Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'

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Types of flexibility – Tension: demands for diversity v. logic of uniformity – United Kingdom and differentiation under Maastricht and Amsterdam – Court of Justice (77/05 and 137/05) on Articles 4 and 5 Schengen Protocol: a clear signal disapproving UK's 'pick and choose' approach – Lisbon Protocols: unparalleled possibilities for differentiation coupled with coercive procedural constraints and threats of 'expulsion'

Introduction

The UK's relations with the EU have often been described as 'awkward'[1] or 'troubled.'[2] From the time of its not uncontroversial entry into this European club in the early seventies up to the present day the United Kingdom has earned the reputation as the EU's trickiest customer; one only has to mention the words 'financial rebate', 'the euro', 'Schengen' and more recently, 'immigration' and 'criminal justice' to know why. The myriad of reasons for the UK's difficult and differential relationship with the EU will not be recounted in any detail in this paper, but their significance is certainly acknowledged. In broad terms press, parliamentary and public scepticism in the United Kingdom about 'Europe' has never been in short supply and this domestic setting has shaped and framed the policy responses and bargaining positions of successive UK governments.[3] Moreover, Wall points out that the typical UK approach of assiduous checking of EC/EU pro-

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[1] *See* for instance S. George, *An awkward partner: Britain in the European Union* (Oxford, Oxford University Press 1998).

[2] *See* for instance S. Wall, *Stranger in Europe: Britain and the EU from Thatcher to Blair* (Oxford, Oxford University Press 2008).

[3] *See* Wall, *supra* n. 2.

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posals before deciding whether (or not) to sign up to them, followed by a serious commitment to implementing what they have signed up to, is attributable in large part to the peculiarities of the UK system of parliamentary politics – a voting system that gives a single party a majority in government (rather than the coalition governments that one sees so often in continental systems) and adversarial politics sustained by a two-party system.[4]

The focus of this paper is less about the *why* of the UK's relations with the EU and more about the *how*. More specifically how the UK's positions of differentiation on specific policy issues have been accommodated within the EU legal framework and what challenges and implications flow from this. The various so-called 'opt-out/opt-in' arrangements dating from the Maastricht Treaty up to the EU's most recent reform effort, the Lisbon Treaty[5] will be discussed against a backdrop of the EU as a flexible and evolving legal order attempting to walk a fine line between the stagnating impact of accommodating too little and the fragmenting impact of accommodating too much diversity. It will become clear that the Lisbon Treaty permits an unprecedented degree of differentiation – much of which relates to the United Kingdom – thereby signalling a perhaps inevitable but certainly controversial path for the future of the EU. However, a new feature appears to be emerging as well. Both in the Lisbon opt-out/opt-in protocols and in some recent judgments from the European Court of Justice concerning the precise scope of the existing Schengen Protocol, there is a more explicit emphasis on incentivising maximum participation and disincentivising a 'pick and choose' and 'free rider' mentality to flexibility.[6] In the absence of a more principled approach, could the introduction of a more *disciplined* framework for flexibility be a practical way of meeting the challenge to find ways of securing 'creative evolution' and avoiding 'destructive fragmentation'?[7]

The EU and differentiation

However one might define the European Community and the European Union one cannot deny the underpinning notion of unity and coherence implicit in their titles. Various structural and 'constitutional' characteristics support this sense of

[4] Ibid.

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007, *OJ* [2007] C 306/1, 17.12.2003. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union can be found at *OJ* [2008] C 115/1, 9.5.2008.

[6] ECJ 18 Dec. 2007, Case C-137/05, *United Kingdom* v. *Council* and ECJ 18 Dec. 2007 Case C-77/05, not yet reported.

[7] The terms of this challenge come from S. Weatherill, *Law and integration in the European Union* (Oxford, Oxford University Press 1995) p. 53.

'sharedness' – not least the common and unique set of institutions that carry out the common tasks and objectives of both the EC and EU as expressed by the national governments in the founding European treaties; the preliminary reference procedure that seeks to ensure a consistent and uniform interpretation and application of European law and the underpinning constitutional principles that regulate the relationship between EC/EU law and national law and ensure the effectiveness of the former, e.g., supremacy, direct effect, state liability. Moreover, the duty of loyal co-operation contained in Article 10 EC offers practical expression of a broader concept or principle of solidarity which itself is of persuasive moral[8] and legal[9] force.

However, it is clear that less centralized and unifying forces have also always been at play through the history of European integration. This is hardly surprising given the heterogeneity in EU membership in socio-economic and geopolitical terms. As van Gerven explains, differentiation is 'inherent in a situation of a gradually enlarged and broadened Union of states, each of them having its own political and cultural past that it cannot and does not wish to abandon in one strike, if ever.'[10] And certainly as the EU has grown both geographically and in terms of policy mandate, most would agree that differentiation between EU member states has become an increasingly prominent feature of the European construction.[11]

Manifestations of differentiation

A variety of words and expressions have been used by politicians (and in the literature) to encapsulate the EU's response to the fact that not all member states will always wish, or be in a position to, pursue the same ends. 'Europe à la carte',[12] 'Europe of variable geometry',[13] multi-speed Europe'[14] or 'hard core Europe'[15]

[8] *See* S. Besson, 'From Integration to European Integrity: Should European Law Speak with Just One Voice?', 10 No. 3 *European Law Journal* (May 2004) p. 257-281.

[9] The concept of solidarity has been evoked by the European Court of Justice as an interpretative legal principle.

[10] W. Van Gerven, *The Economic Union: A Policy of States and Peoples* (Oxford, Hart Publishing 2005) p. 31-32.

[11] Ibid., p. 28-29.

[12] F. Tuytschaever, *Differentiation in European Union Law* (Oxford, Hart Publishing 1999) p. 176 'implies that a given policy objective binds only the MS which are willing to pursue that objective'.

[13] *See* for instance R. Harmsen, 'A European Union of Variable Geometry: Problems and Perspectives', 45 *Northern Ireland Legal Quarterly* (1994) p. 109-133.

[14] Described by Tuytschaever, *supra* n. 12, at p. 174 'multi-speed integration implies that common objectives are pursued by all Member States, but not at the same time and in the absence of a pre-determined timetable.'

[15] The concept of a core or pioneer group is commonly used as a threat by politicians at times of political crisis in the EU. For instance President Chirac and Chancellor Schröder threatened to

are some of the most commonly used examples. In legal terms, differentiation has been permitted through a variety of means. For instance, some provisions of Community law contain express derogations which allow member states to deviate from their general treaty obligations on certain grounds and subject to certain conditions.[16] Other provisions expressly provide for, or at least allow, other types of flexibility, such as allowing member states to co-operate together outside the scope of the Treaties[17] or allowing member states some room for manoeuvre through 'softer' and less prescriptive regulatory approaches.[18]

The Treaties also provide for more specific and 'predetermined' types of flexibility. Here the prominent approaches are first, the transitional arrangements granted to candidate member states and new member states in accession treaties and second, the 'opt-out/opt-in' protocols which permit certain derogations for particular states in relation to specific policy areas, usually subject to certain conditions. Since their introduction into the EU governance armoury at the Maastricht Treaty, the United Kingdom (and to a lesser extent, Denmark, Ireland and Poland) has exploited the 'opt-out/opt-in' mechanism as a tool of diversity management to the greatest extent.

Finally, the Treaties, since 1999, also provide for an 'undetermined'[19] general framework for enhanced co-operation, which allows a group of member states to forge ahead in their pursuit of EC/EU integration without the rest. The hope was that 'enhanced co-operation could regulate diversity in a principled way',[20] i.e., by preserving some key elements of the traditional procedural framework while also ultimately not deviating from existing EU objectives. However, the conditions attached to this procedure arguably go some way to explaining why it has yet to be successfully triggered.[21]

move forward with a 'core' Europe if talks on the draft of the Constitutional Treaty were not finished by the end of 2004. A form of enhanced co-operation comes into being each time a new measure is built upon the Schengen *acquis*, without the participation (which is optional) of the United Kingdom, Ireland or even Denmark, in accordance with the *Protocol integrating the Schengen* acquis *into the framework of the European Union.*

[16] E.g., Art. 95(4) EC and Article 39(3) EC.

[17] E.g., Art. 306 EC which specifically allows for the Benelux Union.

[18] For instance minimum harmonisation of national law through directives or processes that establish an open method of co-ordination in relation to specific policy areas.

