Version for publication in the New Journal of European Criminal Law 5 December 2014

Conference held in Rome on 13 and 14 November 2014 about
"The competence of the Court of Justice of the EU in the Area of Freedom, Security and Justice"

THE GENESIS OF PROTOCOL 36

by Thérèse Blanchet[1]

Introduction

Protocol 36 on transitional provisions concerned mainly institutional matters (transition for the European Parliament, qualified majority voting in the Council, the Council configurations, the Commission, the High Representative for foreign affairs and the EU advisory bodies) and most of its provisions have elapsed.

What is of interest for the Conference are only two Articles in Protocol 36, Articles 9 and 10, both located in the last Title of the Protocol, Title VII, about *Transitional provisions concerning acts adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon*. Titles V and VI constituted what is commonly known as the former second and third pillars.

Article 9: its origins and meaning

Origins of Article 9

Article 9 finds its origin in the failed Constitutional Treaty[2] (Cst Tr.) from which the Lisbon Treaty took the essential of its substance.

Article 438 Cst Tr. contained in Part IV on general and final provisions was dealing with the issue of succession and legal continuity. As the Constitutional Treaty was repealing the previous Treaties, it was necessary to make sure that the new Union would neatly succeed the previous Union and the European Community without legal gap.

The present European Union also succeeded the European Community, but the Lisbon Treaty was only amending previous treaties, not repealing them, so the Union was continuing as amended. And with regard to the European Community, it was enough to insert in Article 1 of the Treaty on European Union (TEU) a sentence stating that "*the Union shall replace and succeed the European Community*".

---

1 Director for Justice and Home Affairs at the Legal Service of the Council of the European Union. Before taking her position as Director, the author was for 11 years assistant to Jean-Claude Piris, Director General of the Council Legal Service, during which she participated in the discussions on the Lisbon Treaty. All views expressed in this article are strictly personal and do not represent the views of the Council Legal Service or the Council of the European Union.

2 See Treaty establishing a Constitution for Europe (OJ C 310, 16.12.2004, p. 1).

Paragraph 3 of Article 438 Cst Tr. was dealing with the legal continuity of the existing *acquis*, the continuity of all the acts which had been adopted on the basis of the previous Treaties.

The first subparagraph of paragraph 3 contained three sentences. It was stating first that "*the acts of the institutions* [and other bodies] *adopted on the basis of the* [previous] *treaties* (…) *shall remain in force*", then that "*their legal effects shall be preserved until those acts are repealed, annulled or amended in implementation of the* [new Constitutional] *Treaty*" and, finally, that the same should apply for the agreements concluded between Member States on the basis of the previous Treaties.

Article 9 of Protocol 36 has been drafted very much like the two last sentences of the first subparagraph of Article 438(3) Cst Tr. It did not however repeat the first sentence under which the previous acts "*shall remain in force*", because that was evident: the Lisbon Treaty did not repeal the previous treaties, it only amended them, so there could be no doubt that the former *acquis* would remain in force.

Article 9 of Protocol 36 limited itself to dealing with the acts adopted on the basis of treaty chapters most affected by the Lisbon Treaty, namely the acts which had been adopted under the second pillar, Title V of the former Treaty on European Union (ex-TEU) on Common Foreign and Security Policy (CFSP), and the acts adopted under the third pillar, Title VI of the ex-TEU, on police and judicial cooperation in criminal matters. This limitation is clear from the very title of Title VII of the Protocol which expressly refers only to Titles V and VI of the ex-TEU.

Meaning of Article 9

This limitation in scope is due to the fact that contrary to the Constitutional Treaty, the Lisbon Treaty did not introduce new types of legal acts, such as the European laws, framework laws, regulations and decisions as they were defined in Article I-33 Cst Tr., but kept the list of legal acts as it was in Article 249 of the Treaty establishing the European Community (EC Treaty): regulations, directive and decisions with the same legal effects as before (now Article 288 of the Treaty on the functioning of the European Union, TFEU). Therefore, only the legal acts of the second and third pillars, which had different legal effects than the Community ones, needed to be covered by the transitional rule, because these types of legal acts were no longer provided for by the Treaties post-Lisbon.

CFSP legal acts were decisions, common positions and joint actions.

- CFSP decisions were considered to be binding, although their legal effects were not expressly defined;
- on common positions, the Treaty was stating that "*Member States shall ensure that their national policies conform to the common positions*" (Article 15 ex-TEU);
- joint actions were said to "*commit the Member States in the positions they adopt and in the conduct of their activity*" (Article 14(3) ex-TEU).

