



The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?

Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele

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Abstract

This study examines the legal and political implications of the recent end of the transitional period for the measures in the fields of police and judicial cooperation in criminal matters, as set out in Protocol 36 to the EU Treaties. This Protocol limits some of the most far-reaching innovations introduced by the Treaty of Lisbon over EU cooperation on Justice and Home Affairs for a period of five years after the entry into force of the Treaty of Lisbon (until 1 December 2014), and provides the UK with special ‘opt out/opt-in’ possibilities. The study focuses on the meaning of the transitional period for the wider European Criminal Justice area. The most far-reaching change emerging from the end of this transition will be the expansion of the powers of scrutiny by the European Commission and Luxembourg Court of Justice over Member States’ implementation of EU criminal justice law. The possibility offered by Protocol 36 for the UK to opt out and opt back in to pre-Lisbon Treaty instruments poses serious challenges to a *common* EU area of justice by further institutionalising ‘over-flexible’ participation in criminal justice instruments. The study argues that in light of Article 82 TFEU the rights of the defence are now inextricably linked to the coherency and effective operation of the principle of mutual recognition of criminal decisions, and calls on the European Parliament to request the UK to opt into EU Directives on suspects’ procedural rights as a condition for the UK to ‘opt back in’ measures like the European Arrest Warrant.

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The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty:

Who monitors trust in the European Criminal Justice area?

Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele*

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Executive Summary

This study examines the legal and political implications of the recent end of the transitional period, enshrined in Protocol 36 to the EU Treaties, applicable to legislative measures dealing with police and judicial cooperation in criminal matters and adopted before the entry into force of the Lisbon Treaty. The analysis focuses on the meaning of the transitional period for the wider nature and fundamentals of the European Criminal Justice area and its interplay in the Area of Freedom, Security and Justice (AFSJ). Particular attention is paid to its multifaceted consequences of ‘Lisbonisation’ as regards supranational legislative oversight and judicial scrutiny, not least by the European Parliament in this context, as well as its relevance at times of rethinking the relationship between the principle of mutual recognition of judicial decisions and the fundamental rights of the defence in criminal matters in the AFSJ.

Legal Framework of the Transition

The transitional provisions envisaged in Protocol 36 have limited some of the most far-reaching innovations introduced by the Treaty of Lisbon over EU cooperation in justice and home affairs (JHA) for a period of five years (1 December 2009 to 1 December 2014). Such limits include restrictions on the enforcement powers of the European Commission and of the judicial scrutiny of the Court of Justice of the European Union over legislative measures adopted in these fields before the entry into force of the Lisbon Treaty under the old EU Third Pillar (Title VI of the former version of the Treaty on the European Union). Moreover, Protocol 36 provides for special ‘opt-out/opt-in’ possibilities for the UK. The scope and rules set out in Protocol 36 are of a highly complex and technical nature. The end of the transitional period enshrined in Protocol 36 reveals a complex conglomerate of legal provisions and procedures primarily designed for meeting the interest of some Member States’ governments to limit EU scrutiny, supervision and enforcement powers over national implementation and compliance with European law on police and criminal justice cooperation. This is a critical juncture because the transitional provisions of Protocol 36 come to a formal end on 1 December 2014.

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Findings and Challenges

The main legal and political challenges related to the transitional provisions of Protocol 36 are multifaceted. The recent end of the transitional period will only partially address the diverse legal landscape of fundamental rights protection in Europe's area of criminal justice. The study argues that the non-participation of the UK in EU legal instruments dealing with suspects' rights in criminal proceedings undermines severely the effective operability of pre-Lisbon Treaty instruments driven by the mutual recognition principle, such as the European Arrest Warrant, even if from a 'black letter' law perspective the UK is entitled to 'pick and choose'. In addition, the complex legal setting has contributed to creating legal uncertainty and lack of transparency characterising EU criminal justice instruments and their common applicability and implementation across the EU. The ambivalent position of the UK opens up the emergence of different and even competing areas of justice as well as dispersed levels of Europeanisation where enforcement of the principle of mutual recognition and protection of suspect rights are variable and anachronistic across the Union.

That notwithstanding, the study argues that one of the most far-reaching consequences of the end of the transitional period will be the shifting of supervision on compliance and faithful implementation of EU law on police and criminal justice from domestic authorities in the Member States to EU institutional instances. The end of the transition will most significantly mean the liberalisation of 'who monitors trust in the AFSJ'. This shift will for the first time ensure transnational legal, judicial and democratic accountability of Member States' laws and practices implementing EU law in these contested areas, in particular the extent to which EU legislation is timely and duly observed by national authorities.

Protocol 36 does not foresee a formal role for the European Parliament in the decisions involved in the transition. Yet, the Parliament does have responsibility for the partly highly sensitive content of the Third Pillar measures directly affecting the citizens' rights and freedoms and as co-legislator in post-Lisbon Treaty laws in these same domains. The lack of an effective and independent evaluation mechanism of EU criminal justice instruments based on the principle of mutual recognition poses a major challenge to legal and democratic accountability.

Protocol 36 has primarily aimed at limiting the degree of supranational (EU) legal, judicial and democratic scrutiny concerning EU Member States' obligations in the EU Area of Justice. The legal patchwork of UK participation in pre- and post-Treaty of Lisbon criminal justice *acquis* indeed sends a critical signal of incoherency in the current delineation of the European Criminal Justice Area. The study argues that the varied landscape resulting from the selective participation of the UK in EU criminal law measures poses significant challenges for legal certainty, the protection of fundamental rights in Europe's area of criminal justice and the overall coherence of EU law.

Article 82(2) TFEU grants express EU competence to legislate on rights of the defence in criminal procedures where necessary to facilitate the operation of the principle of mutual recognition in criminal matters. The legality of post-Lisbon legislation on defence rights is thus inextricably linked with the effective operation of mutual recognition in criminal matters, including of the Framework Decision on the European Arrest Warrant. This is supported by pertinent case law of the Court of Justice of the European Union (CJEU), which ruled against previous UK requests to participate in the Visa Information System, or the Frontex and biometrics regulations on the basis of a teleological and contextual approach focusing on the coherence of EU law.

The study argues that defence rights should not be negotiable at the expense of citizens' and residents' rights and freedoms. There is a direct causal link under EU primary law between the adoption of EU defence rights measures and the effective operation of mutual recognition enforcement instruments. Differing levels of EU Member State commitment to and participation in the fundamental rights of individuals in criminal proceedings run counter to a teleological approach which respects fully the objectives and the integrated nature of the AFSJ.

Recommendations

- **Increasing Coherency and Practical Operability: Suspects Rights as Sine qua non**

The transition envisaged in Protocol 36 may well lead to incoherency and practical inoperability of the European Criminal Justice Area. The European Parliament as co-legislator in EU criminal justice law has an active role to play at times of ensuring that a common understanding of ‘ensuring coherency’ and ‘practical operability’ of the EU AFSJ is firmly anchored on strong defence rights and fair trial protection (rights of suspected or accused persons) and a sound rule of law-compliant (on-the-ground) implementation across the domestic justice arenas of EU Member States.

- **Promoting Consolidation and Codification – Better Linking of Mutual Recognition and Rights of Suspects in Criminal Proceedings**

The European Parliament should give priority at times of implementing previous inter-institutional calls for consolidation and even codification of existing EU rules and instruments dealing with judicial cooperation in criminal matters. The new LIBE Committee should follow up the calls outlined in the European Parliament Report with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)). This should go along with the full accomplishment of the EU Roadmap of suspects’ rights in criminal proceedings as well as the procedural rights package.

- **Implementation and Evaluation – A Stronger Democratic Accountability**

The European Parliament should give particular priority to better ensuring Member States’ timely and effective implementation of pre- and post-Lisbon Treaty European criminal law. An effective and independent evaluation mechanism should be developed following the template provided by the new 2013 Schengen Evaluation Mechanism, in which the European Parliament has played a role in the decision-making and implementation. This template should be followed at times of implementing any future system for criminal justice cooperation.

The study starts by situating the discussion and briefly explaining the material scope and particulars featuring the transitional period in Protocol 36 in Section 2. Section 3 then moves into locating the debate in the specific context of the UK, and outlining its casuistic or privileged position in respect of the expansion of ‘supranationalism’ over EU police and criminal justice cooperation. Section 4 identifies a number of cross-cutting dilemmas and challenges affecting the transitional period, in particular those related to the impact of activating the Commission and Luxembourg Court’s legal and judicial scrutiny powers, questions of incoherencies due to UK’s variable participation and the obstacles to practical operability. Section 5 lays down three potential scenarios for the way forward in what concerns issues of fragmentation and coherence, reforming old EU Third Pillar law and the EAW while ensuring their added value, and questions related to implementation, consolidation and codification of EU criminal law. Section 6 offers some conclusions and puts forward a set of policy suggestions to the European Parliament and its LIBE Committee.

1. Introduction

This study examines the legal and political implications of the recent end of the transitional period enshrined in Protocol 36 to the EU Treaties for the legislative measures adopted in the fields of police and judicial cooperation in criminal matters before the entry into force of the Lisbon Treaty.¹ Protocol 36 limits some of the most far-reaching innovations introduced by the Treaty of Lisbon over EU cooperation on Justice and Home Affairs for a period of five years after the entry into force of the Treaty of Lisbon (1 December 2009). In particular, it foresees limits to the exercise of enforcement powers by the European Commission and the judicial scrutiny performed by the Court of Justice of the European Union (CJEU) over legislative measures adopted in these domains. It also prevents the full display of the legal effects of pre-Treaty of Lisbon legislative measures.

This same Protocol, controversially, envisages a special provision tailored to the UK to refuse accepting the liberalisation of the scrutiny powers of the European institutions after the five-year period and therefore the entire old EU *acquis* adopted before the Lisbon Treaty under the old EU Third Pillar² on police and criminal justice matters will cease to apply to the UK. The UK may still have the possibility to ‘opt back in’ as regards some of these measures, subject to a series of specific procedures. Prime Minister Cameron’s government used this option in July 2013³ by communicating its wish to opt out of all Union acts adopted before the end of 2009 and ‘opting back in’ to a list of 35 measures, which include one of the flagship EU instruments in criminal justice cooperation, the European Arrest Warrant.⁴

The transitional provisions envisaged in Protocol 36 came to a formal end on 1 December 2014. The scope and applicable rules to this transition are of a very complex legal nature, and they are surrounded by a whole series of technical procedures. The technicality characterising these issues may well prevent a comprehensive understanding of and political debate over the relevance and impact which might be expected to emerge from Protocol 36 and the various possible scenarios applying to its future implementation. It may also neglect its wider significance for the EU’s Area of Freedom, Security and Justice (AFSJ).

Current debates in academic and political circles have so far been far too attentive to the specific situation, interests and developments in the UK. While acknowledging the important effects of the UK’s special position, this study instead focuses on the meaning of the transitional period for the wider nature and fundamentals of the European Criminal Justice area and its interplay in the AFSJ. Particular attention is paid to its multifaceted consequences as regards supranational oversight and scrutiny, not least by the European Parliament in this context, as well as its relevance at times of rethinking the relationship between the principle of mutual recognition of judicial decisions and the fundamental rights of the defence in criminal matters.

The end of the transitional period enshrined in Protocol 36 reveals a complex conglomerate of legal provisions and technical procedures primarily designed for meeting the interest of Member States’ governments to limit EU scrutiny, supervision and enforcement powers over national implementation and compliance with European law on police and criminal justice cooperation. The study argues that the most far-reaching legal and political implications of the ‘Lisbonisation’ inherent to the operability of Protocol 36 can be summarised in the following two paragraphs:

¹ Protocol 36 is titled “Transitional provisions concerning acts adopted on the basis of Titles V and VI of the former version of the TEU prior the entry into force of the Treaty of Lisbon”. See Annex 1 of this study.

² EU Third Pillar corresponded to former Title VI of the Treaty on European Union.

³ See the written speech delivered by David Cameron on 23 January 2013 (<http://www.number10.gov.uk/news/eu-speech-at-bloomberg>); M. Emerson (2013), “Seven Hazards in Cameron’s Intended European Policy”, CEPS Commentary, CEPS, Brussels, 15 January.

⁴ Council of the EU (2002), Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, Official Journal L 190, 18.7.2002.

First, the liberalisation of ‘who’ checks mutual trust in the AFSJ and the Criminal Justice Area. One of the main consequences of the end of the transitional period will be the shifting of supervision on compliance and faithful implementation of EU law on police and criminal justice from domestic authorities in the Member States to EU institutional instances. This shift will for the first time ensure supranational legal, judicial and democratic accountability of Member States’ laws and practices in these contested areas, in particular the extent to which EU law is timely and duly observed by national authorities. This will go hand-in-hand with greater EU-level focus on and interest in implementation on the ground by Member States, in particular in what concerns the evaluation of the very basis or foundations on which EU criminal justice cooperation relies: chiefly, the quality of Member States’ institutions and ‘rule of law’ compliance of their judicial systems, in what concerns, for instance, the quality and independence of the judiciary, and detention or prison systems in light of European human rights standards.

Second, the end of the transitional period brings about a wider and far-reaching reflection about the current normative shapes of the European Criminal Justice Area, in particular the relationship between enforcement (mutual recognition of judicial decisions) and suspects’ rights sides. The Treaty of Lisbon gave ground to enhanced differentiation in the EU AFSJ by further expanding the possibilities for the UK to opt out of and re-opt in to a number of legislative measures in these domains, and to maintain its privileged position as regards those measures adopted after the Treaty of Lisbon. This has meant that the UK will have the possibility to ‘opt back in’ to the European Arrest Warrant (EAW) without participating at the same time in key legal measures adopted since the end of 2009 on the rights of individuals in criminal procedures. These include, for instance, the Directives on access to a lawyer, translation and interpretation and the right to information in criminal procedures,⁵ where the European Parliament has been actively involved as co-legislator. The European Commission will be the main actor holding the key to the UK opting back in to old EU Third Pillar (non-Schengen-related) measures.

This degree of differentiation, however, poses a profound risk of jeopardising the Treaty-based goal of establishing a *common* area of justice and suspects’ rights in the EU for citizens by further institutionalising ‘variable participation’ and wider possibilities of flexibility and exceptions. The resulting picture is the emergence of various (even competing) areas of justice across the EU, to the detriment of a harmonious protection of suspects’ fundamental rights. The selective participation of the UK is problematic from the perspective of the protection of fundamental rights in EU criminal justice cooperation, but also for legal certainty and consequently for the very coherency of the entire European justice area; this is backed by the CJEU’s case law on Frontex and police access to the Visa Information System (VIS).

