions on the exclusion of the UK from the existing measure and the financial consequences in Article 4a (2) and (3) FSJ Protocol would apply only in relation to the already existing Title IV measure. Articles 5 (3) to (5) Schengen Protocol would not apply to the possibly inoperable Schengen *acquis* the UK is already participating in because the inoperability of this part of the Schengen *acquis* was caused by a FSJ opt-out. In order to circumvent the question of an analogous application, the legislative act has to be split up. Therefore, measures based on FSJ and Schengen in the same legislative act are only practicable in case of UK's full participation.

With regard to the Protocol on Transitional Provisions, the legal reasoning of the ECJ's judgements in Cases C-77/05 and C-137/05 (no participation in a measure based upon the Schengen *acquis* under Article 5(1) Schengen Protocol without having opted in to the existing part of the *acquis*) also applies to the situation where the UK wishes to exercise its right to opt back into a measure building upon the Schengen *acquis* when the existing legislative act ceased to apply to the UK under Article 10 Protocol on Transitional Provisions or the new Article 5(3) Schengen Protocol. The reason for the non-application of the existing measure to the UK must be irrelevant. In all cases it is still possible for the UK to adopt the existing *acquis*. The ECJ's legal reasoning does not depend on the cause for non-participation.[36] The UK can therefore still be locked out of measures building upon the Schengen *acquis*.

3. Legal Problems of the New Opt-Outs

The change of the UK's rights to opt out or in introduced by the Lisbon Treaty causes various legal problems, overall the application of the FSJ Protocol in relation to the Union's new criminal law competence under Article 83(2) TFEU and the overlapping scope of the Protocols. In addition, questions arise whether or not an opt-in has binding character and how 'inoperability' in terms of Article 4a(2) FSJ Protocol and Article 5(3) Schengen Protocol may be interpreted.

A. Criminal law competence under Article 83(2) TFEU

By abolishing the pillar structure through the Lisbon Treaty, competence in criminal law is no longer divided between the intergovernmental EU and the supranational Community. The new Articles 82 to

[36] Case C-77/05 *United Kingdom* v *Council*, paras. 62 to 67.

86, Chapter 4, Title V, Part Three TFEU provide the EU with competences in criminal law.[37] Article 83(2) TFEU foresees that 'if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.' Thereby, the Lisbon Treaty brings about relevant changes concerning the UK's right to opt-out in this area.

An opt-out from policing and criminal law proposals was neither foreseen by the draft Constitution 2004 nor was it part of the negotiations for the Constitutional Treaty.[38] On the contrary, the IGC 2007 Mandate[39] states in section III.19.l that the scope of the UK's right to opt out shall be extended in order to cover policing and criminal law.[40]

The FSJ Protocol generally concerns all provisions in Title V, Part Three TFEU including the ones referring to the Union's competence in criminal law. The problem whether or not the UK disposes of a right to opt-out also regarding Article 83(2) TFEU originates from a line of case law of the ECJ under the current Treaties.[41] The Court had to decide on the extent of Community competence in criminal law and found in *Casati*[42] and *Lemmens*[43] that as a general rule, criminal law does not fall within the EC's competence because it is expressly regulated under the current Third Pillar in Article 31 TEU.

However, according to the ECJ in *Environmental Crime*[44] and *Ship-source pollution*[45], this does not prevent the Community legislator from taking measures which relate to the criminal law of the Member States and which it considers necessary in order to ensure that the rules laid down on environmental protection are fully effective[46], except type and level of the criminal penalties to be applied.[47] The legal basis of this implied power shall be the relevant provision for the underlining EC legislation or policy. Therefore, the Court established partially an EC competence in form of an implied power in criminal

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[37] See Article 2, B. Specific Amendments, No. 67 of the Treaty of Lisbon.
[38] See S. Peers (n 4 above) p. 2.
[39] http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf.
[40] S. Peers (n 4 above), p. 7.
[41] For an overview see H. Goeters, "New Criminal Law Developments in the Community Legal Order" (2007) SIEPS, pp. 57-68; http://www.sieps.se/publ/utredningar/2007_1u_en.html.
[42] Case 203/80 *Casati* [1981] ECR 2595, para 27.
[43] Case C-226/97 *Lemmens* [1998] ECR I-3711, para 19.
[44] Case C-176/03 *Commission* v *Council* [2005] ECR I-7879.
[45] Case C-440/05 *Commission* v *Council* [2007] ECR I-9097; regarding the EC's competence in criminal law in general after the ECJ's decisions in *Environmental Crime* and *Ship-source-pollution*, see S. Peers, "The European Community's criminal law competence: The plot thickens" (2008) 33 *ELRev* 399-410.
[46] Case C-176/03 *Commission* v *Council*, para 48 and Case C-440/05 *Commission v Council*, para 66.
[47] Case C-440/05 *Commission v Council*, para 70.

law from which the UK currently cannot escape. Neither the opt-out negotiated under the Third Pillar nor the Title IV Protocol applies.[48]

The new Article 83(2) TFEU addresses the competences in criminal law conferred to the EC by the ECJ in the above mentioned cases. Whether the UK's opt-out in the area of criminal law established by the reference of Article 1 of the new FSJ Protocol to all provisions of Title V, Part Three TFEU refers only to measures which would have been issued under the ex Third Pillar and Title IV EC Treaty, or if the opt-out is now extended to all criminal law legislation of the EU including the implied power of the EC depends on the interpretation of Article 83(2) TFEU.