[19] H. Kortenberg, 'Closer Cooperation in the Treaty of Amsterdam', 35 *Common Market Law Review* (1998) p. 833 at p. 835.

[20] G. Majone, 'Unity in Diversity: European Integration and the Enlargement Process', 33 *European Law Review* (2008) p. 457 at p. 458.

[21] Specifically on the enhanced co-operation procedure *see* for instance, G. Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty?', 35 *Common Market Law Review* (1998) p. 855-870. It is worth noting that a form of enhanced co-operation comes into being each time a new measure is built upon the Schengen *acquis*, without the participation (which is optional) of the United Kingdom, Ireland in accordance with the Protocol integrating the Schengen *acquis* into the framework of

The treaty framework of the European Union, despite this suite of techniques to accommodate and contain differentiation has not always managed to satisfy the aspirations of certain groups of member states. There have now been several high profile instances of a group of member states circumventing the EC/EU institutional framework entirely in order to pursue closer co-operation 'outside' EU law in the purely inter-governmental realm of international law. The first and most prominent example was the Schengen co-operation regime established in the late 1980s with the primary goal of abolishing internal border checks between its signatories. Throughout the 1990s the geographical and substantive scope of the Schengen regime was expanded, and it was clear that there was an increasing cross-over between Schengen co-operation and EU Justice and Home Affairs co-operation established by the Maastricht Treaty.[22] The Treaty of Amsterdam brought the Schengen regime into the fold of EU law in 1999, and exceptional regimes were established for those member states who continued to express reservations; the United Kingdom and Ireland and, on a different basis, Denmark.

The experience of the extra–EU Schengen 'laboratory' appears to have set a precedent. In May 2005 seven member states[23] signed the so-called Prüm Treaty on the stepping up of cross-border co-operation, particularly in combating terrorism, cross-border crime and illegal migration. The objectives of this Treaty are entirely synonymous with those of the EU,[24] indeed the signatory states entered into this Treaty negotiation process with the full intention of later incorporating its contents into the EU legal framework.[25] Not unsurprisingly, this circumvention tactic raises questions (again) about whether the EU enhanced co-operation procedure is 'fit for purpose'. Could it be that the onerous legal conditions of the enhanced co-operation procedure forced this group of states to take the easier route offered by international law? Or is it that these national governments, rightly or wrongly, chose the outside route *precisely because* it allowed them to retain exclusive control of the negotiation process and insulated them from the dampening effects associated with parliamentary and judicial scrutiny?

Legally, the signing of this Treaty outside the framework of EU law is entirely acceptable from an international law perspective.[26] Morally, the behaviour is more

the European Union. *See* later discussion. Specifically on the enhanced co/operation procedure *see* for instance, G. Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty?', 35 *Common Market Law Review* (1998) p. 855-870.

[22] *See* S. Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2006) at p. 45.

[23] Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain.

[24] Indeed the Council of the EU published the Treaty (Council Secretariat, Brussels, 7 July 2005, 10900/05)

[25] Significant progress has been made to incorporate the contents of the Prüm Treaty into the EU legal framework through the adoption of a decision.

[26] For an excellent discussion on the extent to which membership of the EU does involve certain constraints on the discretion of states to conclude international agreements between them-

dubious, not least because of the intention on the part of the group to try and impose their rather exclusive agreement upon non-participant states through the process of 'unionisation'. Moreover, one can see that the implications of this for the credibility and the solidarity of the EU as an actor in criminal and security matters are potentially very damaging.[27] Of course it remains to be seen to what extent this practice will continue in the future. Indications suggest that the group of states that took the initiative to the Prüm Treaty wish to continue to work together and to deepen their co-operation. There will be many hoping that the institutional reforms introduced by the Lisbon Treaty – namely the adoption of the 'ordinary legislative procedure' combined with the emergency brake and accelerated enhanced co-operation procedure[28] – will prevent future resort to intergovernmental negotiations outside the framework of EU law on criminal and policing matters.

The challenges of differentiation

As we have seen, the accommodation of diversity within the EU order is continuous and multifaceted. Some expressions are more subtle than others, some have evolved and some ostensibly serve different and even diametrically opposed ends. For sure, flexibility might be regarded as a way of maintaining the momentum of integration when national scepticism threatens to stall that process (enhanced co-operation mechanism), but it might equally be viewed as a way of harnessing national scepticism in order to stall integration and maintain a less unified and so less powerful EU.[29]

At its core differentiated integration presents a clear yet only partially resolved problem for the EU; how to cope with the tension between strong demands for diversity and an equally compelling logic of uniformity. The collective response of the EU to this problem has to date been varied, largely pragmatic, asymmetric[30] and mostly *ad hoc*.[31] The academic community has however made some impor-

selves *see* B. de Witte, 'Old-fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford, Hart Publishing 2000) p. 31.

[27] T. Balzacq et al., 'Security and the Two –Level Game: The Treaty of Prüm, the EU and the Management of Threats', No. 234 *Centre for European Policy Studies* (2006); E. Guild and F. Geyer, 'Getting local: Schengen, Prüm and the dancing procession of Echternach', *Centre for European Policy Studies* (2006).

[28] To be discussed further below.

[29] N. Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford, Hart Publishing 2000) p. 9 at p. 10

[30] Although, as we have noted the EU's attempt to encourage a more generalised and not predetermined avenue for differentiation through the enhanced co-operation procedure has yet to bear fruit.

[31] Walker offers an excellent definition of *ad hoc* by describing the pattern of differentiated integration in the EU as 'not the product of a single fixed or even evolving vision. Rather, it has

tant contributions to offer and encourage the adoption of a more principled frame of reference that can be used to conceptualise[32] and limit[33] differentiation. Commentators have long recognised that increased heterogeneity calls for a more explicit conception of which principles, values and policies integrally define the Community and the Union if the Union is not going to self-destruct.[34] In other words identifying and giving expression to common foundations is crucial to defining and policing the boundaries between constructive (and therefore acceptable) and destructive (and therefore unacceptable) flexible arrangements. This is not an easy task; there is no consensus about the political destiny of the EU project for one thing. Nonetheless, the 'general principles' of EU law, which might include the principles of solidarity and legal certainty, and the Article 10 EC duty of loyal co-operation, offer significant potential as boundary-defining tools in both in legal and moral terms. The recasting of the latter provision by the Lisbon Treaty in Article 4(3) TEU is particularly promising in this regard. It includes a new reference to 'full mutual respect' between and amongst the EU and member states. In addition to suggesting that both EU and national institutions 'must not transgress upon the prerogatives and powers of the other'[35] it might also support a more considered and respectful approach from national governments towards the activation of differentiation mechanisms. For instance, national governments might usefully commit to a default position of full inclusion in the mainstream arrangements and only resort to flexible arrangements in exceptional, and ideally, explicitly defined and transparent, circumstances.[36]

unfolded in a sequence of strategic negotiations and gambits, of policy-driven initiatives within discrete sectors, and of accommodations of new geopolitical forces.' N. Walker, *supra* n. 29 at p. 11. This argument was first made in N. Walker, 'Sovereignty and Differentiated Integration in the European Union', 4 *European Law Journal* (1998) p. 355-388.

[32] *See* the interesting recent work by Majone, in which he argues that the economic theory of clubs provides a helpful theoretical basis for the study of differentiated integration in today's European Union. G. Majone, *supra* n. 20.

[33] *See* for instance the 1984 paper by Ehlermann in which he provides criterion for distinguishing between admissible and inadmissible exceptions in favour of particular member states; C. Ehlermann, 'How Flexible is Community law? An Unusual Approach to the Concept of "Two Speeds"', 3 *Michigan Law Review* (1984) p. 1274.

[34] *See* R. Harmsen, *supra* n. 13. *See also* van Gerven who suggest that the limits are two-fold: 'psychological' and 'manageability', Van Gerven, *supra* n. 10 at p. 32.

[35] D. Chalmers and G. Monti, *European Union Law Text and Materials – Updating Supplement* (Cambridge, Cambridge University Press 2008) at p. 13.

[36] Such a commitment might be made at the national level or EU level. For an example of the latter, *see* Declaration (No. 56) by Ireland annexed to the Lisbon Treaty on Art. 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom security and justice in which Ireland commits to participating in AFSJ measures to the maximum extent it deems possible, in particular in measures in the field of police co/operation. It also commits to review the derogatory position as laid down in the Protocol within 3 years of the entry into force of the Lisbon Treaty. CIG 3/1/07 Rev 1.