The four types of ex-third pillar legal acts (police and judicial cooperation in criminal matters) were listed in Article 34 ex-TEU. These were common positions, framework decisions, decisions and conventions between Member States:

- common positions were considered to have the same legal effects as the CFSP common positions. This allowed the adoption of common positions on a dual second and third pillar legal basis, such as the common position of 2001 on specific measures against terrorism[3] which was based on both Article 15 ex-TEU (CFSP) and Article 34 ex-TEU (ex-third pillar). This act listed both "external" but also so-called "internal" terrorists about which, under Article 4 of the common position, Member States were to assist each other in the widest possible measure through police and judicial cooperation in criminal matters;
- framework decisions' legal effects were the same as that of a directive (binding upon the Member States as to the result to be achieved but leaving to the national authorities the choice of form and methods) and it was expressly specified that framework decisions "*shall not entail direct effects*";
- decisions' legal effects were similar (though not exactly the same) as that of a decision (binding [in its entirety]), but also with the specification of no direct effects;
- conventions were to be adopted by the Member States in accordance with their respective constitutional requirements.

In its Case *Pupino* of 2005,[4] the Court limited the potential negative impact that the "no direct effects" rule could have had on the possibility to use preliminary ruling procedures. Having underlined that the wording on the legal effects of a framework decision was very closely inspired by that on the legal effects of a directive (point 33), the Court ruled that "*the binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity*" (point 34). It added that the Court's jurisdiction to give preliminary rulings "*would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States*" (point 38).

However, Article 9 should of course be understood in a wider way: its purpose is to preserve the legal continuity of the former *acquis* adopted under the former second and third pillar. This means that the words "*legal effects*" should be understood as covering the whole legal content of such acts, including for instance provisions contained in these acts which confer implementing powers on the Council or other institutions or bodies, in conformity which what was allowed under the former second and third pillars.

The legal situation is the same as that of existing implementing powers in the former Community *acquis* which had been conferred in accordance with the previous "comitology" system of 1999. This previous system continued to apply from December 2009, when the Lisbon Treaty entered into force, until March 2011, when the 1999 comitology system was replaced by the new system which contained transitional provisions indicating that the references to the old system contained in the existing basic acts were to be considered as references to the new system.[5]

---

3 Council Common Position (2001/931/CFSP) of 27 December 2001 on the application of specific measures to combat terrorism (OJ L 344, 28.12.2001, p. 93). On the distinction between so-called "internal" and "external' terrorists, see Judgment of the Court of Justice of 19 July 2012, Case C-130/10, ECLI:EU:C:2012:472.

4 Judgment of 16 June 2005, Case C-105/03, *Pupino*, [2005] ECR p. I-5285.

5 Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23). The 1999 comitology Decision was replaced by the new

The same situation exists now for the so-called "PRAC" comitology system (French acronym for *procédure de réglementation avec contrôle* or Regulatory Procedure with Scrutiny)[6] which had been introduced in a great number of basic acts between July 2006 and November 2009. This continues to apply unchanged as long as the so-called "omnibus" proposals which aim at introducing into these basic acts the new post Lisbon system (delegated and implementing acts) have not been adopted.[7]

The transitional character of Article 9 lies in the fact that the legal effects of the ex-second and third pillar acts are preserved only until those acts are repealed, annulled or amended in implementation of the Treaties post-Lisbon. This is what is commonly known as the "lisbonisation" of an act.

What is "lisbonisation" ?

An amendment can take different forms, depending of the drafting techniques used:[8]

- it may take the form of a classic amendment (addition, deletion or replacement of one or several articles or paragraphs within a legal act);
- or it may be done by replacing the whole act by a new one, because amending in details many articles would be too complicated. This is what is called the "recast" drafting technique, which is organised by an Interinstitutional Agreement of 2001 which allows a legal act to be amended and codified at the same time.[9] But sometimes the Commission proposes a replacement without calling it a recast and therefore without triggering the application of the Interinstitutional Agreement but this is nevertheless the same: it is a way to amend an existing legal act.

All these drafting techniques fall within what is called an amendment in Article 9 and trigger, as soon as the legal act is adopted, the end of the transitional arrangement provided in Article 9. The old act, as amended, becomes "lisbonised" in its entirety (i.e. not only as regard its amended parts) and therefore fully enters the post-Lisbon era. Its legal effects become the same as those of the legal act which has amended it.

---

comitology instrument as from 1 March 2011 (Regulation 182/2011 of 16 February 2001, OJ L 55, 28.2.2011, p. 13).

6 Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC (OJ L 200, 22.7.2006, p. 11).