If this provision constituted the legal basis for the criminal law part of measures, essential to ensure the effective implementation of a Union policy, the general opt-out in the FSJ Protocol would apply because the Protocol equally confers to the UK the right to opt-out in relation to all provisions based on Title V TFEU. Article 83(2) sentence 1 clearly indicates that it constitutes the legal basis. First, it establishes a task for the EU to adopt such legislative acts and second, it clearly contains the scope and requirements of the Union's competence, namely the extension to the definition of criminal offences and sanctions[49], and the requirement that the approximation proves essential to ensure the effective implementation of a Union policy. Hence, it partly repeats the content of the ECJ's judgments.[50] This would not have been necessary if the legal basis was still the general provision in conjunction with the ECJ's case law. Third, an interpretation of Article 83(2) sentence 2 TFEU that the reference to the legislative procedure of the harmonising measure testified that the criminal law part shares the legal basis with the main legal act is not convincing. Article 83(2) sentence 2 TFEU rather refers as *lex specialis* in relation to sentence 1 to the general provisions only regarding the procedural part but not the definition of the legal basis. Were the general provision meant to be the legal basis, Article 83(2) sentence 1 and 2 TFEU would be dispensable and would have a mere declarative character. The determination of the right procedure follows the provision of the legal basis and the second sentence is an exception to this general rule. Furthermore, the aim of that sentence is not only to clarify the reference to Article 76 TFEU, which only modifies the right to propose the adoption of an act.

The new Articles 82 to 86, Chapter 4 Part One TFEU regulate the Union's competences in criminal law exclusively.[51] A different interpretation does not help anyway in case other opt-outs apply

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[48] S. Peers (n 4 above), p. 8.

[49] Contrary to the ECJ's judgment regarding criminal law competence under the current Treaties in Case C-440/05 *Commission* v *Council*, para 70 and 71, where it held that the 'determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence'.

[50] *Ibid.*, para 66, and Case C-176/03 *Commission v Council*, para 48.

[51] Also in favour of Article 83(2) TFEU being the legal basis for measures currently based on the implied power conferred to the EC by the ECJ, S. Peers (n 45 above), p. 409.

because the proposed measures relate to immigration law or, only regarding the UK but not Ireland, to the monetary union.[52]

However, the intention of the Treaty of Lisbon and the Member States' intention as contracting parties when negotiating the FSJ Protocol also have to be taken into account. It is questionable whether they really wanted to extend the UK's opt-out in this point or if it should rather be qualified as an automatic but incoherent result of the insertion of criminal law into Title V TFEU and the extension of the opt-out to policing and criminal law.

A third and teleological approach points in the same direction, namely the aim of Article 83(2) TFEU. As the UK's right to opt-out is only an exception to the general idea of joint decisions and is agreed in an annexed protocol, its scope shall be interpreted narrowly. A right to opt-out regarding an essential part of a measure that ensures the effective implementation of a Union policy weakens the *effet utile* of the Union's competence in this area. In relation to criminal law, the Lisbon Treaty was intended to increase and strengthen the Union's competences by transferring them from the Third Pillar to supranational level. The UK's right to opt-out was extended as a compensation for the lost veto under unanimity voting in the Third Pillar. Therefore, an extension of that right to the respective implied power would fall outside that aim.

In addition, the FSJ Protocol does not really deal with an opt-out from measures based on Article 83(2) TFEU. Its Article 4a is not applicable because the criminal law part of the legislative act cannot be defined as an amendment of the basic measure and Article 4 does not foresee the possibility to exclude the UK from the rest of the act like Article 4a(2) and (3) FSJ Protocol. However, this may be necessary in order to give full effect to the underlying harmonisation measure and not to risk its practical operability. Especially in the case of fighting environmental damages and related international crime, the lack of harmonisation of the criminal law part may jeopardize the whole project. Nonetheless, a decision of the ECJ regarding this matter seems to be inevitable and its adherence to the decisions in *Environmental Crime* and *Ship-source pollution* remains possible.

B. Binding character of opt-ins

Another unsolved legal problem is located in the question whether the UK, after having opted into a proposal at a stage where it is acceptable to the UK, disposes of a right to opt out again before the final decision in the Council is reached because the final draft differs from the original proposal. Under unanimity voting it was impossible to bind the UK without its consent.[53] Therefore, the Member States would compromise in order to make the UK's participation possible.[54]

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[52] S. Peers, (n 4 above), p. 8.
[53] See S. Peers (n 4 above), p.5.
[54] *Ibid*.