The United Kingdom and EU differentiation – from 1992 to date

The United Kingdom has exploited the opt-out/opt-in route of accommodating diversity, winning successive UK governments few friends in Brussels and, ironically, few friends at home either. The individual mechanisms of UK differentiation will now be considered in chronological order, but greatest emphasis will be placed on the Schengen and Title IV Protocols, the scope and inter-relationship of which were at issue before the Court of Justice in two judgments delivered in December 2007.

Maastricht and the United Kingdom

The Conservative UK government took exception to several of the big issues being mooted in the run up to the Maastricht Treaty (in force 1 November 1993) in the early 1990s. The legal compromises that flowed from this in the form of so-called opt-out/opt-in Protocols, were to be the first of many in the EU. First, the UK government was opposed to the incorporation of a new social policy chapter in the Treaty on European Union (Maastricht). Consequently, an Agreement on Social Policy and a Social Policy Protocol were annexed to the Maastricht Treaty which permitted all of the other member states to have recourse to the Treaty mechanisms and procedures to adopt social measures amongst themselves. The United Kingdom would not be involved and therefore would not take part in the deliberations or the adoption by the Council of Commission proposals made on the basis of the Protocol and Agreement.

A second policy area in which the United Kingdom did not wish to pursue progress at the same pace as most of the other member states was economic and monetary union (EMU). In particular the UK government did not wish to proceed to the third stage of EMU which involved adopting the Euro as currency. Their position was accommodated in the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland in which it was recognised that 'the UK shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament.' In that event '[T]he UK shall have the right to move to the third stage provided only that it satisfies the necessary [economic] conditions.' The so-called economic 'convergence criteria' were laid down in the Maastricht Treaty and were established for judging whether a member state should join the Euro, whether at that time or at a later date. No UK government has expressed a clear desire to join the Euro, and while the convergence criteria could still apply to any UK application, it is interesting to note that the UK Government under Blair adopted a different set of self-imposed economic criteria (focusing, unlike the Maastricht criteria on domestic issues such as investment and employ-

ment) which would have to be met before that Government would seriously consider taking a political decision to adopt the Euro.[37]

Amsterdam and the United Kingdom

As it turned out the Protocol and associated Agreement on social policy negotiated at Maastricht did not survive the next round of treaty reforms which culminated in the Treaty of Amsterdam (which entered into force on 1May 1999). A change of government in the United Kingdom just weeks before the intergovernmental conference sealed the fate of this Protocol. The new Labour Government no longer wished to see the United Kingdom isolated on the issue of employment-related social reforms and consequently a new chapter on social provisions in the EC Treaty (Articles 136-145 EC). This development was broadly welcomed in its own right but it was certainly not indicative of a more general shift in the UK's relationship with the EU. In fact, three new Protocols (in addition to the EMU Protocol) were annexed to the Amsterdam Treaty which formalised a differentiated position for, *inter alia*, the United Kingdom. These were the Protocol integrating the Schengen *Acquis* into the framework of the European Union (known as the 'Schengen Protocol'), the Protocol on the application of certain aspects of Article 14(7a) of the Treaty establishing the European Community to the United Kingdom and to Ireland (known as the 'Article 14 EC Protocol') and the Protocol on the position of the United Kingdom and Ireland (known as the 'Title IV EC Protocol').[38] The combined impact of the Schengen and Title IV EC Protocols is that the United Kingdom and Ireland have considerable exemptions and opt-in rights in relation to what constitutes a major tranche of the EU's new flagship area of freedom, security and justice (AFSJ) agenda.[39] In general, the domestic political priorities of maintaining external border controls at the point of entry to the United Kingdom and retaining national (executive) dominance over migration

[37] Shortly after taking up office as UK Prime Minister in Autumn 2007, Gordon Brown ruled out membership for the foreseeable future, saying that the decision not to join had been right for Britain and for Europe. The Government published the assessment of the five economic tests; 'UK Membership of the single currency: An assessment of the five economic tests', 9 June 2003 (Cm 5776) <http://www.hm-treasury.gov.uk/int_euro_index.htm>, visited 6 Dec. 2008.

[38] Note that Ireland's motivation for participating in these negotiated opt-outs results from practical necessity rather than political desire, i.e., wishing to maintain the Common Travel Area with the UK.

[39] The remaining tranche of the AFSJ is constituted by the third pillar of the EU known as 'police and judicial cooperation in criminal matters'. The UK does not have a specifically negotiated exemption in relation to the third pillar although it has expressed some reticence to developments and therefore contributed to another position of variable geometry by *not* exercising its right to accept the jurisdiction of the ECJ in the criminal law field pursuant to Art. 35 EU.

controls more generally were central to the negotiation of all of these Protocols. It would appear from the provisions of each of these Protocols that a considerable degree of leeway is granted to the United Kingdom and Ireland in terms of their (non-)participation rights. Perhaps this is indicative of a rather trusting rationale at this time? A rationale that confers a wide degree of flexibility upon the concerned member states but perhaps assumes a wide degree of self-restraint in their approach to exercising it. The stringent line adopted in the recent Court of Justice case-law on the scope of the Schengen Protocol as discussed below appears to indicate a shift away from this more relaxed attitude and towards a more disciplined approach. Such an approach is also discernable in the redrafted protocols concerning the United Kingdom and Ireland which are annexed to the Lisbon Treaty

Article 14 EC Protocol

Article 14 EC defines the internal market as an area without internal frontiers within which the free movement of goods, persons, services and capital is ensured. Although this provision was introduced to the EC Treaty some years earlier by the Single European Act, the UK government took this reform opportunity to clarify that notwithstanding Article 14 EC it retained a right to maintain border controls at its frontiers with other member states (thereby enabling the United Kingdom and Ireland to maintain the long-established Common Travel Area between them). As a corollary, the Protocol entitles the other member states to exercise border controls on persons seeking to enter their territory from the United Kingdom and Ireland.[40]

The Title IV Protocol

By virtue of this Protocol the United Kingdom and Ireland secured an exemption from Title IV EC which contained the newly communitarised aspects of the (former) Justice and Home Affairs pillar of the EU. This Title essentially deals with immigration, asylum, border control and civil justice matters: policy issues which, together with the remainder of the third pillar of the Union (Police and Judicial Co-operation in Criminal Matters) contribute towards the achievement of a 'cross-pillar' objective of the EU – the development of an 'area of freedom, security and justice' (AFSJ).

[40] Art. 3 of the Art. 14 Protocol. Note that the UK Government, in partnership with the Irish Government have announced proposals to further strengthen the Common Travel Area as part of a wider reform of border security and the immigration system. *See* Home Office, UK Border Agency, 'Strengthening the Common Travel Area: Consultation Paper', 24 July 2008 <http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/strenthenthecommontravelarea/>, visited 6 Dec. 2008.

Article 2 of the Protocol provides in essence that no measure adopted pursuant to Title IV EC and no Court decision interpreting such measures shall bind or apply in the United Kingdom or Ireland. However, they can choose to participate in individual measures either on an *ex ante* or *ex post* basis, i.e., either within three months of the publication of the legislative proposal[41] or after the measure has been adopted (even though they have played no part in the adoption of the measure).[42] If they do opt-in, they are entitled to do so since consent from the other member states in Council is not required.[43] As a safeguard against the possibility of either the United Kingdom or Ireland opting in and holding up the process (either intentionally or otherwise) the Protocol permits the Council to adopt the measure without their participation after negotiations have been on-going for 'a reasonable period of time'. This has never happened to date. Finally, it should be noted that the key provisions of this Protocol detailing the opt-in possibilities (Articles 3 and 4) are 'without prejudice to' the Schengen Protocol.[44]

In short, this Protocol offers the UK Government considerable leeway to decide on a case-by-case basis whether to engage with the Title IV EC agenda or not.[45] It cannot be forced to participate in any measure against its will. Ideally, where it does decide to opt-in, it should do so at the earliest opportunity so that it has the possibility of shaping the measure prior to its formal adoption.[46] Thus far, the United Kingdom has chosen to participate in all asylum legislation, most legislation dealing with illegal immigration and most civil litigation matters. It has chosen not to take part in measures that deal with legal migration, divorce and family law. In the field of migration, the patterns of participation reveal a rather remarkable tendency to opt-in to coercive measures that limit the ability of migrants to enter the EU and remain opted-out of measures with a more protective or permissive slant. In relation to asylum matters in particular, as Clayton observes, the 'UK is a key player, not swept unwillingly into European co-operation, but in the forefront of promoting deterrent measures.'[47] Geddes helpfully describes the UK's engagement with EU migration and asylum policy as 'condi-

[41] Art. 3 Title IV Protocol.