7 At the time of writing (December 2014), three proposals are still on the table since 2013 (see Commission proposals in COM(2013) 451 final, COM(2013) 452 final and COM(2013) 751 final).

8 See the explanation about what is "lisbonisation" which is given in the "note to the reader" accompanying the list of acts which were "lisbonised"' as concerns the UK: "(…) *such acts which have been amended, i.e. by whatever drafting technique (amendment, replacement or repeal of the relevant act in whole or in part), after the entry into force of the Lisbon Treaty* (…)" (OJ C 430, 1.12.2014, p. 23). This list was published in connection with the UK's block opt-out/re-opting in episode.

9 Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C 77, 28.3.2002, p. 1).

For instance, the Decision on the European Police College (CEPOL),[10] which had been adopted in 2005, prior to the Lisbon Treaty, was amended post-Lisbon, in May 2014, by a Regulation which modified the location of the seat of the College from the United Kingdom (UK) to Hungary.[11] This means that, as from the date of adoption of the Regulation which amended Article 4 (seat) of the CEPOL Decision, the legal effects of the whole of that pre-Lisbon Decision became those of a regulation, and also that the full powers of the Commission and of the Court of Justice became applicable with regard to that Decision and its amendment (in accordance with Article 10(2) of Protocol 36).

Another example, this time of an act entirely replaced by another, it that of the Framework Decision of 2001 on the standing of victims in criminal proceedings[12] which was replaced by a Directive in 2012.[13]

There was not much discussion about Article 9 during the Intergovernmental Conference (IGC) on the Lisbon Treaty in 2007. It was quite obvious for everybody that there was no need for the kind of transitional rules as had been inserted in the first sentence of paragraph 3 of Article 438 Cst Tr. which were covering all the previous *acquis*.

However, the words "*legal effects*" in Article 4 cannot be understood as meaning that the whole legal environment surrounding the former second and third pillar act as provided in the ex-TEU would also be "imported" together with the legal act in question. For instance, the fact that, pursuant to Article 35 ex-TEU, the Court had only limited powers with regard to ex-third pillar acts was not "imported" together with those acts. Similarly, the fact that, under Article 39 ex-TEU, the European Parliament had to be consulted by the Council before adopting framework decisions, decisions and conventions in the field of the ex-third pillar, including consultation on implementing decisions to be adopted by the Council, was not imported.

This limitation was not so clear for all Member States, and the UK in particular had intended to use this provisions on the preservation of legal effects of the ex-third pillar *acquis* as comprising also an importation of the limitations to the competences of the Court which had existed towards these ex-third pillar acts in Article 35 of the ex-TEU.

This is the reason why an additional provision, which would become our present Article 10, was devised in the Group of Legal Experts during the IGC in September 2007.

---

10 Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA (OJ L 256, 1.10.2005, p. 63).

11 Regulation (EU) No 543/2014 of the European Parliament and of the Council of 15 May 2014 amending Decision 2005/681/JHA establishing the European Police College (CEPOL) (OJ L 163, 29.5.2014, p. 5).

12 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82, 22.3.2001, p. 1).

13 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p. 57).

Article 10: its origins, the 2007 IGC Mandate, the general 5-year transitional period and the UK's block-opt-out

Origins of Article 10 and the IGC Mandate of June 2007

At the beginning of the IGC on 23 July 2007, only Article 9 had been put in the draft Treaty text sent to delegations. There was no Article 10. No transitional provision on the powers of the Court and on the infringement powers of the Commission had been foreseen in the very detailed mandate for the IGC adopted by the European Council in June 2007 about what would become the Lisbon Treaty.

It is recalled that the way the Lisbon Treaty was negotiated was quite unique in the history of IGCs for amending Treaties. Contrary to what had been done for previous Treaties, there was no "Group of Wise Men" or preparatory report, nor general mandate given to an IGC to explore Treaty amendments on certain matters listed in general terms.[14]

Everything was pre-negotiated by the German Presidency in advance of the European Council of June 2007 which would officially convene the IGC. The European Council of June adopted a very detailed text annexed to its conclusions which indicated where and how the existing Treaties would be amended and contained already drafted legal texts.[15] This was called the "*IGC mandate*" and the conclusions requested that the IGC be very quick, starting in July and finishing as soon as possible, before the end of 2007.

The mandate was to be "*the exclusive basis and framework for the work of the IGC*". The existing treaties, which would remain in force and be only amended, would be so by introducing into them, in the way specified in the mandate, what was called "*the innovations resulting from the 2004 IGC*", which was an elusive way to refer to the compromises already reached in the text of the Constitutional Treaty which had been ratified by 18 Member States.