The study starts by situating the discussion and briefly explaining the material scope and particulars featuring the transitional period in Protocol 36 in Section 2. Section 3 then moves into locating the debate in the specific context of the UK, and outlining its casuistic or privileged position in respect of the expansion of ‘supranationalism’ over EU police and criminal justice cooperation. Section 4 identifies a number of cross-cutting dilemmas and challenges affecting the transitional period, in particular those related to the impact of activating the Commission and Luxembourg Court’s legal and judicial scrutiny powers, questions of incoherencies due to UK’s variable participation and the obstacles to practical operability. Section 5 lays down three potential scenarios for the way forward in what concerns issues of fragmentation and coherence, reforming old EU Third Pillar law and the EAW while ensuring their added value, and questions related to implementation, consolidation and codification of EU criminal law. Section 6 offers some conclusions and puts forward a set of policy suggestions to the European Parliament and its LIBE Committee.

This study argues that Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) in combination with the ‘constitutionalisation’ of the EU Charter of Fundamental Rights, which now has the same legal value as the Treaties, have positioned and formally enshrined fundamental rights at the heart of

⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

the European Justice Area.⁶ The rights of the defence are now inextricably linked to the effective operation of the principle of mutual recognition of criminal decisions. Fundamental rights of suspects in criminal proceedings should therefore not be ‘negotiable’ in accordance with changing Member State governments’ wishes or domestic interests. They constitute a fundamental ingredient necessary to facilitate mutual recognition of judgments and judicial decisions. EU enforcement measures driven by the principle of mutual recognition cannot exist independently of defence rights measures. A suspect’s rights-centric approach should not be the only means to ensuring mutual trust and the very legitimacy of the EU AFSJ law in these areas. It also requires the compliance of the EU principle of loyal and sincere cooperation enshrined in Article 4(3) of the Treaty on the European Union (TEU).⁷ This principle stipulates the legal obligation of all EU Member States to facilitate the achievement of the Union’s tasks and refrain from adopting any measure which could jeopardise the attainment of the Union’s objectives, including the one laid out in Article 3 TEU, which states, “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers”.

⁶ In particular Chapter VI of the EU Charter (Justice) which provides for the rights to an effective remedy and fair trial, the presumption of innocence and rights of the defence as well as the principles of legality and proportionality of criminal offences and penalties, and the *ne bis in idem* principle; the UK negotiated a Protocol on the application of the EU Charter of Fundamental Rights.

⁷ Article 4.3 TEU states, “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives”.

2. ‘Lisbonisation’: The End of the Transitional Period over the Old EU Third Pillar

KEY FINDINGS

- The Treaty of Lisbon considerably changed the architecture of JHA cooperation by formally abolishing the pillar structure; Protocol 36, however, provides for (transitional) derogations.
- The concept of ‘Lisbonisation’ refers to the full liberalisation of the enforcement powers of European Commission and the Court of Justice of the European Union (CJEU), as well as the conversion of old EU third pillar legal and quasi-legal instruments into proper pieces of EU legislation.

The Treaty of Lisbon provides for transitional measures for police and judicial cooperation in criminal matters – the old EU third pillar – in Protocol 36 to the EU Treaties. The end of these transitional measures, which have stipulated exemptions from the normal competences of certain EU institutions, is also referred to as ‘Lisbonisation’. As has been pointed out by Carrera *et al.* the term ‘Lisbonisation’ has been used in several English versions of EU official documents,⁸ but there is not a commonly agreed definition or understanding of its scope and fundamentals.⁹ The term has been generally understood as comprising the changes brought by the Treaty of Lisbon, in particular when referring to the innovations introduced by the Title V (Area of Freedom, Security and Justice) of the Treaty on the Functioning of the European Union (TFEU), and its Articles 67-89.

For the purpose of this study, however, ‘Lisbonisation’ is understood and used as mainly referring to the still pending ‘Lisbonisation’ of Union legislative acts adopted prior the Treaty of Lisbon in the areas of police and criminal justice cooperation (ex-Third Pillar acts) and which are subject to Protocol 36 on ‘Transitional Provisions’ (Title VII, Article 10) of the Treaty of Lisbon, which came to an end on 1 December 2014. While the application of the Community method of cooperation (ordinary legislative procedure) has been in place since the end of 2009, ‘Lisbonisation’ here rather refers to the full liberalisation of the enforcement powers recognised by the Treaties to the European Commission and the Court of Justice of the European Union (CJEU) in Luxembourg, as well as to converting old EU Third Pillar legal and quasi-legal instruments into proper pieces of EU legislation and therefore granting direct effect and enforceability.¹⁰

To recall, the old EU Third Pillar on “Cooperation in the Fields of Justice and Home Affairs” was established under the Treaty of Maastricht (which first introduced the Three-Pillar Structure)¹¹ and listed nine areas of common interest relating to asylum, immigration and visa policy, external borders, customs cooperation, police and judicial cooperation in criminal matters, and cooperation in civil law.¹² The legal

⁸ See for example European Parliament resolution of 15 December 2010 on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)), document number: P7_TA(2010)0483, para. 23.

⁹ S. Carrera, N. Hernanz and J. Parkin (2013), “The ‘Lisbonisation’ of the European Parliament – Assessing progress, shortcomings, and challenges for democratic accountability in the area of freedom, security and justice”, Working Paper No. 58, CEPS Liberty and Security in Europe Series, CEPS, Brussels, pp. 6-7.

¹⁰ The Presidency defined the verb ‘to lisbonise’ in the context of Article 10 of Protocol 36 as “i.e. amended or replaced by an act adopted post-Lisbon.” Council of the European Union, “Application of Article 10 of Protocol 36 to the Treaties”, document number: 7519/14 of 10 March 2014, p. 3; see also Annex of the Council document listing ex-Third Pillar acts “which have already been ‘lisbonised’, are soon to be ‘lisbonised’ or are in the process of being ‘lisbonised’”.

¹¹ There were originally seven titles in the TEU: Title I included the common provisions; Titles II, III and IV comprised the First Pillar; Title V corresponded with the Second Pillar (Common Foreign and Security Policy) and Title VI the Third Pillar (Justice and Home Affairs). As Craig argues, this basic architecture remained by and large unchanged (notwithstanding the amendments in the Second and Third Pillars and the addition of a new Title VIII on enhanced cooperation) until the entry into force of the Lisbon Treaty. P. Craig (2013), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, pp. 332-333.

¹² See old Article K.1 TEU.

nature of this Third Pillar was rather specific as it was based on intergovernmental cooperation among the Member States (its substance being public international law requiring unanimity in decision-making) outside the Community framework of the former First Pillar.¹³ With the entry into force of the Treaty of Amsterdam in May 1999 only police and judicial cooperation in criminal matters continued to remain under the auspices of the old EU Third Pillar (Title VI TEU), still subject to the intergovernmental method of cooperation.¹⁴ The EU Third Pillar was subject to various concerns across scholarly contributions alluding to the legal complexity and uncertainty as well as lack of proper legal, judicial and democratic accountability.¹⁵ The entry into force of the Treaty of Lisbon on 1 December 2009 marked significant changes to the previous architecture of JHA cooperation. It introduced a formal abolition of the pillar structure, and police and judicial cooperation in criminal matters was ‘communitarised’ or brought under the main fabric of the Community method of cooperation. As a result, any new EU legislative measures concerning policing and criminal law have taken the form of Regulations and Directives, subject to the ‘normal’ effect of EU law (including direct effect and supremacy) and ordinary legislative procedures (with the European Parliament as co-legislator) and the normal jurisdiction of the CJEU.¹⁶ The ‘normal’ effect of EU law allows individuals under certain circumstances to claim rights derived from EU law directly before their national courts. However, for legislative measures adopted prior to the entry into force of the Treaty of Lisbon, Protocol 36 to the Treaties stipulates ‘Transitional Provisions’, which are the subject of examination in this study.

What do such ‘Transitional Provisions’ exactly provide for? Article 10 of Protocol 36 specifies that as a transitional measure for five years after the entry into force of the Treaty of Lisbon (until 1 December 2014), the powers of the Court of Justice and of the European Commission in the field of police cooperation and judicial cooperation in criminal matters are restricted to the version in force before the entry into force of the Treaty of Lisbon in view of pre-Lisbon Third Pillar measures *for all Member States*.¹⁷

The Commission is thus not able to start infringement proceedings against those Member States in breach of their obligations to implement these laws during this transitional period in the field of police and judicial cooperation in criminal matters. In addition, the CJEU has in principle no full jurisdiction to review and answer questions from the Member States’ national courts on the interpretation of these subject matters, except if the Member States have accepted such jurisdiction optionally. Indeed, in accordance with former Article 35 TEU, 18 Member States have formally accepted such jurisdiction and the CJEU has been active in handing down judgments (see Table 1 below).¹⁸ A large majority of the ‘traditional’ EU15 member states have recognised the jurisdiction of the Court to give preliminary rulings on the validity and interpretation of these acts, with the exception of the UK, Ireland and Denmark. All national courts in the Member States can send questions to the CJEU except in Spain, where only courts of last instance may do so.¹⁹

¹³ P.C. Müller-Graff (1994), “The Legal Bases of the Third Pillar and Its Position in the Framework on the Union Treaty”, *Common Market Law Review*, Vol. 31, No. 3, pp. 493-510.

¹⁴ As J.P. Kuijper (2004) put it, “the ‘Third Pillar’ has confirmed the general prejudice against the intergovernmental method and reconfirmed the ‘Community method’”, see “The Evolution of the Third Pillar From Maastricht to the European Constitution: Institutional Aspects”, *Common Market Law Review*, Vol. 41, No. 2, pp. 609-626, p. 626.

¹⁵ S. Carrera and E. Guild (2006), “No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice”, in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe’s Future*, Aldershot: Ashgate Publishing, pp. 223-239. See also S. Carrera, E. Guild and T. Balzacq (2010), “The Changing Dynamics of Security in an Enlarged European Union”, in S. Carrera, D. Bigo, E. Guild and R. Walker, *Europe’s 21st Century Challenge: Delivering Liberty*, Aldershot: Ashgate Publishing, pp. 31-48.

¹⁶ See S. Peers (2009), “The ‘Third Pillar acquis’ after the Treaty of Lisbon enters into force”, *Statewatch Analysis*, November.

¹⁷ Article 10(1) and (3) of Protocol 36.

¹⁸ Article 35 TEU. See S. Peers (2014), “The UK opt in to pre-Lisbon EU criminal law”, *Statewatch Analysis*, July.

¹⁹ S. Peers (2012), “The UK’s planned ‘block opt-out’ from the EU justice and policing measures in 2014”, *Statewatch Analysis*, October.

Table 1. Jurisdiction of the Court of Justice (CJEU) on pre-Lisbon Third-Pillar Acts²⁰

<u>Member States accepting CJEU jurisdiction</u>	<u>Member States not having accepted CJEU jurisdiction</u>
Austria	Bulgaria
Belgium	Denmark
Czech Republic	Estonia
Finland	Ireland
France	Malta
Germany	Poland
Greece	Slovakia
Hungary	UK
Italy	
Latvia	
Lithuania	
Portugal	
Romania	
Slovenia	
Spain (only courts of last instance may submit questions to the CJEU)	
Sweden	
The Netherlands	

Importantly, in case acts in this specific field are amended after the entry into force of the Treaty of Lisbon, the transitional rules cease to apply for such acts.²¹ This was the case, for example, for Council Framework Decision 2002/629/JHA on combating trafficking in human beings which was replaced by Directive 2011/36/EU of 5 April 2011.²² S. Peers raised the crucial question as to what an ‘amendment’ to a pre-existing Third Pillar act really is: “There is no *de minimis* rule, so it would seem that even a minor amendment to a pre-existing third pillar act would trigger the application of the new rules on the Court’s jurisdiction and the legal effect of to all the measures concerned.”²³

With a view to providing guidance and input on the application of Article 10 of Protocol 36 to the EU Treaties, the so-called Friends of Presidency Group was created.²⁴ The Friends of Presidency Group is charged with “examining issues linked to the end of the 5 year transitional period set out in Article 10 of Protocol 36 to the Treaties” reporting to Coreper.²⁵ The Friends of Presidency Group is composed of representatives of the Member States, with the Commission being present during the negotiations.

It has been pointed out that the ex-Third Pillar acts that fall under Protocol 36 are very diverse in legal nature. Some of such acts have even been defined as “quasi-legislative” or quasi-legal (i.e. Framework Decisions), others are binding, even if not within more ordinary pieces of EU legislation (i.e. international agreements, conventions and the Council Decision) or their nature is uncertain (i.e. Joint Actions adopted

²⁰ The authors could not find information on Croatia’s position.

²¹ Article 10 (2) of Protocol 36.

²² Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

²³ S. Peers (2011), *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 3rd ed., p. 64.

²⁴ Council of the European Union, Note from the Presidency to COREPER on “Application of Article 10 of Protocol 36 to the Treaties”, document number: 7527/14 of 17 February 2014, p. 3.

²⁵ Ibid., for the Terms of Reference of the Friends of Presidency Group.

under the Maastricht Treaty).²⁶ Independently of the actual nature of these instruments, their effects over the fundamental rights of individuals are potentially profound, particularly those related to the rights of defence. There has also been much legal uncertainty as regards the nature and effects of these same acts. This has been the case in respect of Framework Decisions, which are binding on Member States in their entirety and do not require national ratification.²⁷ This, as it will be developed in Sections 4 and 5 below, has led to a very poor record of Member States' implementation of these instruments on the ground. Moreover, wide discussions have been held concerning the extent to which these instruments benefit from 'direct legal effect'. The CJEU has clarified some of these questions as well as the relevance of the EU Charter of Fundamental Rights in this context (See Section 4.1 below). For instance, in the *Pupino* judgment, the Court ruled that "its jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a confirming interpretation of national law before the Courts of the Member States".²⁸

The legal effects these ex-Third Pillar acts entail are likewise specific: differently from the experience in the incorporation of the Schengen *acquis* into the EU framework with the 1999 Treaty of Amsterdam, and as a 2013 Council Note on the Preparation of the upcoming end of the five-year transitional period provided for in Article 10(1) to (3) of Protocol 39 on transitional provisions clarifies,

"...pursuant to Article 9 of Protocol 36, the legal effects of such acts will in any event 'be preserved until those acts are repealed, annulled or amended' in accordance with the post-Lisbon Treaties. This means that the legal effects of pre-Lisbon 'common positions', 'framework decisions' and 'decisions' as defined in Article 34 of the former TEU will continue to apply until they are amended or replaced (or, indeed, repealed or annulled)."²⁹

In other words, the legal effects of ex-Third Pillar instruments will remain the same if not amended, replaced, repealed or annulled. That notwithstanding, and as this Council Note also highlights, such legal effect should, however, be read together with relevant CJEU case law, notably the above-mentioned *Pupino* Case, which limited the consequences of the absence of direct effects of framework decisions. Here the CJEU went further by acknowledging that the duty of consistent interpretation had to be extended to Framework Decisions. According to the CJEU such interpretation is, however, inherently limited by the general principles of Union law and that it can never be used to establish or aggravate criminal liability. Moreover, the duty of consistent interpretation is limited by an interpretation *contra legem*.³⁰

Which ex-Third Pillar acts will be not amended, replaced, repealed or annulled? With respect to Article 10(1) to (3) of Protocol 36, the Presidency listed ex-Third Pillar acts "which have already been 'lisbonised', are soon to be 'lisbonised' or are in the process of being 'lisbonised'".³¹ This list was subdivided into non-Schengen ex-Third Pillar *acquis* and Schengen ex-Third Pillar *acquis*. In addition, the Commission has published a revised preliminary list of the former Third Pillar *acquis* in May 2014.³² The Friends of Presidency Group gave an account of its examination of the list of measures covered by Article 10 of

²⁶ E. De Capitani (2014), "1st December is approaching: will the EU's 'creative ambiguity' on police and judicial cooperation in criminal matters finally draw an end?", Blog on European Area of Freedom, Security and Justice, posted on 8 July 2014; see also S. Peers (2008), "Finally 'Fit for Purpose?' The Treaty of Lisbon and the End of the Third Pillar Legal Order", *Yearbook of European Law*, Vol. 27, No. 1, pp. 47-64, p. 62.