[42] *See* Art. 4 Title IV Protocol and Art. 11a EC.

[43] Art. 3(1) Title IV Protocol.

[44] Art. 7 Title IV Protocol.

[45] Ireland (but not the UK) may notify the President of the Council in writing that it no longer wishes to be covered by the terms of the Protocol pursuant to Art. 8.

[46] Note the recent experience of the Rome I Regulation where the UK was allowed to be involved in the negotiation process without being required to formally opt-in. This informal agreement presumably would be abandoned if there was any hint or suspicion of abuse by the UK. *See* House of Lords European Union Committee 10th Report of Session 2007/2008, 'The Treaty of Lisbon: an impact assessment' (28 Feb. 2008), points 6.288 to 6.292.

[47] G. Clayton, *Textbook on Immigration and Asylum Law,* 3rd edn. (Oxford, Oxford University Press 2008) p. 149.

tional and differential: conditional on the maintenance of external border controls at points of entry to the United Kingdom, and differential in that it is firmly focused on those forms of migration defined in the context of UK policy as unwanted.'[48] It would seem therefore that the United Kingdom has made strategic use of the Title IV EC Protocol, using the EU as an external vehicle through which to advance its own domestic policy objectives, which are at times (and increasingly) convergent with EU policy objectives.[49] Moreover, the institutional arrangements applicable to the field of EC migration at least up until 2004, in particular the dominance of executive power in both agenda-setting and law-making,[50] were undoubtedly a factor in the UK exercising its right to opt-in to the extent that it did.

The Schengen Protocol

The Schengen Protocol,[51] unlike the Article 14 EC and the Title IV EC Protocols, was anticipated and more or less agreed in advance of the Amsterdam summit.[52] The United Kingdom and Ireland had made clear that they wished their pre-existing position of non-participation in the Schengen *acquis*[53] to continue, and therefore any Protocol providing for the incorporation of that *acquis* into the EC/EU legal framework would also have to reflect a special arrangement with these states. Accordingly, the Protocol provides that the United Kingdom and Ireland are not bound by the Schengen *acquis*, but allows them to accept some or all of the provisions thereof. The position for the other (then) thirteen member states pursuant to Article 1 of the Protocol is that they are authorised to establish closer co-operation among themselves within the scope of the Schengen *acquis*. The key provisions on the terms and extent of the UK's and Ireland's (non-)participation are found in Articles 4 and 5 of the Protocol. Article 4 confirms that the United Kingdom and Ireland are not bound by the Schengen *acquis* but that they 'may at any time request to take part in some or all of the provisions of this *acquis*.' The request requires the unanimous approval of the other Schengen States acting

[48] A. Geddes, 'Getting the best of both worlds? Britain and the EU and migration policy', 81(4) *International Affairs* (2005) p. 723 at p. 724 citing A. Geddes, *The European Union and British politics* (London, Palgrave Macmillan 2004).

[49] Ibid.

[50] *See* Art. 67 EC and note the important agenda setting role of the European Council in this field.

[51] Protocol Integrating the Schengen *Acquis* into The Framework of the European Union.

[52] F. Tuytschaever, *supra* n. 12 at p. 75. The other opt-outs and Denmark's opt-out in relation to the Schengen *Acquis* were 'decided behind closed doors at the Amsterdam summit itself'.

[53] The *acquis* comprises the Agreement and Convention on the gradual abolition of checks at common borders signed by five member states on 14 June 1985 and on 19 June 1990 respectively and all related measures and the rules adopted on the basis of those agreements, including accession agreements.

in Council.[54] On the basis of Article 4, the Council adopted two decisions, one for the United Kingdom[55] and one for Ireland,[56] outlining those provisions of the Schengen *acquis* in which these States had requested and were allowed to participate in.[57] Both decisions make clear that the United Kingdom and Ireland are deemed to have opted in to (i.e., required to participate in) all measures which 'build upon' those parts of the Schengen *acquis* which they have been allowed to accept.[58] Article 5 of the Schengen Protocol determines that proposals and initiatives that build upon the Schengen *acquis* shall be adopted according to the decision-making procedure as specified in the relevant legal basis provision in the Treaties. It permits the United Kingdom and Ireland to participate in 'Schengen-building' measures without the consent of the other States if they notify the President of the Council 'within a reasonable period' that they wish to take part. If such notice is not forthcoming then authorisation is automatically granted to the other member states to adopt such measures using the Treaty-based enhanced co-operation mechanism (contained in Article 11 EC and Article 40 EU.)

The precise scope of Article 4 and 5 and the nature of the relationship between them were recently clarified by the Court of Justice in rulings on two cases.

Recent case-law – The relationship between Articles 4 and 5 of the Schengen Protocol

On 18 December 2007 the Grand Chamber of the Court of Justice handed down two judgments in cases brought by the United Kingdom relating to the extent of its opt-out/opt-in rights secured by the Amsterdam Treaty.[59] In ruling upon the

[54] Art. 4 Schengen Protocol. Interestingly, a declaration on Art. 4 was annexed to the Final Act of the Amsterdam Treaty which invites the Council to seek the opinion of the Commission before deciding on a request and undertake to use their best efforts to allow the UK and Ireland, if they wish, to use Art. 4. According to F. Tuytschaever, *supra* n. 12 at p. 101, this declaration was added following a 'diplomatic incident' when the UK refused to believe that it had accepted that the request to participate in Art. 4 required the *unanimous* approval of the Schengen states.

[55] Decision 2000/365/EC, *OJ* [2000] L 131/43, 1.6.2000.

[56] Decision 2002/192/EC, *OJ* [2002] L 64/20, 7.3.2002.

[57] For the UK this essentially includes rules relating to irregular migration and policing and criminal law, with the exception of cross-border 'hot pursuit' by police officers.

[58] Art. 8(2) of the UK Decision *supra* n. 55 and Art. 6(2) of the Irish Decision *supra* n. 56. According to the House of Lords EU Select Committee, 'Article 8 dispenses with the requirement, set out in Article 5 of the Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, for the UK to notify the President of the Council if it wishes to take part in measures building on the Schengen *acquis*. The UK will be "deemed" to have given such notice, but only in relation to proposals or initiatives building on the *acquis* [which it has requested and been permitted to participate in]', House of Lords Select Committee on European Union, Fifth Report, 15 Feb. 2000 at para. 33.

[59] Although these cases were not formally joined, the same arguments are submitted and the same legal reasoning is applied by the ECJ.

extent to which the United Kingdom and Ireland could participate in measures that build upon the Schengen *acquis* pursuant to the Schengen Protocol, the Court clarified on what basis the United Kingdom should participate in legal measures based on Title IV EC.

The United Kingdom brought actions for annulment of the Regulation establishing a European Borders Agency (FRONTEX)[60] and the Regulation on standards for security features and biometrics in passports, both of which had legal bases falling within Title IV EC.[61] The United Kingdom had notified the Council of its wish to participate in each of these Regulations, citing both Article 5 of the Schengen Protocol and Article 3 of the Title IV Protocol. However, the Council refused to allow the United Kingdom to participate on the basis that both Regulations in question built on existing *acquis* in which the United Kingdom had not asked to take part, in accordance with Article 4 of the Schengen Protocol and Decision 2000/365. The Court agreed with the designation of the Regulations as Schengen-building measures and ultimately upheld the Council's argument that the right to opt-in to Schengen-building measures pursuant to Article 5 presupposes that the underlying Schengen *acquis* has already been accepted pursuant to Article 4.[62] The effect of the Court's interpretation is that the United Kingdom cannot participate in Schengen-building measures until they have opted in to the underlying *acquis*.

Adopting almost identical reasoning in each of the judgments, the Court made short shrift of the UK's arguments.

It first rejected the UK's argument that Articles 4 and 5 of the Schengen Protocol are independent of each other and therefore that it could opt-in to Schengen-building measures irrespective of whether they had accepted the underlying Schengen *acquis*.[63] Taking account of the wording of the articles as well as their scheme, context, purpose and effectiveness the Court held that 'the participation of a member state in the adoption of a measure pursuant to Article 5(1) of the Schengen Protocol is conceivable only to the extent that that State has accepted the area of the Schengen *acquis* which is the context of the measure or of which it is a development.'[64] The Court acknowledged that the United Kingdom and Ireland had flexibility in deciding whether or not to take part in Schengen-building

[60] Council Regulation (EC) No. 2007/2004 of 26 Oct. 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* [2004] L 349/1, 25.11.2004.