On ex-third pillar matters (police and judicial cooperation in criminal matters), all the innovations resulting from the 2004 IGC were to be inserted into the EC Treaty, renamed *Treaty on the functioning of the European Union*. This consisted, essentially, in "communitarising" the ex-third pillar, i.e. introducing for most of the legal bases in this field, codecision with the European Parliament (so-called "ordinary legislative procedure") and qualified majority voting in the Council. Points J, K and L of paragraph 19 of the IGC mandate provided for a few modifications to the Constitutional Treaty text. The two modifications of relevance here were:

(1) firstly, the extension of the scope of the opt-out for the UK to cover not only, like in the Constitutional Treaty, the Chapters on border checks, immigration and asylum and on civil judicial cooperation and one provision on data collection in police cooperation, but also the ex-third pillar chapters in title V of Part Three on police and judicial cooperation in criminal matters (and finally also Chapter 1 on general provisions). There was also a sentence in the mandate which said that "*this extension* [of the scope] *will take account of the UK's position under the previously existing Union acquis in these* [two] *areas*". The meaning of this would prove controversial;

---

14 On the Lisbon Treaty and the way in was negotiated, see PIRIS, Jean-Claude, *The Lisbon Treaty – A Legal and Political Analysis*, Cambrigde University Press, 2010; BLANCHET, Thérèse, *The Treaty of Lisbon: A Story in History or the making of a Treaty*, Fordham International Law Journal, Vol. 34, No 5, May 2011, p. 1217-1250; PHINNEMORE, David, *The Treaty of Lisbon - Origins and Negotiations*, Palgrave Mac Millan, 2013.

15 See paragraphs 8 to 14 and Annex I of Presidency Conclusions, European Council of 21 and 22 June 2007 (Brussels), doc. 11177/1/07 REV 1, dated 20 July 2007, available on the Internet site of the European Council [http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf].

(2) secondly, an opening towards addressing an issue which the UK was very keen on, namely the possibility for it to opt out from amendments to existing acts by which the UK was already bound, both in relation to Schengen building measures and to amendments to other, non-Schengen, justice and home affairs measures.

These were the only two items on which the very detailed IGC mandate had left a gap to be filled by the IGC and which would cause much of the discussions in the IGC.

At that moment, in June 2007, Ireland was not covered by these new extensions and was still to determine its position, which it did later in September by joining the UK both on the extension of the scope of the opt-out Protocol and on the possibility to opt-out from amendments.

Nothing was said concerning Denmark because the Constitutional Treaty had already solved the issue by providing that the Danish opt-out Protocol would extend to the whole Title on the area of freedom, security and justice (i.e. also to police and judicial cooperation in criminal matters) and that Denmark would have the possibility to notify of its wish to replace this "opt-out-only" kind of Protocol by an "opt-in/out" kind of Protocol the text of which was similar to the UK/Ireland Protocol and was already annexed to the Danish Protocol.[16]

The IGC Legal Experts Group worked for five weeks mostly in September until 3 October. By mid-September, the Group had already carried out two readings of the whole draft Treaty, including Protocols and declarations.

The second half of the five weeks, between 12 September and 3 October, was dedicated solely to resolving the two UK issues left open by the IGC mandate. This resulted in the text of Article 10 as well as the rather complicated mechanisms set out in Article 5(2) to (5) of Protocol 19 (Schengen) and Article 4a of Protocol 21 (non-Schengen) for cases where the UK or Ireland would opt out from amending measures.

The latter provisions are not however the subject matter of this article, which will concentrate on what became Article 10 of Protocol 36.

The general 5-year transitional period (paragraphs 1 to 3 of Article 10)

The discussions on the UK issues began on 12 September 2007. The very first draft on transitional measures was maintaining the limitations to the Court and Commission powers on ex-third pillar acts until such acts were "lisbonised". So this was a solution similar to Article 9 on the preservation of the legal effects until the act is "lisbonised", but it concerned the Court and Commission powers. The limitation could be put to an end at any time by a declaration of the Member State concerned that it accepts the Court and Commission powers on ex-third pillar *acquis*. Two options were proposed in a paper circulated on 11 September, one under which this would benefit only the UK/Ireland[17] and the other under which this would apply to all Member States.[18]

---

16 See Article 8(1) Protocol No 22 on the position of Denmark annexed to the TEU and TFEU and the Annex thereto (which is almost the same as the Annex to Protocol No 20 on the position of Denmark annexed to the Constitutional Treaty).