The question of the binding character of opt-ins is especially relevant after the extension of QMV in the Area of FSJ by the Lisbon Treaty. As the UK fears being bound by its opt-in and then overruled afterwards by QMV, it may argue to be allowed to opt out again should the measure's shape change substantially.[55] According to Article 3 FSJ Protocol, after a proposal or initiative has been presented to the Council, the UK 'may notify the President of the Council in writing,…, that it wishes to take part in the adoption and application of any *such* [emphasis added] proposed measure'. Article 4 FSJ Protocol provides that the 'United Kingdom…may at any time after the adoption of a measure by the Council…notify its intention…that it wishes to accept *that* [emphasis added] measure'. Therefore, if a substantial change produced a different measure, the declared opt-in might not apply any more as the notification cannot be extended to another than *such* or *that* measure.[56]

Also the Commission claims the right to withdraw a proposal after[57] the decision of the Council[58] in the case of *dénaturé*, i.e. a substantial change by the Council.[59] The Commission uses the argument of *dénaturé* in the case that 'amendments introduced by the European Parliament and/or the Council denature the proposal, introduce a level of complexity which is incompatible with the objectives and provisions contained in the Treaty or appear to contradict the Protocol on the application of the principles of subsidiarity and proportionality'.[60] However, the case of changing the act so that it can be defined as a different and not *such* or *that* measure under the FSJ Protocol cannot be the object of a *dénaturé* argument in favour of the UK and applied in order to avoid the binding effect of an opt-in. The situations are not comparable.

The Council is not permitted to change the Commission's proposal to a different one and would exceed its power if the changes went beyond the scope of the act as defined in the original draft.[61] In that case, a withdrawal of the proposal by the Commission after the decision of the Council would not even be necessary. Indeed, if the Commission claims a right to withdraw a proposal based on the argument of *dénaturé* because the proposal was changed without constituting a different one, this may be even more possible in case of adopting another measure than *such* or *that* act initially proposed.

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[55] Cf. M. Howe QC, House of Lords, 10th Report of Session 2007-08, Vol.II, E52, Q222 and Q224.
[56] Cf. M. Howe QC, House of Lords, 10th Report of Session 2007-08, Vol.II, E52, Q224.
[57] According to Article 250(2) EC (Article 293(2) TFEU), before the decision of the Council, the Commission may at any time alter its proposal during the procedures leading to the adoption of the act.
[58] So long as the Council has not decided the Commission may withdraw the proposal at any time. See K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union*, 2nd Edition, Thomson Sweet & Maxwell, London 2005, pp. 580 and 581.
[59] Cf. M. Howe QC, House of Lords, 10th Report of Session 2007-08, Vol.II, E52, Q224; and Communication from the Commission, "Action plan: Simplifying and improving the regulatory environment", 5 June 2002, COM(2002) 278 final, p. 9; http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0278en01.pdf.
[60] *Ibid.*, p. 9.
[61] Case C-408/95 *Eurotunnel SA and Others* v *SeaFrance* [1997] ECR I-6315, paras. 37-39, and Case 355/87 *Commission v Council* [1987] ECR 1517, paras. 42-44.

Nevertheless, the UK is not forced by any means to opt into the measure at the beginning of the legislative procedure. It can opt in after the adoption under Article 4 FSJ Protocol. The price may be a loss of influence in the negotiations[62], but if the UK wants to avoid this, it should also bear the consequences of the QMV adoption procedure. The argument that the UK being bound by EU legislation against its will would violate the object, context and purpose of the Protocol providing for the opt-out[63], contradicts the UK's possibility to opt-in at a later stage of the proceedings. Indeed, the Protocols aim at leaving the choice of participation to the UK, and they do not set any limitation on the moment the choice has to be made, but they provide only one possibility to exercise that right. By opting in at the beginning of the legislative procedure the UK uses up its privilege and a later change is not foreseen by the Protocols.[64] After deciding to participate, the UK has then the same status and rights as all other Member States. An opt-in is irreversible.[65]

C. 'Inoperability' in terms of Article 4a(2) FSJ Protocol and Article 5(3) Schengen Protocol

According to Article 4a(2) FSJ Protocol and Article 5(3) Schengen Protocol, the UK can be fully or, in the case of the Schengen Protocol, also partly excluded from existing measures into which it had already opted. In relation to Article 4a(2) FSJ Protocol, a precondition is that the UK's non-participation in the amendment of such measure would cause inoperability of the existing *acquis* for other Member States or the EU if it still applied to the UK. The interpretation of 'inoperable' will be a crucial point in regard to the practical importance of that extension of the Protocol.

As a Member State's exclusion from parts of the *acquis communautaire* is an exception and should always be used as a last resort, a narrow interpretation shall be preferred and a relatively high threshold maintained. Therefore, the exclusion may only be possible in the case of technical inoperability so that the functioning of the system is threatened. Mere increased complexity due to the continued application to the UK is not sufficient.[66] However, a Council decision that a measure had become 'inoperable' would be open to challenge before the ECJ.[67]

In relation to Article 5(3) Schengen Protocol, the Council's Decision shall maintain the widest possible participation of the Member State without seriously affecting the practical operability of the various parts of the Schengen *acquis*. In contrast to the FSJ Protocol, the threshold to exclude the UK is

[62] See below 5.B.(i).