²⁷ Refer to former Article 34 TEU.

²⁸ Case C-105/03, Criminal Proceedings against Maria Pupino, 16 June 2005, paragraph 38.

²⁹ Council of the European Union, "Preparation of the upcoming end of the five year transitional period provided for in Article 10(1) to (3) of Protocol 39 on transitional provisions", document number: 8878/13 of 25 April 2013, p. 3.

³⁰ See E. Spaventa (2007), "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*", *European Constitutional Law Review*, Vol. 3, No. 1, pp. 5-24; as well as S. Lorenzmeier (2006), "The Legal Effect of Framework Decisions – A Case-Note on the *Pupino* Decision of the European Court of Justice", *Zeitschrift für internationale Strafrechtsdogmatik*, Vol. 12, pp. 583-588.

³¹ See Annex of Council of the European Union, "Application of Article 10 of Protocol 36 to the Treaties", document number: 7519/14 of 10 March 2014.

³² European Commission (2014), Revised preliminary list of the former third pillar *acquis*, SWD(2014) 166, 14.5.2014.

Protocol 36, taking over the subdivision of Schengen- and non-Schengen-related issues.³³ There is no formal role recognised for the European Parliament in respect of either Schengen-related or non-Schengen-related measures.

To summarise, five years after the date of the entry into force of the Treaty of Lisbon the transitional measures mentioned in Article 10(1) of Protocol 36 will cease to have effect. This means that as of 1 December 2014, the Commission will assume its full powers as guardian of the Treaties under Article 258 TFEU with regard to Third Pillar law and the CJEU will assume its full jurisdiction to give preliminary rulings under Article 267 TFEU.

³³ Council of the European Union, “Application of Article 10 of Protocol 36 – Work of Friends of Presidency Group – Report on the state of play and follow up”, document number: 10114/14 of 22 May 2014.

3. The Position of the UK and Protocol 36

KEY FINDINGS

- Protocol 36 provides the UK with special, derogatory ‘opt-out/opt-in’ possibilities that can lead to differentiation in European cooperation in police and criminal justice matters.
- Other Member States have criticised the UK’s approach of pushing for special treatment, which is exacerbated by the Conservatives’ call for holding a referendum on the UK’s EU membership in 2017: What does the UK actually want?

The UK’s position in respect of European cooperation on Justice and Home Affairs has been traditionally a peculiar and casuistic one. The UK has managed to negotiate a privileged position by inserting provisions into Protocol 36 (Title VII) to the Treaties, which allow the Member State to continue its ‘pick and choose’ (‘opt-out/opt-in’) approach in the field of police and judicial cooperation in criminal matters.³⁴ Why has the UK pursued this special or differentiated path of cooperation? E. De Capitani indicates the UK’s intentions were to protect its common law systems from the CJEU’s “judicial activism”; according to the UK House of Lords Report “EU police and criminal justice measures: The UK’s 2014 opt-out decision”, this approach was taken by the UK government because most pre-Lisbon police and judicial cooperation measures were drafted without regard for the CJEU’s judicial scrutiny powers.³⁵

The UK’s special position on the basis of Article 10 of Protocol 36 can be synthesised as follows: The UK may opt out at the end of the transitional period of five years (1 December 2014). For this the UK has to notify the Council at the latest six months before the expiry of the transitional period (by 1 June 2014) that it does not accept the “normal” powers of the institutions stipulated in the Treaties.³⁶ In case the UK has made that notification, all pre-Lisbon Third Pillar acts cease to apply to it as from the date of expiry of the transitional period, meaning 1 December 2014, unless those acts have been amended and the UK has opted in to these acts. In this instance, the Council, acting by a qualified majority on a proposal from the Commission, will determine the necessary consequential and transitional arrangements; the UK shall not participate in the adoption of this decision. The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

Finally, the UK is free to opt in to those acts in which it wishes to participate, any time afterwards. In that case, the relevant provisions of the Protocol on the Schengen *acquis* or of the Protocol on the position of the UK and Ireland in respect of the AFSJ, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. Article 10 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 in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.”³⁷ What does this latter sentence imply? The Presidency specified, “This means that both the UK and the Union (i.e. the Council and the Commission before allowing, under their respective powers, the re-participation of the UK) will have to respect these three tests: (1) widest possible measure of participation,

³⁴ See S. Peers (2012), “The Mother of all Opt-outs? The UK’s possible opt-out from prior third pillar measures in June 2014”, Statewatch Analysis, February.

³⁵ E. De Capitani (2014), “1st December is approaching: will the EU’s ‘creative ambiguity’ on police and judicial cooperation in criminal matters finally draw an end?”, Blog on European Area of Freedom, Security and Justice, posted on 8 July 2014, referring to House of the Lords (2012-2013), Report “EU police and criminal justice measures: The UK’s 2014 opt-out decision”, European Union Committee, 13th Report Session, HL Paper 159.

³⁶ Article 10(4) of Protocol 36.

³⁷ Article 10(5) of Protocol 36.

(2) not seriously affecting the practical operability of the various parts of the JHA *acquis*, (3) respecting coherence of these various parts.”³⁸

On 24 July 2013 the UK notified the Council that it wishes to opt out of all Union acts in the field of police and judicial cooperation in criminal matters (‘block opt-out’).³⁹ At the same time, the UK Home Secretary announced to the UK Parliament that the UK would seek to opt back in to 35 measures that are considered central to EU cooperation in that field. The UK government published in July 2014 a list on the measures in which it wishes to re-opt in.⁴⁰ This publication is in line with the wish of the EU institutions and the Member States “who have an interest in a large degree of clarity concerning the acts which will continue to apply to the UK.”⁴¹ The formal notification to opt back in can only be made, however, on or after 1 December 2014 by the UK authorities.⁴² As previously announced, the UK government decided to let Parliament take a vote on the decision to opt back into all 35 measures. The vote on the 35 measures is politically binding as the UK government did not need parliamentary scrutiny of the opt-in (according to a ruling of the speaker of the House of Commons the vote was legally binding for only 11 of such measures). This, in turn, led to the confusion and disappointment of many MPs.⁴³ The political significance of such votes internally cannot, however, be underestimated.

The Commission has concluded that the UK should add the Council Decisions relating to Europol⁴⁴ as well as the Council Decision on the European Judicial Network⁴⁵ to the list to ensure practical operability and coherence.

For this ‘opt-back-in’ the Commission will scrutinise the UK requests of the non-Schengen measures⁴⁶; for Schengen measures, the decision is taken by the Council.⁴⁷ As highlighted previously the European Parliament has no formal role in these decisions.

In view of the UK’s special position, the Presidency suggested the Friends of Presidency Group:

- examines the list of the ex-Third Pillar *acquis* which has not been ‘lisbonised’ (i.e. amended or replaced by an act adopted post-Lisbon) for the UK;
- examines the informal list of 35 measures into which the UK intends to opt in (applying the three tests set out above and ensuring coherence of the Schengen *acquis*)⁴⁸;
- indicates whether evaluation on putting into effect of Schengen Information System II (SIS II) for the UK should go separately or in parallel with the UK’s ‘block opt-out’ and ‘re-opt-in’ to the relevant *acquis*;
- and, finally, examines the need for transitional arrangements as well as consequential arrangements related to the special position of the UK.⁴⁹

³⁸ Council of the European Union, “Article 10 of Protocol 36 to the Treaties”, document number: 10168/14 of 16 June 2014, p. 5.

³⁹ Council of the European Union, “UK notification according to Article 10(4) of Protocol No 36 to TEU and TFEU”, document number: 12750/12 of 26 July 2013.

⁴⁰ HM Government (2014), Decision pursuant to Article 10(5) of Protocol 36 to the Treaty on the Functioning of the European Union”, UK Home Office.

⁴¹ Council of the European Union, “Article 10 of Protocol 36 to the Treaties”, document number: 10168/14 of 16 June 2014, p. 4.

⁴² Ibid.

⁴³ See S. Peers (2014), “What just happened? The House of Commons ‘vote’ on the European Arrest Warrant”, Blog on EU Law Analysis – Experts insights into EU law developments, 10 November 2014.

⁴⁴ Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol’s relations with partners, including the exchange of personal data and classified information; Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files; Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information.

⁴⁵ Council Decision 2008/976/JHA on the European Judicial Network.

⁴⁶ Article 10(5) of Protocol 36 in conjunction with Article 4 of Protocol 21 and Article 331(1) TFEU.

⁴⁷ Article 10(5) of Protocol 36 in conjunction with Article 4 of Protocol 19.

⁴⁸ See Annex 2 of this study.

What are the consequences of the UK's 'block opt-out' and a subsequent selective 'opt-back-in'? As S. Peers has put it – aside from the refusal to accept the CJEU's jurisdiction – the most important impact would be the non-application of the respective EU measures concerning the UK as of 1 December 2014.⁵⁰ Peers highlights that the scope of the 'block opt-out' applies only to:

- pre-Lisbon ex-Third Pillar measures dealing with policing and criminal law;
- measures adopted prior to the entry into force of the Treaty of Lisbon, not measures adopted after its entry into force;
- measures which have not been amended since the entry into force of the Treaty of Lisbon;
- EU measures, meaning "acts of the Union", rather than international agreements to which the UK is separately a party outside EU framework.⁵¹

The possibility of opting back in allows the UK – after having declared its 'block opt-out' – to participate in some measures without a time limit ('at any time') as set out in Article 10(5) of Protocol 36. "The underlying intention of Article 10(5) is clearly to encourage the UK's continued participation as much as possible...with concern also for 'practical operability'."⁵² As stipulated in the same provision, the decision to 'opt back in' will be regulated by:

"...the relevant provisions of the Protocol on the Schengen *acquis* integrated into a 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."

This means that different procedural rules apply depending on the Protocol in question: If the Schengen Protocol is applicable, it is the Council that decides on the re-admission of the UK by unanimity. If it is the JHA Protocol that is applicable, it is the Commission that decides in accordance with Article 331 TFEU.⁵³

How did the other Member States perceive the UK's manoeuvre to negotiate the 'opt-out/opt-in' derogatory rules by which the UK basically decided not to decide? Some Member States were discontent with the UK's approach of pushing for special treatment, which is exacerbated by the Conservatives' call for holding a referendum on the UK's EU membership.⁵⁴ In the light of this move by the Conservatives, the UK's request to participate in the SIS II and to create a "form of proportionality assessment as regards the transmission of EAW alerts through SIS II" was not well perceived by some Member States. In particular, the Member States' complaints related to: the legal uncertainty that the UK's opt-in position triggers; objections to the planned EAW proportionality check by the UK; the undue burden that the UK's position creates for other Member States; the lack of 'lasting reliability' of the UK's position.⁵⁵

On the basis of Article 10(4) of Protocol 36 the Council, acting by a qualified majority on a proposal from the Commission, has the competence to determine, firstly, the necessary consequential and transitional arrangements and, secondly, the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts. Such decisions would need to be separate because of different voting rights for the UK (i.e. the UK may not vote on consequential and transitional

⁴⁹ Council of the European Union, "Application of Article 10 of Protocol 36 to the Treaties", document number: 7519/14 of 10 March 2014, p. 9.

⁵⁰ S. Peers (2012), "The UK's planned 'block opt-out' from the EU justice and policing measures in 2014", *Statewatch Analysis*, October; and S. Peers (2012), "The Mother of all Opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014", *Statewatch Analysis*, February; for an in-depth analysis, see also A. Hinarejos, J.R. Spencer and S. Peers (2012), "Opting out of EU Criminal law? What is actually involved?" CELS Working Paper No. 1, September, Cambridge.

⁵¹ For a detailed analysis of the implications of the opt out refer to A. Hinarejos, J.R. Spencer and S. Peers (2012), "Opting our EU Criminal Law: What is actually involved?", CELS Working Paper, No. 1, Centre for European Legal Studies, Cambridge.

⁵² S. Peers (2012), "The UK's planned 'block opt-out' from the EU justice and policing measures in 2014", *Statewatch Analysis*, October.

⁵³ *Ibid.*

⁵⁴ S. Peers (2014), "The UK opt-out from Justice and Home Affairs law: the other Member States finally lose patience", *Statewatch Analysis*, July.

⁵⁵ *Ibid.*

arrangements, but is allowed to vote on financial consequences.⁵⁶ With regard to the latter decision the Commission has put forward a Council Decision requiring the UK to pay a financial compensation of up to EUR 1 508 855.⁵⁷ Protocol 36 does not set forth any role for the European Parliament, which limits democratic scrutiny; see Section 4.4 below.

What does the end of the transitional period mean for the UK? 1 December 2014 will not bring major changes for the UK: it will retain its privileged position in EU decision-making with the privilege/possibility to opt in. The end of the transitional period does not put an end to the legal uncertainty inherent to the UK's participation in European Criminal Justice Area-related initiatives, nor with the 'fragmentation' and legal dispersion of norms and arrangements which leads to various 'areas' of justice in the EU.

Other debates have put the UK in the spotlight, including the possible 2017 referendum on the UK's participation in the EU, and recently announced plans by UK Conservatives to stop British laws being overruled by human rights judgments from the Strasbourg Court, which was described as "viable and legal".⁵⁸ In view of a possible 2017 referendum, in 2012 the British government had already called – under the heading of "Balance of Competence" – for evidence (from several sectors, including business, academia, and civil society) that the EU's competences might have become unduly large, or otherwise warrant revision.⁵⁹ Previous research confirms that there is little or no case for repatriation of EU competences as they are defined in the Treaties.⁶⁰ The EU has accepted the UK's 'cherry picking' approach in some policy fields (for example, with opt-out or discretionary opt-in possibilities in asylum, immigration and civil judicial cooperation).

As formally enshrined in the Lisbon Treaty, which fosters differentiation and 'too much flexibility' as regards European cooperation in police and criminal justice matters,⁶¹ the EU has thereby demonstrated a considerable degree of flexibility as regards special arrangements for the UK. As has been highlighted such an approach would be practically unworkable if all Member States tried to copy this kind of 'special' or differential treatment, particularly when this has direct implications over citizens' rights and freedoms.⁶²

⁵⁶ See Council of the European Union, "Application of Article 10 of Protocol 36 to the Treaties", document number: 7519/14 of 10 March 2014, p. 5.