17 The very first draft text (UK and Ireland) read as follows:
"*1. By a declaration made at the time of signature of the Treaty of Lisbon, the United Kingdom and Ireland may declare they do not accept the powers of the Commission under Article 226* [present Article 258 TFEU] *nor of the Court of Justice under Articles 227, 228 and 234* [present Articles 259, 260 and 267 TFEU] *of the Treaty on the Functioning of the Union with respect to acts of the Union in the field of police cooperation and judicial cooperation adopted before the entry into force of the Treaty of Lisbon.*

A UK/Ireland-only solution was immediately rejected by other Member States who demanded that if there would be a transitional period on the Court and Commission powers, this should be for all Member States. They also opposed that this would be "open ended". So it should be limited in time and not last until the last ex-third pillar act is "lisbonised". The next text immediately proposed on 12 September was already almost the same at the present paragraphs 1 to 3 of Article 10.[19] The differences with the present text of Article 10(1) to (3) were in paragraphs 1 and 2, and the next draft circulated on 13 September was already the same at it is now.[20]

---

2. The application of Article 3(1) or Article 4 [of the opt-out/in Protocol No 21] *with respect to a modification of an act referred to in paragraph 1, implies the recognition of the powers of the Commission and of the Court with regard to the modified act.*

3. The United Kingdom and Ireland may at any time withdraw a declaration made pursuant to paragraph 1."

[18] The very first draft text (all Member States) read as follows:

"*1. By a declaration made at the time of signature of the Treaty of Lisbon, each Member State may declare that with respect to acts of the Union in the field of police cooperation and judicial cooperation adopted before the entry into force of the Treaty of Lisbon it does not accept:*

- the powers of the Commission under Article 226 [present Article 258 TFEU] *nor of the Court of Justice under Articles 227 and 228* [present Articles 259 and 260 TFEU] *of the Treaty on the Functioning of the Union;*

- the powers of the Court of Justice under Article 234 [present Article 267 TFEU] *of the Treaty on the Functioning of the Union, if* [it] *had not accepted such powers of the Court under Article 35(2) of the Treaty on European Union, as established by the Treaty of Amsterdam.*

2. The modification of an act referred to in paragraph 1, implies the recognition of the powers of the Commission and of the Court with regard to the modified act by the Member States to which that modified act applies.

3. Member States may at any time withdraw a declaration made pursuant to paragraph 1."

[19] The draft text circulated to delegations on 12 September 2007 read as follows:

"*1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the* [Treaty of Lisbon]*, the following powers of the institutions shall not be applicable at the date of entry into force of that Treaty: the powers of the Commission under Article 226* [present Article 258 TFEU] *and the powers of the Court of Justice of the European Union under Articles 227 and 228* [present Articles 259 and 260 TFEU] *of the Treaty on the Functioning of the European Union, as well as the powers of the Court of Justice of the European Union under Article 234* [present Article 267 TFEU] *of the said Treaty in the cases where they have not been accepted under Article 35(2) of the Treaty on European Union in its version in force before the entry into force of the* [Treaty of Lisbon].

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions mentioned in that paragraph with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect [three years] after the date of entry into force of the [Treaty of Lisbon]".

[20] The drafting of paragraph 1 was simplified as follows (differences as compared to the previous draft are underlined by us):

"*1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the* [Treaty of Lisbon]*, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 226* [present Article 258 TFEU] *shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in its version in force before the entry into force of the* [Treaty of Lisbon]*, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.*

2. *The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions mentioned in that paragraph under the Treaties with respect to the amended act for those Member States to which that amended act shall apply*" (the present text of paragraph 2 says "(…) *powers of the institutions referred to in that paragraph as set out in the Treaties with respect* (…)").

Then started the discussions on the length of the transitional period: it was first put at two years, and soon three, and then variations appeared: three years plus two additional years, if so decided by the Council by a qualified majority, or five years which could be reduced to four years by a Council decision taken by a qualified majority. The Commission wanted only one year and the UK wanted ten years.

The UK explained that it could not accept the competence of the Court and of the Commission on the ex-third pillar acquis. It claimed that this was what was meant by the sentence in the IGC mandate stating that the extension of the scope of its opt-out "*will take account of the UK's position under the previously existing Union acquis in these areas*", a position which did not include the full powers of the Commission and of the Court of Justice. The UK argued that the length of the transitional period would be important as it would impact on the size of the "relics", i.e. the non-lisbonised *acquis*. In its view, ten years would be long enough to enable for the ex-third pillar *acquis* to be "lisbonised" in the meantime so that the old ex-third pillar *acquis* finally covered by the Court and Commission powers would be very small.