[63] Cf. S. Peers, "Vetoes, Opt-outs and EU Immigration and Asylum law" (2004) Statewatch briefing, p. 5, who also seems to reject this argument.

[64] Regarding the possibility to pull an emergency brake in that situation, see below 4.B.

[65] Cf. M. Howe QC, House of Lords, 10th Report of Session 2007-08, Vol.II, E52, Q222.

[66] Cf. also S. Peers, House of Lords, 10th Report of Session 2007-08, Vol.II, E18, Q90; A. Dashwood, House of Lords, 10th Report of Session 2007-08, Vol.II, E65, Q298; J. Straw MP, House of Lords, 10th Report of Session 2007-08, Vol.II, E118, Q517.

[67] Cf. S. Peers, House of Lords, 10th Report of Session 2007-08, Vol.II, E18, Q90; M. Fletcher, House of Lords, 10th Report of Session 2007-08, Vol.II, E152.

similar. Nevertheless, due to the possibility of excluding the UK from parts of the existing *acquis*, the consequences may not be equally severe.[68] The same level of practical inoperability causes a full exclusion of the UK regarding a FSJ measure, whereas the Schengen Protocol exceeds to maintain as much participation as possible.

4. Other Instruments of Flexible Integration

The UK's right to opt-out/in is not the only way of dealing with the increasing difficulty of reaching a common agreement in the Council. The Treaty of Lisbon extended other instruments of flexible integration. Reasons for this included the enlarging number of Member States and the ill-adapted institutional framework in an EU whose scope of action gets more and more extended to areas of sensitive 'high politics'. The Treaty of Lisbon strengthens enhanced co-operation and introduces emergency brakes to bring about more flexibility in the decision-making process in order to avoid blockages in the further development of the Area of FSJ.[69]

In contrast, the opt-outs 'were never considered a *generally available instrument* [emphasis added] responding to the tension between a growing body of uniform European law and the increasing diversity of Member State economic and institutional conditions and political preferences'.[70] However, all mechanisms have in common that they renounce the idea of a joint progress at the same pace in all Member States of the EU. Especially in sensitive areas like JHA, Member States can suspend legislative procedures and give way to further progress of a smaller group.[71]

A. Enhanced co-operation

The instrument of enhanced co-operation[72], primarily introduced with the Treaty of Amsterdam,[73] can now be applied in all areas of EU competence in order to adopt EU law that fits the requirements of not all but at least nine Member States. Besides the right to opt out, which may be seen as a special kind

[68] See above 2.B.(ii).

[69] The instrument of permanent structured co-operation under the new Articles 42(6) and 46 TEU only applies in CSDP matters; see Protocol (No 10) on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union.

[70] F. W. Scharpf, "The Joint-Decision Trap Revisited" (2006) 44 *JCMS* 858.

[71] S. Carrera and F. Geyer, "The Reform Treaty & Justice and Home Affairs Implications for the common Area of Freedom, Security & Justice" (2007) CEPS Policy brief, No. 141, p. 1; http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf.

[72] Articles 326 to 334 Title III of Part Six TFEU and Article 20 Title IV TEU (former Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and former Articles 11 and 11a EC); for an overview see S. Kurpas, B. Crum, et.al., "The Treaty of Lisbon: Implementing the Institutional Innovations" (2007) Joint Study of CEPS, EGMONT and EPC, pp. 97-119; http://www.irri-kiib.be/SD/Joint_Study_complet.pdf.

[73] Although in a limited scope, under strict conditions and through a laborious procedure, see F. Dehousse, W. Coussens, G. Grevi (n 11 above) p. 9 and 10. The Treaty of Nice increased the scope, revised the conditions and simplified the procedures. Nevertheless, this form of flexible integration has never been used, see F. Dehousse, W. Coussens, G. Grevi (n 11 above) p. 10 and 11, and F. W. Scharpf (n 70 above), p. 858.

of enhanced co-operation at the primary law level consisting of the Schengen and Title IV or FSJ Protocol[74], enhanced co-operation provides a procedure to progress in the respective area after the declaration of non-participation by one or more Member States, either because of a declared opt-out such as that under Article 5(1) Schengen Protocol or an exercised emergency brake, e.g. under Articles 82(3) and 83(3) TFEU. In the Area of FSJ, the Treaties contain under Articles 86(1), 87(3) TFEU[75] a special competence for flexible integration if only some Member States wish to co-operate and others do not want to follow.

In JHA, the general provisions on enhanced co-operation under Article 20 TEU and Article 329 TFEU apply besides the *lex specialis* regulated in Title V Part Three TFEU, although under procedural constraints and only in an area not covered by an exclusive competence of the EU.[76] Articles 326 to 334 of the Lisbon Treaty brought about further innovations to make the mechanism easier to trigger, more useful and attractive.[77] A new feature is the so-called *passerelle* system allowing the participating Member States to determine the procedures (QMV) which govern the implementation of enhanced co-operation.[78] In addition, subsequent access for non participating Member States is facilitated under Article 331 TFEU.[79] In contrary to Articles 27e and 40b of the current TEU, the new Article 331 TFEU overtakes the rule of Article 11a EC and provides that the Commission shall confirm the participation of the Member State concerned and note if the conditions of participation have been fulfilled and shall adopt any transitional measures regarding the acts already adopted within the framework of enhanced co-operation. Hence, with the entry into force of the Lisbon Treaty, in any case of enhanced co-operation a decision of the Council is not necessary.