[61] Council Regulation (EC) No. 2252/2004 of 13 Dec. 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ* [2004] L 385/1, 29.12.2004.

[62] The Council's position was supported by the Commission, Spain and the Netherlands.

[63] The UK was supported by Ireland and the Slovak Republic in both cases and by Poland in the case concerning the European Borders Agency Regulation.

[64] ECJ, Case C-77/05, *supra* n. 6, at para. 62.

measures at all (pursuant to Article 5) but that where they (or one of them) chose to do so they must first have taken part in the relevant underlying *acquis* which is being built upon.[65] This interpretation would, according to the Court, overcome any possible reluctance on the part of those States to accept existing *acquis* and indeed incentivise them to make as much use as possible of Article 4; Article 4 being of essential importance in the system established by the Protocol in that it seeks to ensure the maximum participation of all member states in the Schengen *acquis*.[66] The Court reasoned that Article 4 of the Schengen Protocol would be deprived 'of all effectiveness' if it remained entirely independent of Article 5 in that Ireland and the United Kingdom could then simply take part in all proposals and initiatives to build upon the Schengen *acquis* even though they had not been authorised to participate in the underlying *acquis*, which requires the unanimous approval of all of the other member state governments.[67]

The Court then went on to consider and reject the UK's argument that even if the two articles are linked, that the term 'proposals and initiatives to build upon the Schengen *acquis*' should be understood as referring only to measures inextricably connected to the Schengen *acquis* ('Schengen-integral' measures) and not to measures that are merely 'Schengen-related' (those measures not so intimately connected with that *acquis* that its integrity would be put at risk if a member state took part in it even if they did not take part in the underlying *acquis*).[68] The United Kingdom argued that the Council had a 'loose and ill-defined' conception of what is to be understood by 'proposals and initiatives to build upon the Schengen *acquis*' such that its reading of Article 5 is incompatible with the principle of legal certainty and the fundamental principles governing enhanced co-operation.[69] The Court swiftly rejected the UK's interpretative distinction between 'Schengen integral' and 'Schengen related' measures which it recorded as having 'no basis either in the EU and EC Treaties or in secondary Community law.'[70]

[65] This finding arguably casts doubt upon the validity of Art. 8(2) of the UK Decision *supra* n. 55 and Art. 6(2) of the Irish Decision *supra* n. 56.

[66] ECJ, Case C-77/05, *supra* n. 6, at paras. 66 and 67. The Court said that the goal of maximum participation was implicit in the terms of Declaration No. 45 relating to the Schengen Protocol which reads: 'The Conference declares that whenever the United Kingdom or Ireland indicates to the Council its intention not to participate in a measure building upon a part of the Schengen *acquis* in which it participates, the Council will have a full discussion on the possible implications of the non-participation of that Member State in that measure. The discussion within the Council should be conducted in the light of the indications given by the Commission concerning the relationship between the proposal and the Schengen *acquis*.'

[67] Ibid.

[68] ECJ, Case C-137/05, *supra* n. 6, at paras. 32-36 and ECJ, Case C-77/05 *supra* n. 6, at paras. 37-41.

[69] ECJ, Case C-77/05 *supra* n. 6, at para. 40.

[70] ECJ, Case C-77/05 *supra* n. 6, at para. 73, ECJ, Case C-137/05 *supra* n. 6, at para. 52.

Next, the Court turned its attention to the Council's classification of each of the contested Regulations as initiatives to build upon the Schengen *acquis* within the meaning of Article 5(1). This classification was crucial because it would ultimately determine the applicable procedures and ultimately the scope of the UK's obligation to participate in the measures. In short, if the Regulations were classified as Schengen-building measures, the case fell within the scope of the Schengen Protocol and then turned on the relationship between Articles 4 and 5. Without such a classification these Regulations would be 'regular' Title IV EC proposals and fall to be considered under the Title IV Protocol, which would allow the United Kingdom to freely opt-in to them. Crucially, Article 3 of the Title IV Protocol enables the United Kingdom (and Ireland) to take part in Title IV proposals without any prior conditions other than compliance with a notification period, therefore enabling the United Kingdom to opt-in to these measures without having first to participate in other *acquis*.[71] As noted above, the Court confirmed the Council's classification of the Regulations as Schengen-building measures and therefore subject to the procedures of the Schengen Protocol. It did so (following the Advocate-General) by applying a similar test to that used when determining the appropriate legal basis of a Community act, namely the application of objective factors which are amenable to judicial review, including in particular the aim and the content of the act.[72] The analogy was made since both the choice of a legal basis and the classification of an act as developing the Schengen *acquis* determine the procedure for their adoption.

The Court's judgments are arguably open to criticism on several fronts. First, the Court's judgment appears to be motivated by a desire to ensure the integrity of the procedure for participation in the Schengen *acquis*. The Court hopes to incentivise the United Kingdom and Ireland to participate in the Schengen *acquis* (understood as including both underlying and Schengen-building measures) by forcing them to participate first in the underlying measures. This, it argues, is the only way to ensure the *effet utile* of Article 4, whose purpose is to seek to ensure the maximum participation of all member states in the Schengen *acquis*. It is interesting to note in this context that the inclusion of a unanimous vote on a decision permitting the United Kingdom and Ireland to participate in parts or all of the Schengen *acquis* was taken at the insistence of the Spanish Government during the Amsterdam negotiations, motivated by a desire to put pressure on the UK Government in the dispute over Gibraltar.[73] The unanimity procedure in Article

[71] Art. 3(1) Title IV Protocol.

[72] ECJ, Case C-77/05 *supra* n. 6, at para. 77 and ECJ, Case C-137/05 *supra* n. 6, at para. 56.

[73] *See*, J. Monar, 'Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion', ESRC, 'One Europe or Several?', Programme Working Paper 07/00 <http://www.one-europe.ac.uk/pdf/monarW7.PDF>, visited 12 Dec. 2008. In order to allay the UK's and Ireland's

4 was therefore less about securing the integrity of the Schengen *acquis* or ensuring maximum participation (at least overtly) than it was about securing a veto power for the Schengen States over the UK's and Ireland's participation.

Moreover, as Peers has convincingly argued, the Court's interpretation is questionable because it fails to acknowledge the clear distinction between Articles 4 and 5 which emerges from their express wording.[74] The Protocol distinguishes between Schengen *acquis* and measures building on the *acquis* and provides a different procedure in relation to each of these. There is nothing in Article 5 of the Schengen Protocol regarding the UK or Ireland's participation in measures building on the *acquis* requiring them to have first participated in the original measure. Whereas participation in existing Schengen *acquis* is subject to the unanimous approval of the Schengen states pursuant to Article 4, Schengen-building measures must be adopted subject to the relevant provisions of the EC or EU Treaties pursuant to Article 5. On that basis, and as argued by the United Kingdom in the annulment actions, the UK's participation in Schengen-building measures is governed by other rules of the treaties, including notably the Title IV Protocol. The Court confirmed instead that Articles 4 and 5 of the Schengen Protocol are connected and therefore that there is no overlap at all between the Title IV Protocol and the Schengen Protocol.

Moreover, the wide scope of the term 'Schengen-building measures' endorsed in these cases means that the more exclusionary Schengen Protocol will apply to the United Kingdom and Ireland in the vast majority of AFSJ matters that have their legal basis in Title IV EC. The scope of application of the Title IV Protocol is therefore quite considerably reduced, potentially locking the United Kingdom out of much of this important agenda. The fragmentary impact of this is to the obvious detriment of achieving the expressed goal of creating an area of freedom, security and justice in the EU and appears to be inconsistent with a broader and inclusive conception of solidarity. It is therefore possible that the incentive to maximum participation in the Schengen *acquis* contained in the Court's reasoning might in fact lead to yet more fragmentation (of wider policy agendas).

A separate but related point of criticism is the Court's disregard for the arguments distinguishing Schengen-related (autonomous) and Schengen-integral (non-autonomous) measures. The Court's terse dismissal of this distinction is particularly

concerns that the unanimity requirement could block indefinitely their participation in some or all of the Schengen *acquis* Declaration 45 on Art. 4 of the Protocol was added. This Declaration provides that the Council shall seek the Commission's opinion before deciding on a request by the United Kingdom and/or Ireland. The Schengen States undertake 'to make their best efforts' to allow either or both of them to participate.