A group of other Member States, which was soon called "the Schengen lovers" (they were about 13 or 14), was very reluctant to make any additional concession to the UK on top of the extension of the scope of its opt-out. In addition, discussions on the parallel file about the possibility for the UK to opt out from amending acts were very difficult. The "Schengen lovers" could not accept that the UK would be bound by ex-third pillar *acquis* without full control by the Court, nor that the coverage by the Court would be done on a case-by-case basis, act by act.

The UK's block opt-out (paragraphs 4 and 5 of Article 10)

This is when the idea started to emerge of "expelling" the UK from all non-lisbonised ex-third pillar *acquis*, in case the UK would not accept the Court and Commission powers at the end of the transitional period. This became what is known today as the "block opt-out".

The text submitted on 17 September 2007 is already very similar to the present paragraphs 4 and 5 of Article 10. At the time, it was drafted for both the UK and Ireland,[21] but, soon, Ireland indicated it did not want to be submitted to this. The text circulated on 20 September 2007 was a UK-only text and is almost the same as the present text in Protocol 36.[22]

---

21 This draft text read as follows (which at the time was a continuation of paragraph 3 of Article 10):
"*At the latest six months before the expiry of the transitional period referred to in the first subparagraph, the United Kingdom or Ireland may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions mentioned in paragraph 1 as they are provided for in the Treaties. This subparagraph shall not apply with respect to the amended acts which are applicable to the Member State in question as referred to in paragraph 2.*
For the Member State having made that notification, the acts referred to in paragraph 1 shall cease to apply. The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary transitional arrangements. It may also determine that the Member State shall bear the direct financial consequences, if any, necessarily incurred as a result of the cessation of its participation in those acts. The Member States in question shall not participate in the adoption of that decision. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) [now Article 238(3)(a) TFEU].
4. The Member State in question may, at any time afterwards, notify the Council of its wish to participate in the acts which have ceased to apply to it pursuant to paragraph 3, third subparagraph. In that case, the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply to that notifications".

22 This draft text read as follows (by then numbered paragraphs 4 and 5 of Article 10):
"4. *At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions mentioned in paragraph 1 as set out in the Treaties.*

The idea that some *acquis* would cease to apply to the UK in case it would not participate fully was already in the air. It was being discussed intensively in the parallel file on allowing the UK/Ireland to opt out from amendments. In this file, the texts tabled by the "Schengen lovers" provided that the UK/Ireland would be "expelled" from the underlying *acquis* if it did not opt in to an amending act. This was, at the time, meant to be a sort of "punishment" presumably so difficult to swallow that it would discourage a possible "abuse" of opt-outs.

This "punishment" approach was not new. It resembles the "guillotine" system provided in the agreements with the four associated countries to Schengen (Norway, Iceland, Switzerland and Liechtenstein) under which the association is terminated in case the associated country does not accept a Schengen building measure.[23]

As soon as the block opt-out option was aired, it was agreed to settle for a length of the transitional period of five years which was considered, then, as long enough to diminish, through "lisbonisation", the amount of *acquis* that would risk being submitted to the block opt-out.

This is because, like in Article 9, all through Article 10, the exit door is "lisbonisation": as soon as an ex-third pillar act is "lisbonised", the amended act exits the derogatory regime. It becomes submitted to the Court and Commission powers before the end of the 5-year transitional period and it exits the list of ex-third pillar *acquis* submitted to the block opt-out in all cases where the UK has opted in the amending act (see last sentence of Article 10(4), first subparagraph, of Protocol 36).[24]

In order to help this process, the provisions on the block opt-out were drafted hand in hand with a Declaration (No 50) concerning Article 10 of Protocol 36 whereby the Conference "*invites the European Parliament, the Council and the Commission, within their respective powers, to seek to adopt, in appropriate cases and as far as possible within the five-year period* (…)*, legal acts amending or replacing the acts referred to in Article 10(1)*".

In case the United Kingdom has made this notification, all acts referred to in paragraph 1 shall cease to apply to it. The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements, including with regard to any amended acts applicable to the United Kingdom. It may also determine that the United Kingdom shall bear the direct financial consequences, if any, necessarily incurred as a result of the cessation of its participation in those acts. The United Kingdom shall not participate in the adoption of that decision. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) [now Article 238(3)(a) TFEU].
This paragraph shall not apply with respect to the amended acts which are applicable to the Member State in question as referred to in paragraph 2.
5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in the acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply to that notifications. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to reestablish the widest possible measure of participation of the United Kingdom without seriously affecting the practical operability of the various parts thereof, while respecting their coherence".