⁵⁷ European Commission (2014), Proposal for a Council Decision 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, COM(2014) 595, 26.9.2014; Council of the European Union, "Council Decision 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 – revised draft", document number: 14018/14 of 9 October 2014.

⁵⁸ See: BBC Report (2014), "European human rights rulings 'to be curbed' by Tories", 3 October. Available at: <http://www.bbc.co.uk/news/uk-politics-29466113>.

⁵⁹ British government report (2012), "Review of the Balance of Competences between the United Kingdom and the European Union", presented to Parliament by the Secretary of State of Foreign and Commonwealth Affairs by Command of Her Majesty, July, London.

⁶⁰ See M. Emerson and S. Blockmans (2013), "British Balance of Competences Reviews, Part I – 'Competences about right, so far'", EPIN Paper No. 35, October; and M. Emerson, S. Blockmans, S. Peers and M. Wriglesworth (2014), "British Balance of Competences Reviews, Part II – Again, a huge contradiction between the evidence and Eurosceptic populism", EPIN Paper No. 40, June.

⁶¹ S. Carrera and F. Geyer (2008), "The Reform Treaty and Justice and Home Affairs – Implications for the common Area of Freedom, Security and Justice", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate Publishing, 2008, pp. 289-307.

⁶² M. Emerson, S. Blockmans, S. Peers and M. Wriglesworth (2014), "British Balance of Competences Reviews, Part II – Again, a huge contradiction between the evidence and Eurosceptic populism", EPIN Paper No. 40, June.

4. The End of a Transition: Cross-Cutting Issues and Challenges

KEY FINDINGS

- The expectations behind the ‘Lisbonisation’ in this particularly sensitive policy area relate especially to enhancing legal and judicial accountability as well as the wider legitimacy in the AFSJ.
- Defence rights measures under Article 82(2) TFEU cannot exist independently of measures on mutual recognition.
- While Protocol 36 does not foresee a formal role of the European Parliament; it has a responsibility on the partly highly sensitive content of Third Pillar measures directly affecting the citizens.

4.1 Impact of the End of Transitional Period for EU Third Pillar Law: Who Monitors Trust?

The end of the five-year transitional period prescribed in Protocol 36 on Transitional Provisions will confirm the shift from intergovernmentalism to supranationalism in EU Third Pillar law and lead to the assumption of the full powers of EU institutions in the field. The pre-Lisbon scenario was one where policy-making was based on intergovernmental methods, meaning the policies were Member State-driven and the JHA Council was the main actor determining the priorities and the way forward in issues relating to the AFSJ, without any EU-level scrutiny or supervision. The end of such extended intergovernmentalist structures under the transitional provisions means more transparency and an enhanced enforcement mechanism in practice. The special position of the UK aside, this change sends in addition a strong political signal to bring an end to derogatory rules restricting the competences of the EU institutions.

The question arises of what the end of the transitional period or ‘Lisbonisation’ really mean both in legal and political terms. The end of the transitional period implies that the field of police cooperation and judicial cooperation in criminal matters will be subject to the “normal” enforcement powers of the European Commission and the CJEU in all the Member States, with specific rules applying to the UK and Denmark under Protocol 22.⁶³ As S. Peers points out, annually three to five cases have been referred by national courts to the CJEU, before and after the entry into force of the Treaty of Lisbon.⁶⁴ Such cases dealt almost exclusively with the following three instruments: the Framework Decision on crime victims; the Framework Decision on the European Arrest Warrant; the Schengen Convention rules on cross-border double jeopardy.⁶⁵

The expectations behind the ‘Lisbonisation’ in this particularly sensitive policy area relate especially to enhancing legal and judicial accountability as well as the wider legitimacy in the AFSJ. It has been emphasised that with the end of the transitional period it will be possible on the basis of real and transparent data to decide if dozens of AFSJ measures, for example, the EAW, which have been negotiated in a different legal and political context should be revised to comply with the new EU constitutional framework.⁶⁶ It will

⁶³ See Council of the European Union (2014), “Application of Article 10 of Protocol 36 to the Treaties”, document number: 7519/14 of 10 March, para. 8; on the enforcement of EU law, including infringement proceedings and preliminary rulings of the CJEU, see L. Conant (2012), “Compliance and What Member States Make of It”, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law*, Oxford: Oxford University Press.

⁶⁴ S. Peers (2012), “The UK’s planned ‘block opt-out’ from the EU justice and policing measures in 2014”, *Statewatch Analysis*, October.

⁶⁵ Ibid.

⁶⁶ E. De Capitani (2014), “1st December is approaching: will the EU’s ‘creative ambiguity’ on police and judicial cooperation in criminal matters finally draw an end?”, Blog on European Area of Freedom, Security and Justice, posted on 8 July 2014.

thus provide scope for the Commission to examine in detail the implementation efforts of the Member States in the AFSJ. Partly, the Commission has already published reports either on the implementation of certain measures, such as the EAW, or pre-alert communications to prevent proceedings after 1 December 2014.⁶⁷ Many Member States have not transposed Framework Decisions, which has created a variable legal landscape in which cooperation is difficult to achieve.⁶⁸

The full involvement of the Commission as guardian of the Treaties and the possibility of instituting infringement proceedings will lead to a greater focus on the correct and timely implementation of Third Pillar law – including the plethora of Framework Decisions on various aspects of mutual recognition which remain largely unimplemented across the European Union – by Member States.⁶⁹ On the other hand, allowing courts of all Member States to send questions on the interpretation of EU law to the CJEU in Luxembourg will have a beneficial effect on the development and interpretation of the EU Third Pillar *acquis*, especially in cases where national courts seek recourse to the Court of Justice in order to assist with the interpretation of key Third Pillar law concepts.

A characteristic example of the current *lacunae* in the interpretation of Third Pillar law caused by the current limits to the jurisdiction of the Court of Justice in the field concerns the interpretation of a key concept in the field of judicial cooperation in criminal matters, and in particular mutual recognition, that of ‘judicial authority.’ The Supreme Court of the United Kingdom, which has not been granted the right to send preliminary references to Luxembourg by the UK Government under the Third Pillar arrangements, has had to grapple with the question of the definition of judicial authority for the purposes of the Framework Decision on the European Arrest Warrant in two recent cases, the case of *Assange* and the case of *Bucnys*. In the absence of the cooperative avenue of preliminary references with regard to Third Pillar law for UK courts, the Supreme Court could not avail of the assistance of the Court of Justice and thus had to develop an autonomous concept of judicial authority on its own. In *Bucnys*, the Court did so largely by reference to what it assumed Luxembourg would decide on this matter. Subsequently, the Court of Justice put forward a definition of the concept of judicial authority for the purposes of the Framework Decision on mutual recognition of financial penalties in the case of *Balasz*. However, the normalisation of the preliminary references jurisdiction of the Court of Justice after the end of the transitional period will be a considerable improvement in enabling national courts in all Member States to send questions on the interpretation of Third Pillar law to Luxembourg and thus contribute decisively to legal certainty and the cooperative evolution of the EU *acquis* in the field.

A parallel development affecting the implementation and interpretation of Third Pillar law after Lisbon is the constitutionalisation of the EU Charter of Fundamental Rights via its incorporation in the Treaty of Lisbon. In a number of key rulings since the entry into force of the Treaty of Lisbon, the Court of Justice has confirmed the applicability of the Charter on Third Pillar law. In the case of *Melloni* (Case C-399/11, *Melloni*, judgment of 26.2.2013), the Court of Justice confirmed the application of the principle of primacy of EU law in relation to Third Pillar law, namely the Framework Decision on the European Arrest Warrant. In *Melloni*, the Court rejected an interpretation of Article 53 of the Charter as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the

⁶⁷ See European Commission (2011), Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States, COM(2011) 175, 11.4.2011; as well as European Commission (2014), Report on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM(2014) 312, 2.6.2014.

⁶⁸ The official statistics at EU and Member State levels on the implementation of the EAW are scattered and incomplete, see S. Carrera, E. Guild and N. Hernanz (2013), “Europe’s most wanted? Recalibrating Trust in the European Arrest Warrant System”, Working Paper No. 55, CEPS Liberty and Security in Europe Series, CEPS, Brussels, p. 4.

⁶⁹ Ibid., see also V. Mitsilegas (2012), “The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights”, General Report, in J. Laffranque (ed.), *The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn 2012*, Vol. 3, pp. 21-142.

application of provisions of EU law (paragraphs 56-57). According to the Court, that interpretation of Article 53 would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules, which are fully in compliance with the Charter, where they infringe the fundamental rights guaranteed by that Member State's constitution (paragraph 58). Thus in *Melloni* the Court of Justice adopted an interpretation of the Charter which led to the affirmation of the primacy of secondary EU law (the Third Pillar Framework Decision on the European Arrest Warrant) over national constitutional law.

In another landmark ruling, in the case of *Fransson* (Case C-617/10, Åklagaren v Hans Åkerberg Fransson, judgment of 26 February 2013), the Court of Justice adopted a broad interpretation of the application of the Charter, including in cases where national legislation does not implement expressly or directly an EU criminal law instrument. *Fransson* concerned the interpretation of Article 50 of the Charter (on the principle of *ne bis in idem*) in domestic proceedings related to VAT fraud but not directly related to the implementation of a specific EU law instrument. In *Fransson*, the Court found that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.

The ruling is of great significance with regard to the implementation of EU criminal law in general and Third Pillar law in particular as assessments of the compatibility of national law with the Charter may extend beyond the legislation implementing strictly the relevant EU legislation (Directives and Framework Decisions) to aspects of national law which have a connection with the implementation of EU law. In this context, the Court ruled in *Siragusa* (Case C-206/13, *Siragusa*, judgment of 6.3.2014) that the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other (paragraph 24). To take a key example of Third Pillar law: after *Fransson*, and *Siragusa*, courts examining the compatibility of the Framework Decision of the European Arrest Warrant with the Charter are required to examine not only the implementation of the specific provisions of the Framework Decision, but wider aspects of domestic criminal justice systems (such as detention conditions or the length of pre-trial detention) which affect directly the operation of the measure. This interpretation is backed up further by the Court of Justice's ruling in *Siragusa* that it is important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States (paragraph 31).

4.2 Coherence and the UK: A Common Area of Justice?

The UK government has given notification of exercising its opt-out under the Transitional Provisions Protocol in the summer of 2013. Since then, it has requested to opt back in to a series of Third Pillar measures following the end of the transitional period. A list of 35 such measures has been agreed with the Commission and the Council (see Annex 2). The list includes the majority of the key Third Pillar measures, including, crucially, the Framework Decision on the European Arrest Warrant, the police cooperation parts of Schengen and the Decisions on Europol and Eurojust. The opt-back-in list does not include measures related to the Prüm information exchange system and the Framework Decision on the mutual recognition of probation decisions, but this opt-out will be reviewed in 2015.

In addition to the provisions regarding the United Kingdom's participation in Third Pillar law following the end of the transitional period prescribed in Protocol 36, it should be recalled that for EU criminal law measures adopted after the entry into force of the Treaty of Lisbon, the UK has the right to indicate whether it will opt in on a case-by-case basis. Thus far the UK has opted in to enforcement measures including the Directive on the European Investigation Order, but has not opted back in to key defence rights measures, including most notably the Directive on the right to access to a lawyer for suspects and accused persons, which is a key element of the implementation of the Stockholm Roadmap on the rights of individuals in

criminal proceedings⁷⁰ put forward to complement the application of the principle of mutual recognition in criminal matters.

This varied landscape with regard to the participation of the UK in EU criminal law measures post-Lisbon poses significant challenges for legal certainty, coherence and the protection of fundamental rights in Europe's area of criminal justice. These challenges become more complex following the end of the transitional period in Protocol 36. To take the example of judicial cooperation under the principle of mutual recognition of judicial decisions in criminal matters: the day after 30 November 2014 will see the UK participating fully in the Framework Decision on the European Arrest Warrant, without participating at the same time in a key measure on the rights of suspects and accused persons in criminal proceedings, the Directive on access to a lawyer. The UK's selective participation in this context is problematic not only from the perspective of the protection of fundamental rights, but also from the perspective of the coherence of EU law. The legal basis for the Directive on access to a lawyer (as with the other Directives implementing the Stockholm Roadmap) is Article 82(2) TFEU. This provision grants for the first time express competence to the European Union to legislate on aspects of criminal procedure (including explicitly the rights of the defence) where necessary to facilitate the operation of the principle of mutual recognition in criminal matters. The legality of post-Lisbon legislation on defence rights, including the Directive on access to a lawyer, is thus inextricably linked with the effective operation of mutual recognition in criminal matters, including of the Framework Decision on the European Arrest Warrant. This link is confirmed in the Preamble of the Directive on access to a lawyer,⁷¹ which states:

“Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities, but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied. Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR (recital 6).”

The Preamble continues:

“Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to a more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union (recital 8).”⁷²

The UK's non-participation in measures on defence rights, including the Directive on access to a lawyer, undermines the effective operation of the Framework Decision on the European Arrest Warrant as far as the UK is concerned. There is a direct causal link under EU constitutional law between the adoption of EU defence rights measures under Article 82(2) TFEU and the effective operation of mutual recognition in criminal matters. The non-participation of the UK in such measures poses fundamental challenges with regard to compliance by the UK with the fundamental rights obligations incumbent upon EU Member States participating in the system of mutual recognition in criminal matters. The UK's non-participation also challenges the coherence of EU criminal law in an integrated Area of Freedom, Security and Justice where EU criminal law measures are increasingly interconnected.

One could argue that from a black letter perspective the current position of the UK is tenable: after all, under the Treaty of Lisbon the UK can opt in to (or opt out of) any post-Lisbon legislative proposal in the field of criminal justice on a case-by-case basis (and has decided not to participate in the access to a lawyer

⁷⁰ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

⁷¹ OJ L294, 6.11.2013, p.1.

⁷² For similar statements see also the Directive on the right to information (Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L142, 1.6.2012, p.1, recitals 4, 8 and 10) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L280, 26.10.2010, p.1, recitals 4, 7 and 10).

Directive). On the other hand, the day after the end of the transitional period of Protocol 36 will see the agreed participation of the UK in a list of enforcement measures including the Framework Decision on the European Arrest Warrant. However, this argument runs counter to a more teleological approach which respects fully the objectives and the integrated nature of the Area of Freedom, Security and Justice. In the respect, there are important precedents by the Court of Justice in cases involving UK requests to participate in measures related to border controls.