B. Emergency brakes

According to Articles 82(3) and 83(3) TFEU, any Member State may exercise an emergency brake in criminal matters if it fears that fundamental aspects of its national criminal justice system might be affected by a proposal for a directive. Thereafter, it may request that the ordinary legislative procedure be suspended and refer the draft directive to the European Council. After discussion, and in case of positive consensus on the directive, the European Council refers the draft back to the Council, which then terminates the suspension of the ordinary legislative procedure. In the case of disagreement in the Council, and if at least nine Member States wish to establish enhanced co-operation, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the

[74] See S. Kurpas, B. Crum (n 72 above), pp. 99 (n 1) and 106.
[75] Former Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and former Articles 11 and 11a EC.
[76] See S. Kurpas, B. Crum (n 72 above), p. 108.
[77] *Ibid.*, p. 100.
[78] See for example Article 333 TFEU; cf. S. Kurpas, B. Crum (*ibid.*) p. 104.
[79] *Ibid*.

authorisation to proceed with enhanced co-operation referred to in Article 20(2) of the TEU and Article 329(1) TFEU based on the initial proposal that caused the suspension of the ordinary legislative procedure shall be deemed to be granted and the provisions on enhanced co-operation apply.[80]

In contrast to the right to opt-out, emergency brakes are available only under the above mentioned limited circumstances whereas opt-outs can be exercised without legal (although not political) constraint. Emergency brakes are available to every Member State and therefore possible also for the UK as a second safety barrier after a declared opt-in. The UK's opt-in is therefore reversible if the measure is changed after a declared opt-in and if it affects fundamental aspects of the UK's criminal justice system.[81]

5. Impact of flexible integration on the further development in the Area of FSJ

The negotiation of the UK's opt-outs/ins and the extension of flexible integration in general is seen to be quite ambiguous not only in other Member States but also in the UK itself, because the new situation may not only offer advantages. Even though drawing a clear line between constitutional and political effects may not always be possible because they all relate to each other and some consequences are affected by various aspects, a distinction between constitutional effects on the one hand and political effects on the other hand, helps to evaluate the problems.

A. Constitutional effects

The constitutional effects of flexible integration mainly concern the aspects of democratic legitimacy of both British MEPs and the EU institutions.

(i) Lack of democratic legitimacy of British MEPs

As a consequence of the UK's partial non-participation in FSJ, British MEPs arguably suffer a lack of democratic legitimacy regarding the adoption procedure of legislative acts in the Area of FSJ in the European Parliament (EP). The reason is that the respective acts will not come into force in the UK and in relation to the people the British MEPs represent.[82] This problem emerges even more in the case of enhanced co-operation because only the MEPs of nine out of 27 Member States may be concerned. The fact that the European Parliament always rejected splitting up for single decisions may become an obstacle for the development of enhanced co-operation[83] because also MEP's of non-participating

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[80] S. Carrera, F. Geyer (n 71 above) p. 5.
[81] Cf. S. Peers (n 4 above), p. 8.
[82] The Problem is also known as 'European Midlothian Question'. See S. Kurpas, B. Crum (n 72 above) p. 103.
[83] *Ibid*.

Member States have the right to vote and therefore have to be convinced in order to pass that legislation.[84]

On the other hand, the UK is not excluded from opting-in at a later stage of the legislative procedure (Article 4 FSJ Protocol and Article 4 Schengen Protocol). Therefore, the British MEPs in the EP would not exercise their democratic mandate if they withdrew from the negotiations in the case of a prior opt-out. The same argument applies in the case of enhanced co-operation, as subsequent participation is facilitated by the Lisbon Treaty. The British 'Midlothian Question' is different in this respect, because it concerns acts never coming into force in Scotland.[85]

Furthermore, the assumption that MEPs are only legitimated in order to represent their constituency regarding EU policy applicable to their constituency is not comprehensive. The mandate of MEPs goes beyond that. The new Article 14 TEU[86] provides in paragraph 2 that the EP shall be composed of representatives of the Union's citizens. In contrast to the current Article 189 EC which clearly bases the MEP's mandate on a State link, an emphasis towards the representation of the European people as a whole is introduced by the Lisbon Treaty.[87] Even though we are still far away from a single European citizenry, not only because of problems regarding proportionality, the mandate of an MEP cannot and should not be limited to her or his constituency. This is affirmed in practice by the increasing importance of the link between MEPs and their political group in the EP. In this sense, the status of MEPs is similar to the status of the Members of the German *Bundestag*, who are representatives of the whole people.[88] In addition, acts in the Area of FSJ may also apply and affect non-participating Member States and their citizens at least economically.