[23] See Article 8(4) of the EU/Norway-Iceland Agreement concerning their association with the implementation, application and development of the Schengen acquis (OJ L 176, 10.7.1999, p. 36). The same is provided in the Schengen Agreement with Switzerland (Article 7(4), see OJ L 53, 27.2.2008, p. 52) and in that with Liechtenstein (Article 5(4), see OJ L 160, 18.6.2011, p. 21). A similar mechanism applies in the Agreements whereby the four associated countries participate in the so-called "Dublin" system on determining the State responsible for examining asylum applications (see e.g. Article 4(7) of the Agreement with Switzerland, OJ L 53, 27.2.2008, p. 5).

[24] For a list of ex-third pillar *acquis* which was "lisbonised" as concerns the UK and by which, therefore, the UK remained bound because the block opt-out did not apply, see the list published in OJ C 430, 1.12.2014, p. 23.

The Group of Legal Experts concluded its work on 3 October 2007. A revised Treaty text was circulated on 5 October. The IGC at the level of Heads of State or Government settled five or six important political issues in other areas on 18 October and the Treaty was signed two months later on 13 December.

Epilogue

The 5-year transitional period provided for in Article 10 of Protocol 36 ended on 1 December 2014.

In the meantime, the UK had triggered the block opt-out by letter of 24 July 2013.[25] By letter of 20 November 2014, the UK notified the Council of its wish, taking effect on 1 December, to re-participate in 35 ex-third pillar measures, including six Schengen measures and 29 non-Schengen measures. [26] Among the latter are the European Arrest Warrant, Europol, Eurojust, the "Naples II" Convention on mutual assistance between customs, Joint Investigation Teams, the so-called "Swedish initiative" on exchange of information and intelligence between law enforcement authorities, transfer of prisoners, ECRIS[27] and other important ex-third pillar cooperation instruments.

The Council (on the six Schengen measures)[28] and the Commission (on the 29 non-Schengen measures)[29] adopted on 1 December 2014 their respective decisions on the re-participation by the UK to these 35 measures.

Before that, on 27 November, the Council had adopted a decision on consequential and transitional measures (the UK not voting)[30] and a decision on financial consequences of the UK's opt-out (the UK voting).[31] These concentrated on the fate of the so-called "Prüm *acquis*",[32] about mutual access to national law enforcement data bases on DNA, finger prints and vehicles registration, to which the UK did not want to re-opt in, thus causing problems with a number of Member States. The decisions provides that the UK will conduct a "*full business and implementation case*" during 2015

25 See Council document No 12750/13, accessible on the Council Public Register of documents [http://www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en].

26 See Council document No 15398/14.

27 The European Criminal Records Information System.

28 Council Decision (2014/857/EU) of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen *acquis* which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC (OJ L 345, 1.12.2014, p. 1).

29 Commission Decision (2014/858/EU) of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis* (OJ L 345, 1.12.2014, p. 6).

30 Council Decision (2014/836/EU) of 27 November 2014 determining certain consequential and transitional arrangements concerning the cessation of the participation of the United Kingdom of Great Britain and Northern Ireland in certain acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon (OJ L 343, 28.11.2014, p. 11).

31 Council Decision (2014/837/EU) of 27 November 2014 determining certain direct financial consequences incurred as a result of the cessation of the participation of the United Kingdom of Great Britain and Northern Ireland in certain acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon (OJ L 343, 28.11.2014, p. 17).

32 Council Decision 2008/617/JHA (OJ L 210, 6.8.2008, p. 1), Council Decision 2008/616/JHA (OJ L 210, 6.8.2008, p. 12) and Council Framework Decision 2009/905/JHA (OJ L 322, 9.12.2009, p. 14).

after which it will decide on whether to re-op-in to the Prüm *acquis*, failing what it will have to reimburse the money it got from the EU budget to help implementing the Prüm *acquis*.[33]

Out of more than 130 ex-third pillar acts,[34] almost 20 acts have been "lisbonised". Among those are the Framework Decisions on the standing of victims in criminal proceedings, on combating trafficking in human beings, on combating sexual exploitation of children, on cybercrime, on execution of freezing orders, on confiscation of proceeds of crime, on the protection of the euro, the two PNR Agreements with the US and Australia, the 2000 Convention on mutual assistance in criminal matters and its 2001 Protocol, Chapter 2 of Title III of the Schengen Convention which concerns mutual assistance in criminal matters and the Schengen evaluation decision.

However, not all of these concern the UK or Ireland. It depends whether they have opted in or not in the amending act. For instance, four of the above acts (relating to confiscation and the protection of the euro) did nevertheless fall within the block opt-out because the UK had not opted in the amending act before the end of the 5-year transitional period. 16 ex-third pillar instruments were "lisbonised" as regards the UK[35] and have therefore fallen out from the list of ex-third pillar *acquis* which ceased to apply to the UK on 1 December 2014.[36]

20 ex-third pillar acts are in the process of being lisbonised in the sense that the Commission has tabled a proposal to amend or replace them (among which Europol, Eurojust, the "PIF" Convention[37] to be replaced by a directive and the Framework Decision on data protection in police and judicial cooperation in criminal matters).