[74] An argument made prior to the delivery of the judgments under consideration here S. Peers, *supra* n. 22 at p. 58-59.

disappointing in light of both the general argument put forward by certain of the intervening member states that in these cases the participation of the United Kingdom in the contested Regulations would not endanger the coherence and the integrity of the Schengen *acquis*[75] and the specific point made that both the United Kingdom and Ireland had previously been allowed to participate in certain Schengen-building measures without having first to resort to the Article 4 procedure.[76] Indeed, Advocate-General Trstenjak had accepted that Article 5(1) might, in principle, apply independently of Article 4 but only where the measures building on the Schengen *acquis* are 'capable of autonomous application',[77] or, in other words, could be considered as sufficiently unrelated to the underlying *acquis*. It is noteworthy that the Schengen Protocol as revised by the Lisbon Treaty introduces the criterion of 'practical operability' into a test for deciding whether the United Kingdom and Ireland are able to opt-out of a Schengen-building measure, therefore suggesting that the Court is somewhat out of line with the thinking of national governments on this point.[78]

Ultimately the Court in these judgments has sent a clear signal disapproving of a 'pick and choose' approach from the United Kingdom (and Ireland) regarding the Schengen *acquis*.[79] This is likely to have come as a surprise to the UK Government which had thought that the Schengen Protocol afforded them 'quite a large degree of freedom for opting in or opting out'.[80] It may also have come as a surprise to certain of the Schengen states, based upon what is known about the rationale and the wording of the Protocol. The judgments suggest a harder line towards those states that hold the position of exceptionality in order to secure the maximum participation possible in the Schengen *acquis*. And there appears to be a disciplinary intent underpinning the Court's coercion of the United Kingdom to opt-in as much as possible. It remains to be seen whether this will have the desired effect or whether it will in fact lead to further fragmentation of broader policy goals, such as those which come under the AFSJ umbrella. Certainly, the themes of discipline and coercion identifiable in this case-law run through some of the

[75] J.J. Rijpma, 'Case C-77/05 United Kingdom v Council, judgment of the Grand Chamber of 18 December 2007, not yet reported, and Case C-137/05 United Kingdom v Council, Judgment of the Grand Chamber 18 December 2007, not yet reported', 45 *Common Market Law Review* (2008) p. 835 at p. 848.

[76] Opinion in ECJ, Case C-77/05, *supra* n. 6, at para. 59.

[77] Ibid., at para. 107. The Advocate-General went on to find that neither of the two contested Regulations could be applied autonomously. *See* Rijpma, *supra* n. 75 at p. 846-847 for why this is more persuasive in respect of FRONTEX than in respect of the biometric passports Regulation.

[78] The amendments made to the Schengen *acquis* by the Lisbon Treaty are discussed in full later in the paper.

[79] *See* J.J. Rijpma, *supra* n. 75 at p. 836.

[80] House of Lords Select Committee on European Communities, 31st Report, Session 1997-1998, 28 July 1998 at para. 85.

Protocols annexed to the Lisbon Treaty, including among others the revised Schengen Protocol.[81]

Lisbon and the United Kingdom

Differentiation and the Lisbon Treaty

It is not possible to measure the extent to which the political pressures from the fallout of the Constitutional Treaty predisposed Europe's leaders to call for and consent to more flexible and variable approaches in the Treaty of Lisbon. One can only speculate on the degree to which differentiation techniques became more likely as reports of an 'EU in crisis' reverberated across Europe's mass media. In times of political crisis, accommodating diversity becomes the lynchpin of securing a common future for the European Union. Deals are done, allegiances tested and exploited. Politics at is purest and dirtiest. It is highly likely in any case that the period following the failure of the Constitutional Treaty provided one of the 'least favourable and least promising – to put it mildly – moments for optimistic outbursts regarding the future of European solidarity.'[82]

Certainly the political tone coming from the United Kingdom at this time was protectionist and uncompromising.[83]

In general, in the Lisbon Treaty one sees not only the continuation but also the extension of the 'trend' of flexibility and differentiation. The familiar, but hitherto unused option of enhanced co-operation is maintained and amended with a view to facilitating the triggering of the mechanism[84] and differential legal positions for the United Kingdom as expressed in existing Protocols are confirmed, amended and in some cases extended as will be discussed below.

The policy field which has been most affected by the Lisbon Treaty is the 'AFSJ' – Area of Freedom, Security and Justice. Many of the changes address long-standing criticisms of the institutional and structural arrangements of the AFSJ and to that extent are to be welcomed. In brief, the abolition of the pillar structure of the EU means that the AFSJ agenda (including police and criminal matters) will be dealt

[81] *See* further below.

[82] S. Giubboni, 'Free Movement of Persons and European Solidarity', 13 *European Law Journal* (2007) p. 360 at p. 376.

[83] The then Home Secretary, Jack Straw said that the UK's aim was to co-operate in the Treaty reform negotiations 'to the maximum extent consistent with our national interests'. Those interests were expressed in terms of 'red lines' – which became a mantra recognised across Europe at this time. House of Lords European Union Committee, *supra* n. 46, at para. 6.310.

[84] *See* Art. 20(1) EU and Art. 329 Treaty on the Functioning of the European Union (hereafter, TFEU). On this *see* S. Kurpas et al., 'The Treaty of Lisbon: Implementing Institutional Innovations', Joint Study of *CEPS, EGMONT and EPC* (2007), p. 100, <www.irri-kiib.be/SD/Joint_Study_complet.pdf>, visited 29 Nov. 2008.

with under a single chapter of a single Treaty for the first time (Title V TFEU, Articles 67-89). The 'ordinary legislative procedure' will apply as a rule (co-decision and QMV), there will be enhanced powers for both the European Parliament and national parliaments and for the 'supra-national' institutions – the Commission and the Court. The shift in the balance of power entailed in these arrangements constitutes a major sea change, particularly in respect of the sensitive areas of criminal and policing matters – where executive power has dwarfed, and continues to dwarf parliamentary power and where the Court presently enjoys only limited jurisdiction. These developments instill a much needed degree of a legitimacy and accountability into this field and the replacement of the complex cross-pillar institutional arrangements with a single coherent framework increases legal certainty.[85] However the shift to what we currently know as the 'Community method of decision-making' in the field of AFSJ comes at a price: here, more than anywhere in the Lisbon Treaty, expressions of differentiation and flexibility occur. Two arrangements, which Ladenburger terms 'quid pro quo' as the price for communitarisation, are particularly noteworthy.[86] First is the institutional arrangement taking the form of a so-called 'emergency brake procedure'[87] which enables a single member state to request the European Council to suspend the ordinary legislative procedure and therefore block almost any criminal law proposal if it considers that the act concerned would affect fundamental aspects of its criminal justice system. However, continued disagreement among EU leaders after the emergency brake is pulled leads to an *automatic* authorisation of a simplified enhanced co-operation mechanism which permits nine member states to progress with the measure. This in fact acts as a kind of 'accelerator mechanism' permitting integration amongst some member states in what are undoubtedly very sensitive and difficult matters.[88] It should be noted that this means that progress could be made without even needing to obtain a qualified majority of all member states and without needing the consent of the European Parliament. Needless to say, it is hoped that national Governments will think seriously before pulling the emergency brake in the first place.

A second element of 'quid pro quo' is the rather complex set of 'opt-out/opt-in' regimes, which predominantly concern the United Kingdom, and which emerged

[85] For a comprehensive account of the implications of the Lisbon Treaty on AFSJ matters *see* S. Carrera and F. Geyer, 'The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice', Policy Brief No. 141, *CEPS* (2007), <www.ceps.eu>, visited 29 Nov. 2008.

[86] C. Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon – A New Dimension for the Community Method', 4 *European Constitutional Law Review* (2008) p. 20 at p. 31.

[87] Arts. 83(3) and 69B(3) TFEU.

[88] A similar, easier 'acceleration' mechanism is provided in the event that a proposal concerning the European Public Prosecutor or aspects of police co-operation is vetoed. *See* Arts. 86(1) and 87(3) TFEU.

because of a stricter negotiating line adopted by the United Kingdom, in particular *vis-à-vis* criminal matters, in the period between the failure of the Constitutional Treaty and the signing of the Lisbon Treaty. The next section will consider all of the Protocols which establish a differential legal position for the United Kingdom, there are six in total.

The Lisbon Treaty – Protocols affecting the United Kingdom

The protocols on the Euro[89] and in relation to Article 14 EC[90] remain with only minor, mostly cosmetic amendments.