However, the European 'Midlothian Question' is also a political aspect of flexible integration because it affects the UK's political influence.[89]

(ii) Legitimacy of EU institutions

The legitimacy of the ECJ's and the Commission's actions may be positively influenced by the possibility of flexible integration. In many cases, the culture of joint decisions produces wide gaps in the legislation in the Area of FSJ due to necessary compromises.[90] The onus is then on the ECJ and the Commission to fill these gaps through interpretation, arguably sometimes even beyond the legitimate

[84] Cf. S. Peers (n 4 above), p. 9.
[85] See n. 82 above.
[86] Ex Article 189 EC. For an overview of the changes see J. Gerkrath, "Representation of Citizens by the EU" (2005) 1 EuConst, pp. 73-78.
[87] *Ibid.,* p. 74.
[88] Article 38(1), '*Grundgesetz: Sie sind Vertreter des ganzen Volkes....*'
[89] See below B.(i).
[90] Cf. M. Fletcher, "The European Court of Justice: Carving itself an influential role in the EU's Third Pillar" (2007) European Union Studies Association (EUSA), 10th Biennal Conference, Montreal, 17-19 May 2007, p. 12; http://www.unc.edu/euce/eusa2007/papers/fletcher-m-08i.pdf.

scope of their competences. The democratic legislative process is circumvented if decisions are intentionally left to be decided by the ECJ and the Commission due to the lack of political consent in the Council. Only the development of flexible integration in the Third Pillar may resolve the difficulties the ECJ faces in the Third Pillar. The court is restraint by the formal limits on its judicial power imposed by Title VI EU while "the limited and contested nature of the legal and political environment might encourage a bold and more dynamic jurisprudence."[91]

Furthermore, measures once entered into force and judgments of the ECJ are unlikely to be changed by political reversal.[92] Flexible integration may therefore lead to more coherent legislation not exposed to unforeseeable and uncertain interpretation beyond the influence of the legitimate legislator.

(iii) Fragmentation of UK and EU law

A very obvious and foreseeable consequence of the UK's non-participation and flexible integration in general consists in the fragmentation of the *acquis communautaire*, with the effect of jeopardising homogeneity and the good functioning of the internal market.[93]

B. Political effects

The political effects of opt-outs/ins mainly concern the UK's political influence and the possibility of participating in the development of the EU. The fact that future EU law may partially be developed and predetermined by enhanced co-operation puts political pressure on all Member States to participate in order to maintain their influence. A lock-in may be the consequence. Besides, the strengthening of flexible integration increases the problem of a two-speed European Union.

(i) Exclusion from political participation

A major disadvantage for the UK and all Member States not participating in enhanced co-operation is their exclusion from influencing the legislative procedure not only regarding single measures but new EU policies and developments as a whole.[94] With the enlargement of the Union, a uniform progress in all Member States gets more and more difficult. It can be expected that progress is made and arguably has to be made under enhanced co-operation, before other Member States join in and the measure or the development little by little becomes a Union wide project.

No difference to the current situation exists regarding the general disadvantage of opt-outs for the political influence in the decision-making process. Indeed, the UK was invited to participate in the

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[91] M. Fletcher (n 90 above), p. 22.
[92] See F. W. Scharpf (n 70 above), p. 857.
[93] For an overview of this argument regarding Civil law, see D. Wallis, House of Lords, 10th Report of Session 2007-08, Vol.II, Memorandum, E84.
[94] Cf. J. Shaw, House of Lords, 10th Report of Session 2007-08, Vol.II, E1, Q34.

adoption of legislative acts like Rome I even though it had declared not to opt in. But this may have been a unique arrangement not transferable to all future measures.[95] Once the opt-out is declared, there is no right to participate afterwards in the negotiations in order to decide to opt-in after the final draft has been agreed. Article 4 FSJ Protocol indicates that the general rule, apart from gentleman's agreements as in the case of Rome I, is 'take it or leave it'.[96]

In addition, the influence in the procedure is even more diminished by the weakened democratic legitimacy of British MEPs.[97] They may lose political influence in the EP in relation to MEPs from participating Member States.[98] On the one hand, this is caused by a self-committed restraint and, on the other hand, by a loss of political reliance or confidence overall of members of the governing party in the UK.

The risk of being locked out of future Schengen measures increased due to the judgments of the ECJ in Cases C-77/05 and C-440/05.[99] A major change was made with the Lisbon Treaty by introducing Article 4a FSJ Protocol and the possible exclusion of the UK also from existing measures. Therefore, an opt-out may now have the consequence not only to stop further progress but to get excluded from already existing areas of co-operation on supranational level.

In addition, the UK government tends to prefer a security opt-out in the beginning of the adoption procedure in order to avoid the risk of having opted in and afterwards being overruled due to the extension of QMV in the TFEU. The right to exercise the emergency brake may not be possible at any time and the above mentioned argument of a substantial change of the measure's shape is at least very uncertain.[100]

On the other hand, the UK may also use the advantage of excluding itself from existing measures it already opted into by using the argument of inoperability under Article 4a(2) FSJ Protocol or Article 5(3) Schengen Protocol.[101] This option will be a double-edged sword due to the risk of being excluded from measures in cases the UK does not want to be excluded. The interpretation of the wording has still to be confirmed by the ECJ. A broad interpretation in one case may be a disadvantage in the other.