A key ruling in this context concerns the UK request to participate in a Third Pillar Decision (Decision 2008/633) authorising access to the Visa Information System by law enforcement authorities (Case C-482/08, *United Kingdom v Council*, judgment of 26 October 2010). The Decision is a Third Pillar measure (and at the time the Treaties did not include a Protocol extending the UK's opt-out arrangements to the Third Pillar). In applying for annulment of Decision 2008/633, the UK submitted that that decision does not constitute a development of provisions of the Schengen *acquis* in which the UK did not take part, but a police cooperation measure, as is also apparent from the Council's choice of legal basis, namely Articles 30(1)(b) EU and 34(c)(2) EU (paragraph 30). The Court, however, ruled against UK participation in the Decision. According to the Court, when classifying a measure as falling within an area of the Schengen *acquis*, the need – where that *acquis* evolves – to maintain that coherence must be taken into account (paragraph 48). The Court added that the cooperation established by Decision 2008/633 could not, from both a functional and a practical point of view, exist independently of the VIS which falls, like Decision 2004/512 and the VIS Regulation on which the VIS is based, within the scope of the Schengen *acquis* concerning the common visa policy (paragraph 54). The Court adopted a teleological and contextual approach focusing on the coherence of the Schengen *acquis*, following largely precedents in earlier rulings excluding the UK participation in the Frontex and biometrics Regulations.⁷³

The Court's rulings are also applicable with regard to UK participation in EU criminal law measures. Defence rights measures under Article 82(2) TFEU are clearly inextricably linked with mutual recognition measures. In fact, as the Treaty is currently worded, defence rights measures under Article 82(2) TFEU cannot exist independently of measures on mutual recognition, including the Framework Decision on the European Arrest Warrant. Participating in the enforcement measures but not in the measures granting rights in order to facilitate judicial cooperation challenges the coherence of Europe's area of criminal justice and is contrary to EU law. This has been confirmed by 2014 European Parliament Report prepared under the direction of the former MEP Sarah Ludford⁷⁴, which in Recital A stated:

“...to be effective, the principle of mutual recognition must be premised upon mutual trust which can only be achieved if respect for the fundamental rights of suspects and accused persons and procedural rights in criminal proceedings are guaranteed throughout the Union...”

Moreover, the high level of differentiation, fragmentation and legal uncertainty emerging from the variable geometry applicable to suspects' rights leads to the instauration of various Areas of Justice which undermine the goal enshrined in Article 3 TEU to establish a *common* Area of Freedom, Security and Justice for citizens. The fundamental rights of the defence of EU citizens and residents may be negatively affected as a result of this patchwork of areas of justice across the Union. There are differing statuses of suspects depending on the location or destination to which EU citizens and residents are surrendered and/or judged.⁷⁵ A previous study commissioned by the European Parliament, which called for the EU criminal justice area to be centrally guided by the concept of citizenship of the Union, highlighted that “Any EU criminal justice system must be designed to serve citizens and their status and expectations as constitutional rights holders”

⁷³ Case C-77/05 *United Kingdom v Council*, judgment of 18 December 2007 (Frontex), paragraph 55; Case C-137/05 *United Kingdom v Council*, judgment of 18 December 2007 (Biometrics).

⁷⁴ European Parliament report of 28 January 2014 with recommendations to the Commission on the review of the European Arrest Warrant, Committee of Civil Liberties, Justice and Home Affairs, Rapporteur: Sarah Ludford, document number: A7-0039/2014.

⁷⁵ S. Carrera and F. Geyer (2008), “The Reform Treaty and Justice and Home Affairs – Implications for the common Area of Freedom, Security and Justice”, in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate Publishers, pp. 289-307.

and that citizens' "rights and expectations as constitutional rights holders should not be undermined by EU criminal justice (enforcement) procedures".⁷⁶

4.3 Practical Operability

Section 4.2 examined the legality and impact on the practical operability of EU criminal law measures of UK's opt-out of post-Lisbon legislation. In addition to this issue, there is also the issue of the practical operability of the EU criminal law *acquis* in cases where the UK does not opt back in to certain Third Pillar measures after the end of the Protocol 36 transitional period. The UK will not participate imminently as things stand in measures including the Prüm *acquis*⁷⁷ (that allows for the automated exchange of DNA, fingerprints and vehicle registration data, as well as for other forms of police cooperation between Member States) and the Framework Decision on the mutual recognition of probation orders⁷⁸ (that aims at facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the Member State of conviction). As regards the latter, questions arise with regard to the impact of the UK's opt-out on the system of mutual recognition of decisions in criminal matters overall, as the EU has now adopted a raft of mutual recognition measures which can work in an interrelated manner and extend to all stages of the criminal process.

It should be reminded in this context that Article 10(5) of the Protocol on Transitional Provisions calls upon the Union institutions and the UK to seek to re-establish the widest possible measure of participation of the United Kingdom in the AFSJ *acquis* "without seriously affecting the practical operability of the various parts thereof, while respecting their coherence." A case in point here are the effects of the UK ceasing to participate in the EAW system when there are still pending EAW cases between the UK and other Member States.

In addition to the operability concerns, the Protocol on Transitional Provisions allows the Council to adopt a decision determining that the UK must bear the direct financial consequences necessarily and unavoidably incurred as a result of the cessation of its participation in the acts it has opted out of (Article 10(4) final). The European Commission has tabled a draft Council Decision requiring the UK to repay to the EU budget sums up to EUR 1 508 855 if the UK does not participate in the Prüm Decisions, or if it does not respect a condition in the Council Decision on consequential and transitional arrangements.⁷⁹

⁷⁶ M.L. Wade (2014), "Developing a Criminal Justice Area in the European Union", European Parliament study, DG Internal Policies, Brussels.

⁷⁷ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; the UK has committed to take a decision in December of 2015 on whether it will opt-in into the Prüm Decision. Importantly, for as long as the UK has not joined Prüm, it shall have no access to the EURODAC database for law enforcement purposes.

⁷⁸ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, subsequently amended by Council Framework Decision 2009/299/JHA of 26 February 2009

amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

⁷⁹ European Commission (2014), Proposal for a Council Decision 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, COM(2014) 595, 26.9.2014.

4.4 Which role for the European Parliament?

The European Parliament has become the co-legislator and active co-owner of the EU AFSJ since the end of 2009. In a 2010 Resolution on the effective implementation of the fundamental rights after the entry into force of the Treaty of Lisbon, the European Parliament called for the ‘Lisbonisation’ of the current *acquis* in the field of police and judicial cooperation and for a strengthening of democratic accountability in the AFSJ.⁸⁰ This demonstrates that the European Parliament has been aware of the important role of the end of the transitional derogatory regime for the fundamental rights protection in the EU.

While Protocol 36 does not foresee a formal role for the European Parliament in the procedure, it has a responsibility on the partly highly sensitive content of the Third Pillar measures directly affecting citizens. It has been argued that the Parliamentary Committee for Civil Liberties, Justice and Home Affairs – the LIBE Committee – has to some extent assumed this responsibility by accepting its new competences and role, becoming a ‘policy-setter’ and promoter of EU fundamental rights protection: “LIBE has been successful in navigating the new inter-institutional decision-making processes and actors and ensuring a higher degree of democratic scrutiny in EU AFSJ decision-making. This has materialised in concrete and visible inputs into the actual content of adopted EU AFSJ legislation, a higher degree of democratic scrutiny in EU AFSJ cooperation, and the development of new working methods and practices in the conduct of negotiations of complex legislative dossiers.”⁸¹ The European Parliament can therefore in other ways play a role by addressing the legal and political implications. The research studies that the LIBE Committee publishes on a regular basis contain in-depth analyses to support the work of the Committee and help to raise awareness of sensitive issues on the ground in the Member States. For example, a recent study provided background information for the March 2014 LIBE delegation visit in Italy on the situation of prisons.⁸² Thus sending MEPs on missions investigating circumstances on the spot also contributes to enhancing democratic control.

The important role which the European Parliament can play in the building of the European Criminal Justice Area has further been proven with regard to the discussions on the EAW. In January 2014 the Parliament’s LIBE Committee adopted a Report under the direction of the former MEP Sarah Ludford, providing recommendations for the Commission on the review of the EAW (including a motion for a European Parliament Resolution).⁸³ Referring to the new legal framework from 2014 under the Treaty of Lisbon, the LIBE Committee highlights not only the problems arising from an incorrect implementation of the Framework Decision 2002/584/JHA but stresses the importance of considering the implementation of the body of Union criminal justice measures as a whole as being complementary to the EAW. The LIBE Committee asks the Member States to explore all the existing possibilities within Framework Decision 2002/584/JHA to safeguard the protection of human rights and fundamental freedoms and identified some of the key concerns regarding the EAW. The Committee in particular called for

“a clear and consistent application by all Member States of Union law regarding procedural rights in criminal proceedings linked to the use of the EAW; including the right to interpretation and translation in criminal proceedings; the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest; and the right to information in criminal proceedings...”

⁸⁰ European Parliament resolution of 15 December 2010 on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)), document number: P7_TA(2010)0483, para. 23.

⁸¹ S. Carrera, N. Hernanz and J. Parkin (2013), “The ‘Lisbonisation’ of the European Parliament – Assessing progress, shortcomings, and challenges for democratic accountability in the area of freedom, security and justice”, Working Paper No. 58, CEPS Liberty and Security in Europe Series, CEPS, Brussels, p. 36.

⁸² A. Davoli and R. Raffaelli (2014), “Background information for the LIBE delegation to Italy on the situation of prisons 26-18 March 2014”, European Parliament study, Policy Department C: Citizens’ Rights and Constitutional Affairs, March, Brussels.

⁸³ European Parliament report of 28 January 2014 with recommendations to the Commission on the review of the European Arrest Warrant, Committee of Civil Liberties, Justice and Home Affairs, Rapporteur: Sarah Ludford, document number: A7-0039/2014.

As it will be developed in Section 5.2 below, the procedural rights framework in the AFSJ is key relative to the enforcement mechanisms, such as the EAW, and the UK's special position poses serious challenges in this respect.

Moreover, the European Parliament could be more involved in evaluation mechanisms under Article 70 TFEU. This provision provides for the establishment of evaluation mechanisms in the AFSJ: The Council may, on a proposal of the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of Union AFSJ policies, in particular in order to facilitate full application of the principle of mutual recognition; the European Parliament and national parliaments must be informed of the content and the results of the evaluation.

Is there any model/template in other areas of European law which could be followed here? For the new Schengen evaluation mechanism adopted in October 2013⁸⁴ the Council cooperated closely with the European Parliament in order to ensure that the latter views have been taken into account "to the fullest extent possible".⁸⁵ This was the first time that Article 70 TFEU was used as a legal basis. By integrating the views of the European Parliament this evaluation mechanism approach improves democratic accountability and control:

"The Commission will play a significant role in this new evaluation mechanism, and the implementation of the new mechanism will thus be subject to political scrutiny by the European Parliament... Even though the mechanism is to be approved on the basis of Article 70 of the Treaty, which does not provide for Parliament to be involved in the decision-making process, this regulation has in effect been negotiated as a co-decision text and includes the vast majority of the amendments tabled by Parliament in its report (A7-0226/2012)."⁸⁶

"It should also be stressed that the majority of the most significant improvements were obtained after the negotiations had been reopened, that is following the Council's decision to change the legal basis and the interinstitutional dispute. This is true, for example, of the coordination role assigned to the Commission, its responsibility for adopting the evaluation reports, the possibility of carrying out unannounced on-site visits at internal borders and the increased involvement of the European Parliament and its access to information and documents. It was only thanks to the strong and united position that Parliament maintained throughout this lengthy process of negotiations that all these improvements could be achieved."⁸⁷

In light of the fact that the Treaty describes the principle of mutual recognition as a principle governing civil and criminal law,⁸⁸ it was emphasised that "this provision would therefore likely have little relevance to immigration and asylum law outside the context of the Schengen evaluation."⁸⁹

However, the new Schengen evaluation mechanism foreseen in Regulation 1053/2013 provides a 'template' to be used in future implementation of Article 70 TFEU in the field of criminal justice cooperation, in particular when it comes to the increased involvement of the European Parliament in the decision-making

⁸⁴ Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

⁸⁵ Council of the European Union (2013), "Council adopts the Schengen Governance Legislative Package", document number: 14441/13 of 7 October, p. 1; see also European Commission press release (2013), "New Schengen rules to better protect citizens' free movement", 12 June.

⁸⁶ European Parliament Report of 10 June 2013 on the draft Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, LIBE Committee, Rapporteur: C. Coelho, document number: A7-0215/2013, pp. 8-9.

⁸⁷ Ibid.

⁸⁸ See Articles 67(3) and (4), 81 and 82 TFEU.

⁸⁹ S. Peers (2008), "Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon", *European Journal of Migration and Law*, Vol. 10, No. 2, pp. 219-247, p. 224.

process of EU law instruments focused on evaluation,⁹⁰ as well as regards its role in the evaluation system itself and its access to information and documents in respect of the (annual and multiannual) evaluation results of Member States' practical implementation of EU law,⁹¹ including those cases where serious deficiencies have been identified.⁹² This includes the requirement by the European Commission to inform the European Parliament of follow-up and monitoring on regular basis as well as the adoption of any improvement measures.⁹³ The access to information to the European Parliament will apply even in cases of sensitive information. In particular, Article 17 of Regulation 1053/2013 states, "Classification shall not preclude information being made available to the European Parliament." Finally, the latter Regulation foresees an annual reporting by the Commission before the European Parliament.⁹⁴

⁹⁰ See Paragraph 20 of Council Regulation (EU) No 1053/2013, which states, "the Commission will fully inform the European Parliament and the national parliaments of the content and results of the evaluation. In addition, should the Commission submit a proposal to amend this Regulation, the Council would, in accordance with Article 19(7)(h) of its Rules of Procedure, consult the European Parliament in order to take into consideration its opinion, to the fullest extent possible, before adopting a final text."

⁹¹ Article 5 (Multiannual Evaluation Programme) stipulates, "The Commission shall transmit the multiannual evaluation programme to the European Parliament and to the Council." Article 6 (Annual Evaluation Programme) states, "The Commission shall transmit the annual evaluation programme to the European Parliament and to the Council." This also includes access to the questionnaires. According to Article 9.2, "The Commission shall make the replies available to the other Member States and shall inform the European Parliament of the replies. If so requested by the European Parliament, in particular as a result of the seriousness of the matter, the Commission shall, on a case-by-case basis and in accordance with the applicable rules on relations between the European Parliament and the Commission, also inform the European Parliament of the content of a specific reply."

⁹² Article 16.7. states, "If an on-site visit reveals a serious deficiency deemed to constitute a serious threat to public policy or internal security within the area without internal border controls, the Commission, on its own initiative or at the request of the European Parliament or of a Member State, shall inform the European Parliament and the Council as soon as possible thereof."

⁹³ Article 16 (Follow up and Monitoring): "1. The Commission shall transmit such action plan to the European Parliament"; and "6. The Commission shall inform the European Parliament and the Council on a regular basis about the implementation of the action plans or improvement measures referred to in this Article."

⁹⁴ Article 20 of Council Regulation (EU) No 1053/2013.