The revised Schengen Protocol[91] is of particular interest. Article 5(1) continues to specify that Schengen-building measures are subject to the relevant provisions of the Treaties and that where the United Kingdom or Ireland does not notify its intention to participate, the other member states are authorised to engage in enhanced co-operation for the purposes of adopting the relevant measure. This is in line with the Court's case-law discussed above. Article 5(2) is amended to confer a new right upon the United Kingdom and Ireland to *opt-out* of Schengen building measures even when they have already opted in to the underlying Schengen *acquis*.[92] This opt-out possibility also effectively codifies the Court's case-law, however unlike the judgments, the Protocol goes on to exhaustively regulate the conditions in which the United Kingdom and Ireland can exercise such an opt-out. This right must be exercised within three months of the proposal and if it is, then the decision-making procedure will be suspended and a special procedure provided for in Articles 5(3), (4) and (5) applies.[93] During this special procedure the Council may decide that the underlying Schengen *acquis* no longer applies to the United Kingdom or Ireland, either in its entirety or in part, though it must 'seek to retain the widest possible measure of participation of the member states concerned without seriously affecting the practical operability of the various parts of the Schengen *acquis*, while maintaining their coherence.' The test therefore includes an obligation of the widest possible participation as balanced against coherence and serious effect on practical operability. As if to anticipate how difficult it may be to

[89] Renamed Protocol (No. 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

[90] Renamed Protocol (No. 20) on the application of certain aspects of Art. 26 of the Treaty on the Functioning of the European Union to the United Kingdom and Ireland

[91] Protocol (No. 19) on the Schengen *Acquis* Integrated into the Framework of the European Union.

[92] This would confirm the invalidity of Art. 8(2) of the UK Decision, *supra* n. 55 and Art. 6(2) of the Irish Decision, *supra* n. 56 which require those member states to opt in to measures building upon parts of the Schengen *acquis* which they have already opted in to.

[93] The UK can withdraw its opt-out notification at any time before the adoption of the measure in accordance with a Declaration annexed to the Final Act of the Lisbon Treaty.

apply this test and reach agreement on such a *de facto* 'expulsion' mechanism,[94] the Council is authorised to pass the baton to the European Council to reach a decision after four months of trying and if the European Council fails it may pass the baton onto the Commission.

In essence, the new provisions of the Schengen Protocol mean that the United Kingdom can escape from measures that further develop a part of the *acquis* in which it is already participating. The price to be paid for this opt-out decision may however be partial or complete expulsion of the United Kingdom or Ireland from the underlying *acquis*. This latter possibility constitutes a novel and in-built method to discourage (ab)use of the opt-out in the first place. The rationale is clearly to regulate and discipline the behaviour of the states in exercising their flexibility options. How this will work in practice will ultimately depend upon how the tests of 'widest participation', 'coherence' and 'serious effect on practical operability' are weighed up. It is likely that, assuming ratification of the Lisbon Treaty, the Court of Justice will be asked to give its view on this sooner rather than later. Peers is even sceptical that the threat of expulsion will work at all, suggesting that 'the UK or Ireland might even welcome the change to escape from their existing obligations in some cases.'[95]

The revisions to the Schengen Protocol in Articles 5(2)-(5) in relation to opt-out possibilities combined with the Court's confirmation that the United Kingdom and Ireland cannot opt-in to Schengen-building measures without first participating in the underlying *acquis* pursuant to Article 4 raises the question of the continued purpose and utility of Article 5(1). Following the Court's rulings it would appear to be surplus to requirements, perhaps suggesting that when the revised Protocol was drafted (prior to the judgments) the national governments were willing to accept that the United Kingdom and Ireland could opt-in to (at least certain) measures building on the *acquis* that they have not already participated in.

If this were not the case then the drafters of the revised Protocol might be accused of some rather bad drafting. Ultimately, it would seem that, unless the Court's ruling is overturned, the only purpose for Article 5(1) is to confirm that the process laid down in Article 5(2)-(5) authorises enhanced co-operation among the Schengen states.

The fourth protocol to note is the AFSJ (Title V) Protocol[96] which replaces and amends the existing Title IV EC Protocol. Pursuant to the AFSJ Protocol EU

[94] M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', 45 *Common Market Law Review* (2008) p. 617 at p. 684.

[95] S. Peers' Statewatch Analysis, 'EU Reform Treaty Analysis no. 4' (26 Oct. 2007) p. 9. <http://www.statewatch.org/news/2007/oct/eu-reform-treaty-uk-ireland-opt-outs.pdf>.

[96] Protocol (No. 21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice.

criminal justice and indeed all AFSJ matters will be subject to a derogatory scheme in relation to the United Kingdom and Ireland. It extends the UK's opt-out to all policy areas that fall under the umbrella AFSJ objective, so the UK's existing opt out from asylum, immigration and civil (i.e., current Title IV EC) is extended to include policing and criminal matters for the first time. It will be recalled that EU criminal justice was one of the UK's 'red lines' in the lead up to the Lisbon Treaty negotiations.

The basic principles of the scheme in the AFSJ Protocol are as follows:[97] Article 2 establishes the principle that no legal instrument adopted in pursuance of the EU's AFSJ, or any judgment of the Court interpreting such instruments are applicable to the United Kingdom and Ireland. Article 3 gives the United Kingdom and Ireland the opportunity to declare that they wish to participate in any proposed legal instrument in this area. However, Article 3(2) makes it clear that if either the United Kingdom or Ireland, after such a declaration, nevertheless makes life so difficult for the other member states, they will be excluded according to the principle of Article 2. The United Kingdom and Ireland cannot therefore opt in only to sabotage a proposed instrument. Article 4 makes it possible for the United Kingdom and Ireland to accept an instrument after it has been adopted. Article 4a, a completely new addition, regulates the position in relation to instruments amending existing instruments which the United Kingdom and Ireland participate in. The basic principle of non-participation applies even for these amending instruments *but* the United Kingdom and Ireland will potentially pay a high price for non-participation. In a similar vein to the revised provisions of the Schengen Protocol, according to Article 4a(2), if they decide not to opt in, and the other member states formally decide that that particular instrument will be 'inoperable' without their participation, the *original* measure will cease to apply to them. This means that if an important amendment is proposed to an existing instrument such as the European Arrest Warrant Framework Decision, and the United Kingdom decides not to participate in this amendment, it can cease to apply to the United Kingdom. It is hoped that all sides will show political restraint in the use of these provisions to prevent a too significant fragmentation of the EU's AFSJ agenda.

This specific protocol is, however, not the end of the matter in relation to the United Kingdom and the AFSJ field. With respect to the *United Kingdom only*, Protocol (No. 36) on Transitional Provisions creates yet another special solution prompted by the UK government's intransigent line in the Treaty negotiation phase. This specifies that the full scheme of judicial enforcement applicable to other EU policy areas will only apply to policing and criminal law measures adopted under

[97] What follows is largely taken from M. Fletcher et al., *EU Criminal Law and Justice* (Cheltenham, Edward Elgar Publishing Ltd 2008) *see* Annex.

the existing third pillar of the EU (Title VI EU) five years after the entry into force of the TFEU, unless they have been amended after the entry into force of the TFEU. However, the United Kingdom (alone) can choose not to accept the full jurisdiction of the Court even after this five year period; Article 10(4) specifies that up until six months prior to the expiry of this transitional period, the United Kingdom may notify to the Council that it does not accept the extension of the Court's powers. If it does make such a notification, as from the date of expiry of the transitional period *all such measures shall cease to apply to the United Kingdom*. Article 10(5) specifies that at any time following the eventual disapplication to the United Kingdom of the pre-TFEU measures, the United Kingdom may notify the Council 'of its wish to participate in acts which have ceased to apply to it.' In such case, the relevant provisions of the AFSJ Protocol or the Schengen Protocol, as the case may be, shall apply.