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[95] Cf. D. Wallis, House of Lords, 10th Report of Session 2007-08, Vol.II, E91, Q 395.
[96] Cf. J. Shaw MP, House of Lords, 10th Report of Session 2007-08, Vol.II, E1, Q34 to Q37.
[97] See above A.(i).
[98] Cf. Baroness Ludford MEP, House of Lords, 10th Report of Session 2007-08, Vol.II, E93, Q402; and D. Wallis MEP, House of Lords, 10th Report of Session 2007-08, Vol.II, E90, Q394; different M. Cashman MEP, House of Lords, 10th Report of Session 2007-08, Vol.II, E89, Q393.
[99] See above 2.A.(i).
[100] See above 3.B.
[101] Cf. S. Peers, House of Lords, 10th Report of Session 2007-08, Vol.II, E23, Q98; S. Peers, (n 4 above), p.9.

(ii) Risk of being locked in

On the other hand, some fear that the new system of opt-outs/ins may politically lock the UK into some measures, even so not legally.[102] Articles 4a(2) and (3) FSJ Protocol may be used to force the UK continuing to opt into an already existing measure by threatening with an exclusion from the existing *acquis* and the financial consequences. However, the threshold to do so is quite high because Article 4a(3) requires 'necessarily and unavoidably incurred' costs 'as a direct consequence of the cessation of UK participation'.[103] Article 5 of the Schengen Protocol may have the same effect by providing the possibility to lock the UK out of existing measures.

Nevertheless, the practical consequences of the provisions should not be overestimated. The principles of solidarity and co-operation are respected by the Member States as well as their peculiarities and different interests. An EU without a high standard of mutual respect and trust does not work. Therefore, political pressure on the UK exists but it is balanced with the other Member States' concern about excluding a very important Member from significant parts of progress.

(iii) Two-speed Europe

As an obvious consequence, all instruments of flexible integration, opt-outs, enhanced co-operation and emergency brakes bear the risk of differentiation. They divide the EU into Member States participating in new policies of the Area of FSJ and Member States which do not. The project of a common and uniform Area of Freedom, Security and Justice may therefore be hard to realize.[104]

However, whether this might be positive or negative is subject to an intensive discussion. The enlargement of the EU to 27 Member States makes some degree of variable geometry almost inevitable;[105] a complete blockade of the EU's development is surely not better and the diversity of Member States' institutions, economic and social conditions, and political preferences has increased.[106] Particularly considerable in the Area of FSJ is the difference between criminal law in continental legal systems and Common Law systems. Besides, 'research has documented the high economic, administrative and political costs of compliance with European rules that do not fit'.[107]

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[102] See House of Lords, European Union Committee, 10th Report of Session 2007-08, The Treaty of Lisbon: an impact assessment, Volume I: Report, ordered to be printed 26 February 2008 and published 13 March 2008, para 6.264; http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.
[103] See House of Lords, 10th Report of Session 2007-08, Vol.I, 6.268 and 6.269.
[104] S. Carrera, F. Geyer (n 71 above) p. 7.
[105] D. Edwards, House of Lords, 10th Report of Session 2007-08, Vol.II, E143.
[106] Cf. F. W. Scharpf (n 70 above) pp. 857 and 858.
[107] *Ibid.*, p. 858, with further references.

Increasing the scope of QMV in the Treaties may not be enough to solve the problem that successful development of the EU is prevented by the Member States' heterogeneity and emphasis on national interests and preferences. In addition, the solution on an intergovernmental level is ruled out due to the legal constraints of EU law.[108] The Lisbon Treaty enhances flexible integration but at the same time the intention and need to work under the common supranational framework increased. Furthermore, the ratio of implementation of secondary EU law into national law is still a big problem particularly in JHA[109]. The possibility of flexible integration can be an instrument to enhance the willingness of Member States to fulfil their duties in this respect. At the moment, Member States may vote in favour of compromises just because non-implementation of or difficulty in implementing the measure is already foreseen or at least taken into account.

On the other hand, longer negotiations and compromises on a lower level may be advantageous in the long term. Diversity in the applicable EU Law may manifest and deepen over the years due to Article 4a FSJ Protocol, Article 5 Schengen Protocol and enhanced co-operation, even though subsequent access of non-participating Member States is facilitated. Integration of the UK after years of progress without its participation may be politically more difficult and disappointing than a compromise in the beginning of the development. In addition, it is not only the possibility that a group of nine Member States might go ahead which exists. In a European Union of 27 Member States, there is even a danger of having two enhanced co-operations at the same time regarding the same subject but heading in opposite directions.[110] The major problem could, therefore, not even be the creation of legal and practical complexity[111] and confusion especially in JHA,[112] but rather a threat to the common and parallel evolution of the European Union. This may particularly be the case because a new Commission proposal for the whole EU after years of successful co-operation may be rather difficult because the participating Member States can always refer the others to the possibility of accession.[113] It is argued that the unique and sole character of the Area of FSJ is precisely the justification for dealing with these matters on supranational level and is necessary in order to establish mutual trust which is the basis for the realization of the principle of mutual recognition.[114]