5. Scenarios

KEY FINDINGS

- The UK's selective participation in the EU criminal law *acquis* poses significant challenges to the coherence of EU law and the protection of fundamental rights.
- The very limited implementation of a majority of Framework Decisions in the field of mutual recognition by Member States raises questions about their content and added value for judicial cooperation.
- Reform of the EAW system should encompass an examination of the potential rebalancing of the system to strengthen the position of the individual and enhance fundamental rights protection.
- With a view to reform Europe's area of criminal justice the existing *acquis* should be consolidated and/or codified. Consolidation will serve to revisit the existing instruments and re-examine their position within the AFSJ, their purpose and their added value.

5.1 Fragmentation and Coherence – Revisiting the UK Position

The legal patchwork of UK participation in the pre- and post-Lisbon EU criminal law *acquis* poses significant challenges to the coherence of EU law and the protection of fundamental rights. The end of the transitional period introduced by Protocol 36 will see the United Kingdom participating in a series of enforcement measures (most notably the Framework Decision on the European Arrest Warrant⁹⁵) but having opted out of key measures adopted in order to facilitate mutual recognition in criminal matters (and upholding fundamental rights in the process, including in particular the Directive on access to a lawyer). These challenges are likely to become more acute in the future if the United Kingdom chooses to opt out of future criminal procedure measures proposed under Article 82(2) TFEU, which implements the Defence Rights Roadmap⁹⁶ and the procedural rights package (including the Directives on legal aid and presumption of innocence),⁹⁷ but also develops other areas of the *acquis*, such as minimum standards on the admissibility of evidence which will accompany the Directive on the European Investigation Order⁹⁸ (to which the UK has opted in).

⁹⁵ See V. Mitsilegas (2014), "Politicisation of the European Arrest Warrant is dangerous and unnecessary", *New Statesman*, 12 November 2014.

⁹⁶ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance) (2009/C 295/01).

⁹⁷ The procedural rights package is comprised of three proposed directives and two recommendations: European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824, 27.11.2013; European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821, 27.11.2013; European Commission (2013), Proposal for a Directive of the European Parliament and of the Council **on procedural safeguards for children suspected or accused in criminal proceedings**, COM(2013) 822, 27.11.2013; European Commission (2013); Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02); European Commission (2013); Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03).

⁹⁸ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

EU institutions need to address this lack of coherence stemming from the UK's selective participation in the EU criminal law *acquis* and the negative implications this stance may have on the protection of fundamental rights and the operation of the EU system of mutual recognition. Ways forward can be: to negotiate measures based on Article 82(1) and 82(2) in a combined manner in order to ensure coherence in UK participation; to put forward hybrid instruments under joint legal bases, including both mutual recognition and criminal procedure harmonisation measures. At the stage of implementation, the implications of UK non-participation in EU criminal procedure measures, including measures on defence rights for the protection of fundamental rights and the operation of the system of mutual recognition, must be assessed as a matter of priority. Scrutiny of the implementation by the UK of the mutual recognition *acquis* must include scrutiny of the compatibility of the aspects of the domestic criminal justice system, which directly affect the operation of mutual recognition with the Charter of Fundamental Rights.⁹⁹

5.2 Reforming EU Third Pillar Law and the EAW

Another way forward following the end of the transitional period in Protocol 36 is the reform of EU Third Pillar law. Two areas of concern arise in this context: for the vast majority of Framework Decisions in the field of mutual recognition, the concern is their very limited implementation by Member States, which raises questions about their content and added value for judicial cooperation. The implementation exercises by the European Commission should also examine the added value of the EU *acquis* in the field. The second area of concern involves the operation of the Framework Decision on the European Arrest Warrant (EAW), the only Third Pillar mutual recognition measure which has been fully implemented in all EU Member States. Since the adoption of the EAW Framework Decision, two main concerns have arisen with regard to its operation: the impact of the EAW on the fundamental rights of affected individuals; and, in a related manner, the compatibility of the EAW with the principle of proportionality. Underlying these concerns is the general debate of the extent to which mutual trust exists between the authorities and the citizens and residents of EU Member States which are called to implement a highly automatic principle of mutual recognition in the highly sensitive area of criminal law.¹⁰⁰ Reform of the EAW system should encompass an examination of the potential rebalancing of the system in order to bring the individual to the fore and provide a higher level of protection of fundamental rights.

One of the key areas of improvement to the EAW system is the introduction in EU law of an express ground for refusal to recognise and execute a warrant when such action would result in a breach of fundamental rights as enshrined in EU constitutional law. Which fundamental rights are at stake when mutual recognition enforcement measures come into play? To clarify, a number of fundamental rights are at stake as enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the EU Charter of Fundamental Rights (EU Charter). The execution of an EAW has severe consequences with regard to restrictions on physical freedom (Article 3 EU Charter) and the free movement of the requested person (Article 45 EU Charter), as the quotation from the European Handbook on EAW below indicates. In addition, enforcement measures involve the prohibition of inhuman and degrading treatment, including the link to detention (Article 3 ECHR, compare Article 4 EU Charter); the right to a fair trial (Article 6 ECHR) and to an effective remedy; presumption of innocence and right of defence (Articles 47 and 48 EU Charter),¹⁰¹ and the right to family life (Article 8 ECHR and Article 7 EU Charter).

While the Framework Decision does not currently include an express ground for refusal if the action would result in a breach of fundamental rights, a number of Member States have added non-compliance of

⁹⁹ There is a UK Protocol on the application of the EU Charter, see C. Barnard (2010), "The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?", available for download at: <http://www.law.cam.ac.uk/faculty-resources/download/barnard-uk-opt-out-and-the-charter-of-fundamental-rights/7309/pdf>.

¹⁰⁰ V. Mitsilegas (2006), "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *Common Market Law Review*, Vol. 43, pp. 1277-1311.

¹⁰¹ See S. Peers *et al.* (2014) (eds), *The EU Charter of Fundamental Rights – A Commentary*, Oxford: Hart Publishing, p. 1197; see also E. Lloyd-Cape *et al.* (2010), *Effective Criminal Defence in Europe*, Ius Commune: European and Comparative Law Series Vol. 87, Cambridge: Intersentia.

surrender with fundamental rights as a ground of refusal in their national implementing law.¹⁰² While this implementation choice was initially criticised by the European Commission as being contrary to the Framework Decision,¹⁰³ its most recent implementation Report indicates a change of strategy: according to the Commission, “it is clear that the Council Framework Decision on the EAW [and Article 1(3) therein] does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person’s fundamental rights arising from unacceptable detention conditions.”¹⁰⁴

The Commission thus perceives the general statement of compliance with fundamental rights in Article 1(3) of the Framework Decision as constituting a *de facto* ground for refusal, at least as regards breach of fundamental rights resulting from deficiencies in detention conditions. In addition to this expansive interpretation of grounds of refusal, the Commission also argues in favour of the application of a proportionality test by Member States in the operation of the Framework Decision.¹⁰⁵

While the Court of Justice has been reluctant to accept the existence of a human rights ground for refusal in its EAW case law (see in particular the cases of *Melloni* and *Radu*), the Court’s case law in the field of asylum law provides a powerful precedent in that direction. In joint cases of *N.S.* and *M.E.* concerning the legality of transfers of asylum seekers under the Dublin Regulation,¹⁰⁶ the Court found that an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker’s fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with fundamental rights.¹⁰⁷ The Court admittedly adopted a high threshold in order to suspend the negative mutual recognition system established by the Regulation: a transfer under the Dublin Regulation would be incompatible with fundamental rights if there are *substantial grounds for believing that there are systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter (on the prohibition of torture and inhuman or degrading treatment or punishment), of asylum seekers transferred to the territory of that Member State.¹⁰⁸ However, the judgment is extremely important in that the Court has put an end to automaticity in the transfer of individuals within the AFSJ based on an unchecked presumption of compliance of all Member States with fundamental rights in all cases, and stressed the need to examine the impact of transfer on fundamental rights of an individual, on a case-by-case basis.¹⁰⁹ The Court’s case law in *N.S.* has led to significant change in the Dublin system with the latest Dublin Regulation having introduced essentially a human rights ground for refusal to transfer an asylum seeker to another Member State.¹¹⁰ *N.S.*

¹⁰² For an overview see V. Mitsilegas (2012), “The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights”, General Report, in J. Laffranque (ed.), *The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn*, Vol. 3, pp. 21-142 and the national reports contained in the volume.

¹⁰³ See COM (2005) 63 final, Brussels, 25.2.2005.

¹⁰⁴ *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States* COM(2011) 175 final, Brussels, 11.4.2011, p. 7.

¹⁰⁵ *Ibid.*, p.8.

¹⁰⁶ Joined Cases C-411/10 and C-493/10, *N. S. (C-411/10) v Secretary of State for the Home Department* and *M. E. (C-493/10), M. E. (C-493/10), A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011 (Grand Chamber).

¹⁰⁷ Paragraph 99.

¹⁰⁸ Paragraph 85. Emphasis added.

¹⁰⁹ V. Mitsilegas (2012), “The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual”, *Yearbook of European Law* 2012, Vol. 31, pp. 319-372.

¹¹⁰ Article 3(2) of the new Dublin Regulation, second and third indent, read as follows: “Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in the Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of

has introduced a *de facto* human rights ground for refusal in relation to the EAW system. The judicial and legislative approach in the field of asylum law can act as a guide towards the revision of the EAW Framework Decision to include an express ground for refusal if surrender would violate fundamental rights.

Another, more recent, concern related to the operation of the EAW Framework Decision has been the compatibility of the system with the principle of proportionality. The debate on proportionality has been triggered by concerns that EAWs are issued for relatively minor offences, resulting in considerable pressure on the criminal justice systems of executing Member States and disproportionate outcomes for the requested individuals.¹¹¹ Proportionality concerns with regard to the position of the individual have led to national courts interpreting non-compliance with proportionality as a fundamental rights ground of refusal to execute a European Arrest Warrant.¹¹² However, the prevailing view with Member States is for proportionality to be dealt with in the issuing and not in the executing Member State. This is the interpretative guidance given in the revised version of the European Handbook on how to issue a European Arrest Warrant.¹¹³ According to the Handbook,

“It is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include the effective protection of the public and taking into account the interests of the victims of the offence.”¹¹⁴ (Emphasis added).

This approach is also gaining ground with national courts¹¹⁵ and with the EU legislator: the recently adopted Directive on the European Investigation Order (EIO)¹¹⁶ not only includes non-compliance with fundamental rights as a ground for refusal,¹¹⁷ but also introduces a proportionality test in the issuing Member State: the issuing authority may only issue an EIO where the issuing of the EIO is necessary and proportionate and where the investigative measures indicated in the EIO could have been ordered under the same conditions in

Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designed as responsible...Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.”

¹¹¹ See inter alia Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report, session 2010-12, pp. 40-43. For an analysis refer S. Carrera, E. Guild and N. Hernanz (2013), “Europe’s most wanted? Recalibrating Trust in the European Arrest Warrant System”, Working Paper No. 55, CEPS Liberty and Security in Europe Series, CEPS, Brussels.

¹¹² See the ruling of the Higher Regional Court of Stuttgart of 25 February 2010, reported by J. Vogel (2010), “Introduction to the Ruling of the Higher Regional Court of Stuttgart of 25 February 2010 – The Proportionality of a European Arrest Warrant”, *New Journal of European Criminal Law*, No. 2, pp. 145-152; see also the report and commentary on the ruling by J. Vogel and J. Spencer, “Proportionality and the European Arrest Warrant”, *Criminal Law Review*, Vol. 6, pp. 474-482.

¹¹³ Council doc. 17195/1/10 REV 1, Brussels, 17.12.2010.

¹¹⁴ P. 14.

¹¹⁵ See the *Assange* ruling of the UK Supreme Court, [2012] UKSC 22, Lord Phillips in paragraph 90. Similar recommendations were made in the Review on UK extradition arrangements commissioned by Theresa May and chaired by Sir Scott Baker, *A Review of the United Kingdom’s Extradition Arrangements*, presented to the Home Secretary on 30 September 2011, paragraph 5.150.

¹¹⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

¹¹⁷ Article 11 – optional grounds for non-recognition or non-execution: 11(1)(f): where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter.

a similar domestic case.¹¹⁸ On the other hand, the recent amendment of the UK Extradition Act 2003 (implementing *inter alia* the EAW Framework Decision) has introduced breach of proportionality as a ground for refusal in the executing Member State.¹¹⁹ The prospect of breach of proportionality constituting a fundamental rights ground for refusal to the Framework Decision on the European Arrest Warrant was also raised by AG Sharpston in her recent Opinion in *Radu*.¹²⁰ While finding that the issue was not of direct relevance to the present case, the AG discussed the tension between warrants issued for perceived trivial offences on the one hand and the principle of proportionality on the other as follows:

“I would add one thing. At the hearing, counsel for Germany used the example of a stolen goose. If that Member State were asked to execute a European arrest warrant in respect of that crime where the sentence passed in the issuing Member State was one of six years, she thought that execution of the warrant would be refused. She considered that such a refusal would be justifiable on the basis of the doctrine of proportionality and referred the Court to Article 49(3) of the Charter, according to which ‘the severity of penalties must not be disproportionate to the criminal offence’. This Court has yet to rule on the interpretation of that article. In the context of the Convention, the Court of Human Rights has held that while, in principle, matters of appropriate sentencing largely fall outside the scope of the Convention, a sentence which is ‘grossly disproportionate’ could amount to ill-treatment contrary to Article 3 but that it is only on ‘rare and unique occasions’ that the test will be met. It would be interesting to speculate as to the interpretation to be given to Article 49(3) of the Charter having regard to the interpretation given by the Court of Human Rights of the provisions of Article 3 of the Convention.”¹²¹ (Emphasis added.)

Calls to reform the European Arrest Warrant system have been made by the European Parliament. In the above-mentioned European Parliament Report prepared by Sarah Ludford,¹²² concerns were raised *inter alia* about:

Human rights

F(i): The absence in Framework Decision 2002/584/JHA and other mutual recognition instruments of an explicit ground for refusal where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State’s obligations in accordance with Article 6 TEU and the Charter of Fundamental Rights.

F(ii): The absence of a provision in Framework Decision 2002/584/JHA and other mutual recognition instruments on the right, as laid down in Article 47 of the Charter, to an effective remedy which is left to be governed by national law, leading to uncertainty and inconsistent practices between Member States.

Proportionality

F(iv): The lack of precision in the definition of serious crimes and the inclusion of crimes the seriousness of which is not envisaged in the criminal codes of all Member States and which may not satisfy the proportionality test.

F(v): Disproportionate use of the EAW for minor offences or in circumstances where less intrusive alternatives might be used, leading to unwarranted arrests and unjustified and excessive time spent in pre-trial detention and thus to disproportionate interference with the fundamental rights of suspects and accused persons as well as burdens on the resources of Member States.

¹¹⁸ Article 6(1)(a) and (b) respectively.

¹¹⁹ See in this context Section 157 of the Anti-Social Behaviour, Crime and Policing Act 2014 introducing a new proportionality ground for refusal under section 21A to the Extradition Act 2003.

¹²⁰ Opinion of AG Sharpston delivered on 18 October 2012 on Case C-396/11 *Radu*.

¹²¹ Para. 103.