It is submitted that Article 10, paragraphs (4) and (5) of Protocol (No. 10) on Transitional Provisions present a much greater danger to the coherence of the AFSJ than does the Protocol on the position of the United Kingdom and Ireland in respect of the AFSJ.[98] It is true that the UK's eventual wish to avoid the extension of the Court's powers will be tempered by the drastic consequence of the disapplication to it of the *entire acquis* in the field of police co-operation and judicial co-operation in criminal matters. That effect however is significantly lessened by the fact that Article 10(5) then grants the United Kingdom the possibility to cherry-pick from the 'outside.' This may prove to be a perverse incentive for a UK government dissatisfied with some of the measures adopted under Title VI EU. Article 10, paragraphs (4) and (5) would then provide the UK government with the option first to cause the whole of the criminal law *acquis* to be disapplied to the United Kingdom after which it could attempt to 're-accept' only those measures it thinks are palatable. The efforts of the Commission, European Parliament and Council to replace or amend acts of this *acquis* within five years of the entry into force of the TFEU may in fact minimize the consequences of any such rejection by the UK government pursuant to Article 10(4). And in relation to the right to re-accept acts of the *acquis* the last sentence of Article 10(5) contains a limiting clause to guide the behaviour of the EU institutions and the UK government: it reads 'When acting under the relevant protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom of the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practicable operability of the various parts thereof, while respecting their coherence.'

Finally, brief mention must be made of Protocol (No. 30) on the application of the Charter of Fundamental Rights of the EU to Poland and to the United

[98] Ibid.

Kingdom. It should be noted at the outset that this Protocol, by the UK Government's own admission,[99] is an interpretive Protocol rather than an opt-out, in fact leading some to question the need for it, legally, at all.[100] It is certainly likely that the demand for this special protocol was essentially political. Dougan attributes it to the Government's willingness to bow to the forceful yet overly-simplistic and sometimes dishonest claims made by sections of the media and political parties about the detrimental impact of the Charter on the UK's flexible employment arrangements, all against a backdrop of needing to make the Lisbon Treaty look different from the Constitutional Treaty.[101] He concludes that the Protocol emerges as a fantasy solution to a fantasy problem: 'the Charter is not actually a serious threat to UK labour law; for its part, the Protocol is not really an opt-out from anything.'[102] In short, it would appear that the UK and Polish governments have merely re-emphasised those so-called 'horizontal provisions' of the Charter (Articles 51 and 52) that already circumscribe the scope and interpretation of the rights contained therein.[103] Even if one were to accept the Protocol as an opt-out from the full legal effects of provision of the revised EU Charter of rights, it is arguable that the relevant Charter provisions merely codify fundamental rights and freedoms, which already exist as *general principles* of EU law, binding upon all member states.[104] It would therefore seem appropriate that the Protocol adds a regrettable and unnecessary layer of complexity and confusion to an already complicated EU legal landscape in relation to fundamental rights.[105]

Comments on the landscape of differentiation created by the Lisbon Treaty

The possibilities for differentiation enshrined in the Lisbon Treaty are unparalleled in the history of the EU project. A more complex position of flexible legal

[99] *See* House of Lords European Union Committee *supra* n. 46, at para. 5.86.

[100] For instance *see* evidence submitted by Professor Dashwood to the House of Lords European Union Committee *supra* n. 46. He saw the Protocol as part of the 'belt-and-braces' approach of the Government.

[101] M. Dougan, *supra* n. 94 at p. 665. The Charter became one of the UK's 'red lines' – not that the Charter should remain non-binding, but that it should have no impact on UK law. While the UK's concerns related to Title IV economic and social rights, Poland's late decision to be included in the Protocol related to concerns about the impact of the Charter on issues such as abortion and same-sex marriage. *See* Declaration No. 61 annexed to the final act.

[102] Ibid., p. 670.

[103] The 'horizontal' provisions aim to avoid a situation where the Charter imposes more limitations on fundamental rights than the ECHR and at preserving the level of protection which is already ensured by international law, including EU law, and by national Constitutions.

[104] M. Dougan, p. 667, *supra* n. 94.

[105] Note that the Lisbon Treaty confers a legally binding status upon a revised EU Charter and imposes an obligation upon the Union to accede to the European Convention on Human Rights.

arrangements is established which risks being procedurally unmanageable and more fundamentally, threatens to undermine achieving the common objectives and tasks of the EU to a damaging degree. The onus falls on national actors (including governments and parliaments) and the political and judicial institutions of the EU to harness and secure 'communal advancement' and the 'common EU interest'.

Notwithstanding the difficult political backdrop leading up to the Lisbon Treaty, one is left wondering whether the derogatory and multi-Protocol system in place for the United Kingdom in relation to the AFSJ was simply too high a price to pay for securing political agreement. Legally, the system is complicated. It is difficult to navigate and will undoubtedly be difficult to apply. The likelihood that the Court of Justice would be called upon to interpret the scope of these protocols is surely high. Carrera and Geyer warn that increased resort to the differentiation mechanisms established could affect the EU's ability to construct a *common* AFSJ, since national policies would be allowed to 'drift apart'.[106] This would undermine the now significant practical and operational co-operation of national (police and judicial) agencies and moreover endanger the status and legal safeguards of citizens.[107] In a field where policy objectives are often achieved by way of packages of inter-connected legislation (e.g., the first phase of the Common European Asylum System) 'reading across' legal instruments in order to elucidate the full extent of rights and duties is called for. Here, the right to opt-in and out of individual measures creates problems of legal coherence and lacuna in protection.

The risks for the United Kingdom as an EU actor that emerge from the legal landscape forged by the Lisbon Treaty are also potentially high. The more the United Kingdom exercises its right to opt-out, the less political clout it will likely have, not only in relation to the individual measures in question, but also in relation to the broader direction of the AFSJ policy field. The United Kingdom might find itself increasingly side-lined by reputation in political alliance-building initiatives, initiatives that will become more common place as qualified majority voting becomes the default legislative procedure in Council.

As the recent cases on the scope of the UK's opt-out in the Schengen Protocol revealed, there is no guarantee that the self-imposed legal insulation will be interpreted to the UK's advantage. Indeed, the cases and some of the (re-)negotiated Lisbon Protocols indeed suggest a tendency towards limiting the flexibility of the United Kingdom (and Ireland). Nor is there any guarantee that opt-out/opt-in mechanisms are effective when viewed from a wider policy perspective. The necessarily crude and increasingly coercive procedural constraints imposed by opt-out/opt-in arrangements cannot adequately take account of the fact that policies

[106] S. Carrera and F. Geyer, *supra* n. 85.
[107] Ibid.

and policy positions are in a state of flux. Policy overlaps and interdependencies in matters of migration and crime for example are easy to envisage. Put another way, while the AFSJ opt-out/opt-in arrangements can provide some legal insulation for the United Kingdom they cannot insulate the United Kingdom from the social, economic and political effects of international migration and crime.[108]

Conclusion

Whatever one's views about the purpose and desired destination of the EU polity the continued and indeed increasing resort to mechanisms of differentiation serve as a reminder that ultimately, nation states remain the custodians and gatekeepers of that polity. The EU, in spite of everything, is fragile. The tension between European goals and national imperatives is never far from the surface.

The Lisbon Treaty was claimed as a success by the EU and the United Kingdom for different reasons; the United Kingdom successfully defended its red lines and even extended its opt-in/opt-out possibilities in relation to highly sensitive policy issues such as policing and crime and the EU had a text which it hoped would reinstate some confidence in the EU project and stand it in good stead for the future.

The recent case-law of the Court of Justice interpreting the Schengen Protocol is extremely interesting. It may be criticised legally on several fronts but it is more interesting as proof of the Court's wish to intervene on the side of coherence and solidarity. An attempt to influence and discipline the behaviour of states which have negotiated an exceptional legal position is discernible from these cases and also from certain of the Protocols (re-)negotiated as part of the Lisbon Treaty, where exclusionary sanctions are used to dissuade and coerce specific actions. But the devil, as always, is in the detail. The revised Schengen Protocol includes an exhaustive and procedurally complex regulation of how the United Kingdom or Ireland might be able to opt-out of Schengen-building measures. Furthermore, the activation of sanctions against these states for doing so requires that various underlying goals of 'maximum participation', 'integrity' and 'practical operability' are first weighed up. This is likely to be a challenging and politically sensitive task (for at least the Council and European Council) and there is a high likelihood that the Court will be asked to mediate.

The Lisbon Treaty exposed a brutal reality: differentiation mechanisms as mere political concessions demanded and won by national governments in a secretive IGC environment. Ultimately, a more principled consideration of differentiation is desirable if 'destructive fragmentation' is to be avoided – one that is grounded

[108] A. Geddes, *supra*, n. 48 at p. 740.

in the underlying sense of unity, integrity and solidarity that inspired and continues to drive the projects of the EU and the EU project itself. This seems to be the gist of the Court's rulings on the Schengen Protocol, and it is to be expected that the Court in the future will be involved in adjudicating and shaping the EU's differentiated legal landscape.

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