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[108] *Ibid*., pp. 855 and 856.
[109] See http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm and the Communication from the Commission to the Council and the European Parliament - Report on the implementation of The Hague programme for 2006, COM (2007) 373 final, SEC (2007) 896 and 897; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0373:EN:HTML; and more generally: Commission Staff Working Document – Annex to the 24th Annual Report from the Commission on monitoring the application of Community law (2006) – Situation in the different sectors, COM (2007) 398 final, SEC (2007) 976, No. 2.14, pp. 93-95; http://ec.europa.eu/community_law/infringements/pdf/sec_2007_0975_1_en.pdf.
[110] S. Carrera, F. Geyer (n 71 above) p. 8.
[111] Cf. F. Dehousse, W. Coussens, G. Grevi (n 11 above) pp. 8 and 9; S. Carrera, F. Geyer (n 71 above) p. 8.
[112] See H. Wallace, House of Lords, 10th Report of Session 2007-08, Vol.II, S49, Q191.
[113] Cf. S. Kurpas, B. Crum (n 72 above) p. 104.
[114] S. Carrera, F. Geyer (n 71 above), p. 7.

Furthermore, instruments of flexible integration 'would be bound to impair both prompt and efficient action and also the transparency, objectivity and impartiality of the system'.[115]

Nevertheless, producing two velocities means that one of them is enhanced in comparison to the average speed of development. As the Treaties still keep the possibility to access[116] or opt-in later on, overall progress might be accelerated and majority decisions by QMV more easily accepted. The risk of never closing the gap between participating Member States and non-participating Member States may be disappointing but inevitable in some areas.[117] Furthermore, a two speed development in the framework of the Union is more accessible to non-participating Member States than an intergovernmental co-operation outside the Union[118] as in the case of the Prüm Treaty.[119] It strengthens the community framework and preserves transparency and legitimacy due to an increased parliamentary and judicial control.

6. Conclusion

The Lisbon Treaty intensifies the complexity and the many incoherencies resulting from the FSJ and Schengen Protocols rather than clarifying the legal situation of the opt-outs. The protocols unfortunately do not explicitly address the problem whether or not the right to opt-out applies to the competence in criminal law under Article 83(2) TFEU. In addition, the questions arise if the UK disposes of a right to withdraw a declared opt-in based on the argument of *dénaturé* and to what extend the operability of the *acquis* must be threatened in order to exclude the UK from existing legislation. The success of the practical application of these instruments remains highly uncertain and will depend on decisions of the ECJ.

Considering all consequences, advantages and disadvantages, the instruments of flexible integration are a double-edged sword for both the EU as a project and the UK itself. While British and Irish EU sceptics may appreciate the changes brought about by the Lisbon Treaty, others who would like to see the UK as an important participating leader, active in the development of EU's future, have to consider that opt-outs should not be used as a unilateral exit option to avoid QMV.[120]

[115] J. Edwards, House of Lords, 10th Report of Session 2007-08, Vol.II, E143.
[116] Especially in the case of enhanced co-operation, see above IV.1.
[117] Cf. F. W. Scharpf (n 70 above) p. 860.
[118] Cf. S. Kurpas, B. Crum (n 72 above) p. 100; S. Kurpas, J. De Clerck-Sachsse, et.al., "From Threat to Opportunity: Making Flexible Integration Work" (2006) EPIN Working Paper, No. 15, p. 5; http://www.epin.org/pdf/EPIN_WP15.pdf.
[119] A Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria, signed in Prüm (Germany) 27 May 2005. For a general overview, see B. Thierry, "The Treaty of Prüm and the Principle of Loyalty" (2006) Briefing Paper; http://www.libertysecurity.org/article1186.html.
[120] See F. W. Scharpf (n 70 above) p. 859.

On the other hand, a certain need to accommodate diversity in the EU of the 27 can be observed, even though increasing international interdependence and globalization increases the need for joint action on EU level.[121] Flexible integration within the community framework has to be preferred to intergovernmental co-operation outside the EU. Therefore, the crucial factor will be the legal enhancement and responsible exercise of all instruments of flexible integration. They have to be used carefully and with focus on the merits of the specific case without polemic argumentation.

The future of the EU also depends on active participation by the UK. Particularly Article 4a(2) and (3) FSJ Protocol and Article 5 Schengen Protocol should be applied as constructive tools only in situations of severe disagreement on development or severe inoperability rather than as general instruments of political threat in negotiations.[122] Every form of exclusion due to flexible integration may intensify distrust among Member States and imply protectionism and a denial of solidarity.[123] Nothing less than the credibility and sincerity of both the EU's relation to the UK and the UK's relation to the EU are at stake.

[121] *Ibid*.
[122] Cf. S. Kurpas, J. De Clerck-Sachsse (n 118 above) p. 4.
[123] See F. W. Scharpf (n 70 above) p. 859.