¹²² European Parliament, Report of 28 January 2014 with recommendations to the Commission on the review of the European Arrest Warrant, Rapporteur: Sarah Ludford, Motion for a Resolution, doc. A7-0039/2014.

Detention

F(viii): The absence of minimum standards on pre-trial detention coupled with the lack of proper assessment of whether the case is trial-ready, can lead to unjustified and excessive periods of suspects and accused persons in pre-trial detention.

F(ix): The unacceptable conditions in a number of detention facilities across the European Union and the impact that this has on fundamental rights and on the effectiveness and functioning of mutual recognition.

The European Parliament:

[5.] Considered that as the problems highlighted in recital F arise out of both the specifics of the Framework Decision and the incomplete and unbalanced nature of the Union area of criminal justice, the legislative solutions need to address both issues through continued work to establish minimum standards on inter alia the procedural rights of suspects and accused persons and a horizontal measure establishing principles applicable to all mutual recognition instruments, or if such a horizontal measure is not feasible or fails to remedy the problems identified in this resolution, amendments to the EAW FD;

[7.] Requested the Commission to submit, within a year following the adoption of this Resolution, legislative proposals providing for inter alia:

(b) a proportionality check when issuing mutual recognition decisions;

(d) a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality;

(e) the right to an effective legal remedy in compliance with Article 47(1) of the Charter and Article 13 ECHR;

(f) a better definition of the crimes where the EAW should apply in order to facilitate the application of the proportionality test.

5.3 Implementation, Consolidation and Codification

A way forward with regard to law reform in Europe's area of criminal justice after the end of the transitional period is to consolidate and/or codify the existing *acquis*, in particular with regard to the Third Pillar. Consolidation will serve to revisit the existing instruments and re-examine their position within the AFSJ, their purpose and their added value. This exercise must be linked with a greater emphasis on the implementation of EU criminal law, in particular Third Pillar law where a considerable number of instruments (especially in the field of mutual recognition) have been followed up by limited implementation at national level. The emphasis on consolidation and implementation has been reiterated in the June 2014 European Council Conclusions, according to which building on the past programmes, the overall priority now is to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place.¹²³

The end of the transitional period must be followed by a rigorous process of scrutiny of implementation of Third Pillar law into national legislation by the European Commission under its role as the guardian of the treaties and by the relevant EU institutions under the evaluation procedure established by the above-mentioned Article 70 TFEU. The implementation process must be linked with an evaluation of the added value of these measures and their impact on fundamental rights, the national legal systems of Member States and the AFSJ. Consolidation or codification can be considered on the basis of these evaluations.

¹²³ European Council Conclusions, 26-27 June 2014, Brussels, 27 June 2014, EUCO 79/14, paragraph 3.

Consolidation may be the way forward in relation to the various mutual recognition instruments, with a general part including the basic principles of mutual recognition (including an express ground for refusal in cases of breaches of fundamental rights) and a special part including provisions on the various stages of the criminal process. Consolidation may also lead to a combined approach linking in a coherent whole enforcement and fundamental rights/criminal procedure measures. This move may address coherence issues stemming from variable geometry in Europe's area of criminal justice. Consolidation would further benefit the operability of the EU principle of loyal and sincere cooperation set forth in Article 4(3) TEU. Under this principle all EU Member States are bound to facilitate the achievement of the Union's tasks and refrain from adopting any measure which could jeopardise the attainment of the Union's objectives.

6. Conclusions and Policy Recommendations

This study has examined the legal and political impact of the recent end of the transitional period for European cooperation on police and judicial cooperation in criminal matters adopted before 1 December 2009, as envisaged by Protocol 36 to the Treaties. While the position of the UK constitutes a case in point which has attracted much attention and critical reflection, this study has instead focused mainly on the implications, cross-cutting challenges and possible scenarios of the end of the transitional period for the wider EU Criminal Justice Area. Particular attention has been paid to the potential effects that the large degree of differentiation, flexibility or ‘variable geometry’ as regards Member States’ commitments to and upholding of the fundamental human rights of the defence and suspects in criminal proceedings may pose to effectiveness and legitimacy of the principle of mutual recognition of judicial and enforcement decisions.

Our assessment has first highlighted that one of the most far-reaching consequences of the end of the transitional period is a shift from ‘intergovernmentalism’ to ‘supranationalism’ in old EU Third Pillar law covering police and criminal justice cooperation. For the first time in European integration, the European Commission will be recognised as having the competence to legally scrutinise the implementation by Member State authorities of EU police and criminal justice law, and possibly launch infringement proceedings against those not complying with their obligations of timely and effective implementation. CJEU jurisdiction will also be expanded to rule on infringement proceedings and hold preliminary rulings submitted by national courts of EU Member States. The normalisation of the preliminary ruling procedures in Luxembourg will constitute a considerable step forward in enabling national tribunals to refer questions on the interpretation of old EU Third Pillar legal acts. These changes will contribute to greater legal certainty in the EU AFSJ.

The study has shown that the background and fundamentals behind the transition envisaged in Protocol 36 has primarily aimed at limiting the degree of supranational (EU) legal, judicial and democratic scrutiny concerning EU Member States’ obligations in the EU Area of Justice. A case in point has been EU Member States’ hesitations to subject their actions or inactions to the judicial scrutiny of the CJEU in Luxembourg. The Treaty of Lisbon considerably extended the options for applying ‘flexibility’, exceptions or derogations to the liberalisation of the Community method of cooperation and the enforcement powers of the European institutions, in particular those regarding the judicial control guaranteed by the CJEU. The Treaty of Lisbon also expanded the already existing privileged position of the UK in EU Justice and Home Affairs cooperation by further enlarging its ‘opt-in/opt-out’ possibilities to include that of opting out of the entire pre-Treaty of Lisbon (Third Pillar) *acquis* and the EU institutions’ new enforcement powers.

The privileged position of the UK remains clearly an issue of concern. Yet, the implications of Protocol 36 for the wider AFSJ and other EU Member State government’s agendas are more far-reaching and call for deeper democratic debate. The legal patchwork of UK participation in pre- and post-Treaty of Lisbon criminal justice *acquis* sends indeed a critical signal of incoherency in the current delineation of the European Criminal Justice Area even if this ‘pick and choose’ approach is allowed under Protocol 36. It also sends a worrying message to other EU Member States as regards the value and commitment which the Union attributes to the role of fundamental rights of suspects in ensuring consistency and coherency in the European criminal law. In light of this, the ‘Lisbonisation’ of the old EU Third Pillar raises a number of legal and political challenges which can be synthesised as follows:

First, the lack of a common level playing field of fundamental rights protection in Europe’s area of criminal justice. The envisaged non-participation of the UK in EU legal instruments dealing with suspects’ rights undermines the effective operability of instruments driven by the mutual recognition principle such as the EAW. The uneven or variable participation and commitment by EU Member States in what concerns EU legislation on the rights of the defence presents EU citizens and residents with various or fragmented areas of justice and fundamental rights which profoundly undermine the legitimacy of the common Area of Freedom, Security and Justice. Instruments such as the EAW have potential repercussions over fundamental rights, as these may entail restrictions on physical freedom and free movement of EU citizens.

Second, the legal uncertainty and lack of transparency characterising EU criminal justice instruments and their common applicability and implementation across the Union. The ambivalent position of the UK opens up the emergence of different and even competing areas of justice as well as dispersed levels of Europeanisation where enforcement of the principle of mutual recognition and protection of suspect rights are variable and anachronistic. In other words, ‘What rights where across the EU’? The study highlights that defence rights of EU citizens and residents cannot exist independently of mutual recognition measures covering criminal justice.

The main consequence emerging from these challenges is that of ‘incoherency’ and practical inoperability of the principle of mutual recognition in criminal matters in the AFSJ. We have explained that the legality of post-Treaty of Lisbon law on defence rights is now inextricably linked with the effective operation of mutual recognition in criminal matters. Defence rights should therefore not be negotiable at the expense of citizens’ and residents’ rights and freedoms. There is a direct causal link under EU primary law between the adoption of EU defence rights measures and the effective operation of mutual recognition enforcement instruments. Differing levels of commitment and participation by EU Member States on the fundamental rights of individuals in criminal proceedings run counter to a teleological approach which respects fully the objectives and the integrated nature of the AFSJ.

On the basis of the analysis conducted in this study, the following policy recommendations are put forward. They are primarily driven by a suspect’s rights-centric approach, which we argue should be the centrifugal force behind any future action in these policy domains:

RECOMMENDATION 1: Coherency and Practical Operability: Suspects Rights as *Sine qua non*

The transition envisaged in Protocol 36 may well lead to incoherency and practical inoperability of the European Criminal Justice Area. The European Parliament as co-legislator in EU criminal justice law has an active role to play at times of ensuring that a common understanding of ‘ensuring coherency’ and ‘practical operability’ of the EU AFSJ is firmly anchored in strong defence rights and fair trial protection (rights of suspected or accused persons) and a sound rule of law-compliant (on-the-ground) implementation across the domestic justice arenas of EU Member States. These are not only pre-conditions for mutual trust. They are also essential components for ensuring the implementation of the loyal and sincere cooperation principle in the wider European justice area.

The European Parliament should call on the European Commission to present in a clear and transparent manner the set of old EU Third Pillar measures which have been envisaged to be repealed, annulled or amended as a consequence of Protocol 36. The Parliament should also call on the Commission to explain in detail how the UK’s opting out and opting back in to a number of selected measures would ensure coherency and practical operability of the principle of mutual recognition of judicial decisions in criminal matters from a citizens’ rights perspective. The Parliament should request the Commission to ask the UK to ‘opt back in’ not only to Third Pillar legislative measures focused on ‘enforcement’ and coercion, such as the EAW, but also to all the Directives adopted since the entry into force of the Lisbon Treaty on suspects procedural rights and the fundamental rights of the defence. Full UK participation in these measures should be the *sine qua non*, particularly in light of the current UK debates on reconsidering its obligations with regard to judgments from the Strasbourg Court.¹²⁴ The European Parliament should ensure consistent participation by the UK in both enforcement and suspect rights measures in order to avoid incoherency and practical inoperability of the European Criminal Justice Area, which is supported by the CJEU’s case law on Frontex and police access to VIS.

RECOMMENDATION 2: Consolidation and Codification – Better Linking of Mutual Recognition and Rights of Suspects in Criminal Proceedings

The European Parliament should promote previous inter-institutional calls for consolidation and even codification of existing EU rules and instruments dealing with judicial cooperation in criminal matters. The new LIBE Committee should follow up the calls outlined in the European Parliament Report with

¹²⁴ See: BBC Report (2014), “European human rights rulings ‘to be curbed’ by Tories”, 3 October. Available at: <http://www.bbc.co.uk/news/uk-politics-29466113>.

recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) for the European Commission to submit before February 2015 legislative proposals following the recommendations set out in the Annex of the Resolution (See Annex 3 of this study) and providing for, among others: a mandatory ground of refusal where there are substantial grounds to believe that the execution of the measure would be incompatible with fundamental human rights; a proportionality check when issuing mutual recognition decisions, which would include the impact on the rights of the requested person; the right to an effective remedy; and a better definition of the ‘crimes’ where the EAW should apply. This should go along with the full accomplishment of the EU Roadmap of suspects’ rights in criminal proceedings as well as the procedural rights package. A solid suspects’ rights EU framework would be the best way to address the currently “incomplete and unbalanced nature of the European of the Union area of criminal justice”.¹²⁵

A Digest or Common Corpus of European Criminal Law should be adopted.¹²⁶ The Digest could be composed of two main sections. First, a general section dealing with basic or general principles of mutual recognition and European law, including relevant standards developed by the European Court of Human Rights in Strasbourg. This section would also include an express ground of refusal in cases of alleged breaches of fundamental rights of suspects as well as common definition of ‘serious crimes’ and ‘competent judicial authority’. Second, the Digest would include a specific section bringing together the currently dispersed or sectoral set of legislative and quasi-legislative instruments and covering the various stages of the European criminal process. The negotiations and adoption of the EU Digest of European Criminal Law should avoid lowering current European standards foreseen in post-Lisbon Treaty Directives on suspect rights.

RECOMMENDATION 3: Implementation and Evaluation – A Stronger Democratic Accountability

The European Parliament should give particular priority to better ensuring Member States’ timely and effective implementation of pre- and post-Lisbon Treaty European criminal law. The European Parliament Resolution called on:

“...[EU Member States] to implement in a timely and effective manner the whole body of Union criminal justice measures since they are complementary including the European Investigation Order, the European Supervision Order and procedural rights measures, thereby making available to judicial authorities alternative and less intrusive mutual recognition instruments whilst also ensuring respect for the rights of suspects and accused persons in criminal proceedings...[and] on the Commission to carefully monitor their correct implementation as well as their impact on the functioning of the EAW and the Union area of criminal justice.”¹²⁷

An effective and independent evaluation mechanism should be developed following the template provided by the new 2013 Schengen Evaluation Mechanism, in particular in what concerns the role that the European Parliament has played in decision-making and implementation (by having obtained access to information of this evaluation system and documents in respect of the evaluation results of Member States’ practical implementation of EU law). This template should be followed at times of implementing any future system for criminal justice cooperation. The current system of mutual (Member State) peer evaluation over old EU Third Pillar instruments should move from its exclusive intergovernmental nature towards a more EU-driven objective, arrived at via sound and independent methodology. A key objective should be better ensuring a full and effective monitoring of the European instruments through a scientifically rigorous methodology, an improved system of statistical collection and independent (Member State-by-Member State) assessment of

¹²⁵ European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), paragraph 5. According the Resolution, “the legislative solutions need to address both issues through continued work to establish minimum standards on inter alia the procedural rights of suspects and accused persons and a horizontal measure establishing principles applicable to all mutual recognition instruments, or if such a horizontal measure is not feasible or fails to remedy the problems identified in this resolution, amendments to Framework Decision 2002/584/JHA.”

¹²⁶ See S. de Biolley *et al.* (2012), *Code of Criminal Law of the European Union*, Brussels: Bruylant.

¹²⁷ Point 2 of the European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).

key developments and main challenges in practical implementation.¹²⁸ The evaluation should be a ‘bottom-up’ system, in light of the experiences of EU networks of national practitioners and criminal justice actors, including civil society and practitioner organisations.¹²⁹

Any new system could give priority to thematic areas where concerns or more important challenges have been so far identified. The European Parliament has rightly expressed concerns regarding the “disproportionate use of the EAW for minor offences or in circumstances where less intrusive alternatives might be used, leading to unwarranted arrests and unjustified and excessive time spent in pre-trial detention and thus to disproportionate interference with the fundamental rights of suspects and accused persons as well as burdens on the resources of Member States”.¹³⁰ Special attention should indeed be paid to issues such as pre-trial detention,¹³¹ the basis for the implementation of the Framework Decision on the cross-border execution of judgments in the EU involving deprivation of liberty (transfer of prisoners system),¹³² or the uneven and differentiated practical implementation of the rights of suspects in police detention and criminal proceedings across the Union.¹³³ Another priority area should be better ensuring the quality/independence of justice (principle of separation of powers), for instance, in what concerns the existence of sufficient impartial controls over the necessity and proportionality of the decisions on the issuing and execution of EAWs. The European Parliament should be entrusted with an active role not just in the follow-up of and provision of information on the evaluation results of EU criminal law instruments, but in the actual conduct and coordination of the evaluations as well as in the implementation of a solid follow-up system.