One could wonder why, during the 5-year transitional period, the Commission did not propose more amendments to the ex-third pillar *acquis* in an attempt to "lisbonise" more acts and therefore diminish the "relics" as was planned during the IGC through Declaration No 50. The reason might be that the Commission wanted to truly "recast", with an added value, the few ex-third pillar acts on which it submitted proposals, and not only slightly amend them simply to achieve lisbonisation.[38]

However, although this was most likely not the reason for the little number of proposals for lisbonisation, there is a drawback to any lisbonisation, the victim of which is Denmark: each time an ex-third pillar act is lisbonised, Denmark is excluded because its opt-out Protocol (No 22), in its present version, does not allow it to opt-in. So each time an existing act is amended or replaced, Denmark cannot opt in to the amending or replacing act and remains bound by the old act. When that old act is not an instrument harmonising substantive law but a cooperation instrument or an agency, such as the European Evidence Warrant or Europol, Denmark finds itself *de facto* expelled

---

33 In a Statement to the Minutes of the Council of 18 November 2014, the UK promised to give reciprocal treatment to other Member States during this year of trial, so that not only the UK could test its crime scene samples against the data bases of other Member States but also other Member States could do so against UK databases.

34 See "revised preliminary list of the former third pillar *acquis*", Commission Staff Working Document, of 14 May 2014 (SWD(2014) 166 final.

35 See list referred to above in footnote 24.

36 See list of acts which have ceased to apply to the UK on 1 December 2014 in OJ C 430, 1.12.2014, p. 17.

37 "PIF" is the French acronym for *protection des intérêts financiers* or protection of the EU's financial interests on which a Convention between Member States was concluded in 1995.

38 Lisbonisation could have been done almost "en bloc", by amending for instance all the final clauses of the ex-third pillar acts that oblige Member States to inform the General Secretariat of the Council of implementing measures. These could have been replaced by an obligation to inform instead the Commission. Provided the UK would have opted in those amendments, lisbonisation would have applied to the UK, and therefore reduced the number of acts submitted to the block opt-out. Denmark would have been little hurt by such an "omnibus" lisbonisation as its non-participation in an amendment of this kind would have had no substantial consequences for the proper functioning of the act for Denmark.

from it, because it has nobody to cooperate with under the old instrument by which it remains bound.

Faced with this drifting away process,[39] the Danish authorities have announced that they are considering convening during the next legislative term a referendum to decide switching from the present version of Protocol 22 to the alternative one (the text of which is annexed to Protocol 22). This would establish for Denmark an opt-out system with an opt-in possibility like the UK and Ireland have. As well as relieving Denmark from its slow exclusion from the ex-third pillar *acquis*, this might help the lisbonisation process. But too late for what the negotiators had planned, i.e. diminishing the number of acts falling under the block opt-out.

Finally, a founding element for the good functioning of the EU legal order, but more particularly of the area of freedom, security and justice, is mutual trust between Member States. In the EU legal order, mutual trust is supported by the confidence that the EU institutions, and more particularly the Commission as "guardian of the Treaties" and the Court of Justice, which is charge of ensuring that "*the law in observed*" in the interpretation and application of the Treaties (Article 19(1) TEU), are there to see to it that Member States abide by their obligations. As a consequence of this enforcement system, the reciprocity principle does not apply within the EU. Contrary to what happens in classic international relations, EU Member States are not allowed to self-redress or to take the law in their own hands.

The ex-third pillar has lived through a rather long period without all the EU tools of enforcement and mutual trust may have suffered from that. This can be seen, for instance, from the critics often made on the European Arrest Warrant. Part of these may be explained by the prolonged absence of infringement powers of the Commission and of the Court which, as a consequence, could not deal either with excessive use of the EAW for relatively minor offences or with additional conditions put for executing an EAW. The end of the 5-year transitional period is therefore likely to help bringing more discipline in implementation and therefore more mutual trust.

_____

[39] This unfortunate consequence is underlined in the preamble of Protocol 22 which states, in its third recital: "*Conscious of the fact that a continuation under the Treaties of the legal regime originating in the Edinburgh decision will significantly limit Denmark's participation in important areas of cooperation of the Union, and that it would be in the best interest of the Union to ensure the integrity of the acquis in the area of freedom, security and justice*".