¹²⁸ Refer to S. Carrera, E. Guild and N. Hernanz (2013), “Europe’s most wanted? Recalibrating Trust in the European Arrest Warrant System”, Working Paper No. 55, CEPS Liberty and Security in Europe Series, CEPS, Brussels, pp. 26-27.

¹²⁹ For instance the European Judicial Network (EJN) in criminal matters, the European Network of Councils for the Judiciary (ENCJ), the European Criminal Bar Association (ECBA) and the Justice Forum, as well as independent networks of interdisciplinary academics.

¹³⁰ European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).

¹³¹ As the same European Parliament Resolution underlined, “while recognising the necessity of pre-trial detention under certain criteria, the absence of minimum standards on such detention including regular review, its use as a last resort and consideration of alternatives, coupled with the lack of proper assessment of whether the case is trial-ready, can lead to unjustified and excessive periods of suspects and accused persons in pre-trial detention”, paragraph F.viii.

¹³² Council of the EU (2008), Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5 December 2008. Refer to G. Vermeulen *et al.* (2011), *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU member states*, Volume 41, IRCP-series, Antwerpen: Maklu.

¹³³ For a comparative study refer to J. Blackstock *et al.* (2014), *Inside Police Custody: An Empirical Account of Suspects’ Rights in Four Jurisdictions*, Antwerp: Intersentia; “The research indicates that the rights which were the subject of the study are sometimes not defined by law, and often not implemented in practice, in a way that gives recognition to the fact that they are suspect’s rights, and that it is for suspects (rather than lawyers, prosecutors or police officers) to determine whether or not they wish to exercise them”, p. 427.

Literature References

- Barnard, C. (2010), "The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?", available for download at: <http://www.law.cam.ac.uk/faculty-resources/download/barnard-uk-opt-out-and-the-charter-of-fundamental-rights/7309/pdf>.
- Blackstock, J. *et al.* (2014), *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*, Antwerp: Intersentia.
- Carrera, S. and E. Guild (2006), "No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice", in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future*, Aldershot: Ashgate Publishing.
- Carrera, S. and F. Geyer (2008), "The Reform Treaty and Justice and Home Affairs – Implications for the common Area of Freedom, Security and Justice", in E. Guild and F. Geyer, F. (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot: Ashgate Publishing, pp. 289-307.
- Carrera, S., E. Guild and T. Balzacq (2010), "The Changing Dynamics of Security in an Enlarged European Union", in Carrera, S., D. Bigo, E. Guild and R. Walker, *Europe's 21 Century Challenge: Delivering Liberty*, Aldershot: Ashgate Publishing.
- Carrera, S., N. Hernanz and J. Parkin (2013), "The 'Lisbonisation' of the European Parliament – Assessing progress, shortcomings, and challenges for democratic accountability in the area of freedom, security and justice", Working Paper No. 58, CEPS Liberty and Security in Europe Series, CEPS, Brussels.
- Carrera, S., E. Guild and N. Hernanz (2013), "Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System", Working Paper No. 55, CEPS Liberty and Security in Europe Series, CEPS, Brussels.
- Conant, L. (2012), "Compliance and What Member States Make of It", in M. Cremona (ed.), *Compliance and the Enforcement of EU Law*, Oxford: OUP.
- Craig, P. (2013), *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, pp. 332-333.
- Davoli, A. and R. Raffaelli (2014), "Background information for the LIBE delegation to Italy on the situation of prisons 26-18 March 2014", European Parliament study, Policy Department C: Citizens' Rights and Constitutional Affairs, March, Brussels.
- De Biolley, S. *et al.* (2012), *Code of Criminal Law of the European Union*, Brussels: Bruylant.
- De Capitani, E. (2014), "1st December is approaching: will the EU's 'creative ambiguity' on police and judicial cooperation in criminal matters finally draw an end?", Blog on European Area of Freedom, Security and Justice, posted on 8 July 2014, see <http://free-group.eu/2014/07/08/1st-december-2014-is-approaching-will-the-eus-creative-ambiguity-on-police-and-judicial-cooperation-in-criminal-matters-finally-draw-to-an-end/>.
- Emerson, M. (2013), "Seven Hazards in Cameron's Intended European Policy", CEPS Commentary, CEPS, Brussels, 15 January.
- Emerson, M. and S. Blockmans (2013), "British Balance of Competences Reviews, Part I – 'Competences about right, so far'", EPIN Paper No. 35, October.
- Emerson, M., S. Blockmans, S. Peers and M. Wriglesworth (2014), "British Balance of Competences Reviews, Part II – Again, a huge contradiction between the evidence and Eurosceptic populism", EPIN Paper No. 40, June.
- Hinarejos, A., J.R. Spencer and S. Peers (2012), "Opting out of EU Criminal law? What is actually involved?" CELS Working Paper No. 1, September, Cambridge.
- Kuijper, J.P. (2004), "The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects", *Common Market Law Review*, Vol. 41, No. 2, pp. 609-626.

- Lorenzmeier, S. (2006), "The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision of the European Court of Justice", *Zeitschrift für internationale Strafrechtsdogmatik*, Vol. 12, pp. 583-588.
- Lloyd-Cape, E. *et al.* (2010), *Effective Criminal Defence in Europe*, Ius Commune: European and Comparative Law Series Vol. 87, Cambridge: Intersentia.
- Mitsilegas, V. (2006), "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *Common Market Law Review*, Vol. 43, pp. 1277-1311.
- Mitsilegas, V. (2012), "The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights", General Report, in J. Laffranque (ed.), *The Area of Freedom, Security and Justice, Including Information Society Issues. Reports of the XXV FIDE Congress, Tallinn*, Vol. 3, pp. 21-142.
- Mitsilegas, V. (2012), "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law 2012*, Vol. 31, pp. 319-372.
- Mitsilegas, V. (2014), "Politicisation of the European Arrest Warrant is dangerous and unnecessary", *New Statesman*, 12 November 2014.
- Müller-Graff, P.C. (1994), "The Legal Bases of the Third Pillar and Its Position in the Framework on the Union Treaty", *Common Market Law Review*, Vol. 31, No. 3, pp. 493-510.
- Peers, S. (2008), "Finally 'Fit for Purpose?' The Treaty of Lisbon and the End of the Third Pillar Legal Order", *Yearbook of European Law*, Vol. 27, No. 1, pp. 47-64.
- Peers, S. (2008), "Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon", *European Journal of Migration and Law*, Vol. 10, No. 2, pp. 219-247.
- Peers, S. (2009), "The 'Third Pillar acquis' after the Treaty of Lisbon enters into force", *Statewatch Analysis*, November.
- Peers, S. (2011), *EU Justice and Home Affairs Law*, 3rd ed., Oxford: Oxford University Press.
- Peers, S. (2012), "The Mother of all Opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014", *Statewatch Analysis*, February.
- Peers, S. (2012), "The UK's planned 'block opt-out' from the EU justice and policing measures in 2014", *Statewatch Analysis*, October.
- Peers, S. (2014), "The UK opt in to pre-Lisbon EU criminal law", *Statewatch Analysis*, July.
- Peers, S. *et al.* (2014) (eds), *The EU Charter of Fundamental Rights – A Commentary*, Oxford: Hart Publishing.
- Peers, S. (2014), "What just happened? The House of Commons 'vote' on the European Arrest Warrant", *Blog on EU Law Analysis – Experts insights into EU law developments*, 10 November 2014.
- Spaventa, E. (2007), "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino", *European Constitutional Law Review*, Vol. 3, No. 1, pp. 5-24.
- Vermeulen, G. *et al.* (2011), *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU member states*, Volume 41, IRCP-series, Antwerpen: Maklu.
- Vogel, J. (2010), "Introduction to the Ruling of the Higher Regional Court of Stuttgart of 25 February 2010 – The Proportionality of a European Arrest Warrant", *New Journal of European Criminal Law*, No. 2, pp. 145-152.
- Vogel, J. and J. Spencer, "Proportionality and the European Arrest Warrant", *Criminal Law Review*, Vol. 6, pp. 474-482.
- Wade, M.L. (2014), "Developing a Criminal Justice Area in the European Union", *European Parliament study, DG Internal Policies*, Brussels.

Annex 1. Protocol 36 (Title VII)

Article 9

The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on the European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on the European Union.

Article 10

Paragraph 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 the Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union 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 the 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.

Paragraph 2

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

Paragraph 3

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

Paragraph 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 referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238.3.a of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

Paragraph 5

The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in 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 a 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. 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 re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

Annex 2.

List of ex-Third Pillar Non-Schengen *Acquis* which the UK Might Seek to Rejoin¹³⁴

- 16 - Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (OJ L 344, 15.12.1997, p. 7)
- 17 - Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations (Naples II) (OJ C 24, 23.1.98, p. 1)
- 21 - Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO) (OJ L 333, 9.12.98, p. 4)
- 25 - Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the internet (OJ L 138, 9.6.2000, p. 1)
- 27 - Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention) (OJ L 271, 24.10.2000, p. 1)
- 28 - Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of Member States in respect of exchanging information (OJ L 271, 24.10.2000, p. 4)
- 37 - Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1)
- 50 - Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 245, 29.9.2003, p. 44)
- 71 - Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 138, 4.6.2009, p. 14)
- 39 - Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension (OJ L 121, 8.5.2002, p. 1)
- 68 - Council Decision 2007/412/JHA of 12 June 2007 amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension (OJ L 155, 15.6.2007, p. 76)
- 40 - Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (OJ L 162, 20.6.2002, p. 1)
- 43 - Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1)
- 58 - Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16)
- 66 - Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders (OJ L 328, 24.11.2006, p. 59)

¹³⁴ As set out in Annex 1 of Council of the European Union, “Application of Article 10 of Protocol 36 to the Treaties – Complementary note on the state of play report”, document number: 10167/14 of 17 June 2014; see also “Conservative whips warn of backbench revolt on European arrest warrant”, *The Independent*, 23 October 2014, <http://www.independent.co.uk/news/uk/politics/conservative-whips-warn-of-backbench-revolt-on-european-arrest-warrant-9814772.html>.

- 67 - Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (so-called “Swedish initiative”) (OJ L 386, 29.12.2006, p. 89)
- 69 - Council Decision 2007/845/JHA of 6 December 2007 concerning co-operation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime (OJ L 332, 18.12.2007, p. 103)
- 75 - Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220, 15.8.2008, p. 32)
- 78 - Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union (so-called “transfer of prisoners”) (JO L 327, 5.12.2008, p. 27)
- 82 - Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24.12.2008, p. 130)
- 84 - Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009, p. 24)
- 85 - Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, p. 23)
- 86 - Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ L 93, 7.4.2009, p. 33)
- 89 - Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20)
- 92 - Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes (CIS) (OJ L 323, 10.12.2009, p. 20)
- 87 - Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) (OJ L 121, 15.5.2009, p. 37)
- 97 - Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information (OJ L 325, 11.12.2009, p. 6)
- 99 - Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files (OJ L 325, 11.12.2009, p. 14)
- 101 - Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information (OJ L 332, 17.12.09, p. 17)

List of ex-Third Pillar Schengen *Acquis* which the UK Might Seek to Rejoin

102 - Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 (OJ L 239, 22.9.2000, p. 19)

- Chapter 1 on police cooperation - Art. 39, 40, 42¹³⁵, 43¹³⁶, 44, 46 and 47¹³⁷;
- Chapter 3 on *ne bis in idem* - Art. 54 to 58;
- Chapter 4 on extradition - Art. 59 to 66;
- Chapter 5 on the transfer of enforcement of criminal judgments - Art. 67 to 69;
- Chapter 6 on narcotic drugs - Art. 71 and 72;
- Title VI on personal data protection - Art. 126 to 130¹³⁸;
- Declaration 3 to the Final Act concerning Article 71(2)

112 - Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (OJ L 248, 3.10.2000, p. 1)

116 - Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (OJ L 260, 11.10.2003, p. 37)

117 - Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar) (OJ L 79, 20.3.2007, p. 29)

118 - Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 205, 7.8.2007, p. 63)

122 - Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p. 60)

¹³⁵ To the extent that it relates to Article 40.

¹³⁶ Ibid.

¹³⁷ Except for Art. 47(2)(c) and (4).

¹³⁸ To the extent that it relates to the provisions of the 1990 CISA in which the UK participates.

Annex 3

Annex to the European Parliament Resolution of 27 February 2014 with Recommendations to the Commission on the Review of the European Arrest Warrant (2013/2109(INL))

RECOMMENDATIONS AS TO SOME ENVISAGED LEGISLATIVE PROPOSALS

Validation procedure for Union mutual legal recognition instruments:

– ‘Issuing authority’ in Union criminal legislation shall be defined as:

- (i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or
- (ii) any other competent authority as defined by the issuing Member State, provided that the act to be executed is validated, after examination of its conformity with the conditions for issuing the instrument, by a judge, court, investigating magistrate or a public prosecutor in the issuing Member State.

Proportionality check for the issuing of Union mutual recognition legal instruments:

When issuing a decision to be executed in another Member State, the competent authority shall carefully assess the need for the requested measure based on all the relevant factors and circumstances, taking into account the rights of the suspected or accused person and the availability of an appropriate less intrusive alternative measure to achieve the intended objectives, and shall apply the least intrusive available measure. Where the executing authority has reason to believe that the measure is disproportionate, the executing authority can consult the issuing authority on the importance of executing the mutual recognition decision. After such consultation, the issuing authority may decide to withdraw the mutual recognition decision.

Consultation procedure between the competent authorities in the issuing and executing Member State to be used for Union mutual recognition legal instruments:

Without prejudice to the possibility of the competent executing authority to avail itself of the grounds for refusal, a standardised procedure should be available whereby the competent authorities in the issuing and executing Member State can exchange information and consult each other with a view to facilitating the smooth and efficient application of the relevant mutual recognition instruments or the protection of the fundamental rights of the person concerned such as the assessment of proportionality, including, with regard to the EAW in order to ascertain trial-readiness.

Fundamental rights refusal ground to be applied to Union mutual recognition legal instruments:

There are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligations in accordance with Article 6 TEU and the Charter.

Provision on effective legal remedies applicable to Union mutual recognition instruments:

Member States shall ensure in accordance with the Charter, the established case law of the ECJ and the ECtHR, that everyone whose rights and freedoms are violated by a decision, action or omission in the application of an instrument of mutual recognition in criminal matters has the right to an effective remedy before a tribunal. If such a remedy is exercised in the executing Member State and has suspensive effect, the final decision on such a remedy shall be taken within the time limits set by the applicable mutual recognition instrument or, in the absence of explicit time limits, with sufficient promptness to ensure that the purpose of the mutual recognition process is not jeopardised.



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