

The Lisbon Treaty - An Overview

**Dr. Gunnar Beck, Barrister (Henderson Chambers) and Reader
in EU Law (SOAS, Univ of London)**

Contact:

clerks@hendersonchambers.co.uk

gb18@soas.ac.uk

Tel Chambers.: 020 7583 9020

Tel. (academic office): 020 78984661

The road to Lisbon

- 1957 Treaties of Rome
- 1986 Single European Act
- 1992 Treaty of Maastricht
- 1997 Treaty of Amsterdam
- 2001 Treaty of Nice
- 29 Oct 2004 EU Constitutional Treaty signed by EU heads of gov
- May-June 2005 France and the Netherlands reject the Constitutional Treaty by referendum
- 13 Dec 2007 signature of the Lisbon Treaty
- 12 June 2008 Ireland rejects the Treaty by referendum
- 2 October 2009 Second referendum in Ireland

What has been the result of successive EU treaties?

- Each successive treaties has transferred law-making powers from “national competence” either to “intergovernmental cooperation” or to the supra-national level and sometimes from the intergovernmental to the Community method.
- EU treaties have not (so far) returned powers from the supranational level to either the intergovernmental or purely national levels
- The Treaty of Lisbon is similar to preceding treaties in both respects.

Institutional innovations

- Creates permanent President of the European Council (2.5 years; renewable once). The rotating six-month Council Presidency remains in place.
- Creates a high representative on foreign affairs, merging jobs of current representative for the Common Foreign and Security Policy (in the Council) with the Commissioner for External Relations

Decision-making innovations

- Introduces new basis for qualified majority voting (QMV) from 2014 (2017): 55% of MS representing 65% of population required.
- Extends co-decision (which effectively becomes the norm) which renamed the Ordinary Legislative Procedure (OLP) OLP = co-decision; QMV.
SpLP (Special Legislative Procedures) = joint but unequal legislation by Council and EP (European Parliament)
- Art 289 TFEU: Only legal acts adopted by OLP or a SpLP are legislative acts.
- EP gets more say over how budget is spent

Decision-making innovations (ii)

- Lisbon extends majority voting in the Council of Ministers to new areas. Member States lose their veto in e.g.:
 - *Soc sec for free movement of workers (with emergency brake)*
 - *Judicial cooperation in criminal matters (UK has opt-in)*
 - *Measures to promote culture awareness and diversity*
 - *Energy (specific base created, but energy saving / internal energy market rules already previously adopted under QMV)*
 - *EU humanitarian aid*
- But unanimity (each MS has veto) still applies to direct tax, foreign policy, defence and social security

Democracy-enhancing innovations

- National Parliaments given a voice in making EU laws:
 - “Yellow card” refers Commission proposals not supported by 1/3 of domestic legislatures back to drawing board.
 - “Orange card” strikes down proposal if a majority of national parliaments object and national governments or MEPs agree
- Commission President to be of same political hue as majority grouping in EP

Democracy-enhancing innovations

(ii)

- Citizens' right to kick-start legislative process via petition (1 million signatures)
- Express provision for countries to leave the EU
- Council of Ministers to meet in public

Legal Innovations (Formal)

- Replacement of the EC Treaty with a new TFEU (Treaty on the Functioning of the EU)
- The treaty articles, alas, will be renumbered yet again
- Articles 3 to 6 TFEU sets out the division of the EU's competences for the first time.

Legal Innovations (Substantive)

- Incorporates Charter of Fundamental Rights into EU law (UK insistence that this should not enable ECJ to strike down existing UK laws)
- Extension of the Court of Justice's jurisdiction
- Abolition of the Pillar Structure and the absorption of the third pillar (JHA) into the Community Method; foreign and defence policy (formerly the second pillar) will remain *sui generis*.
- There is no longer a separate European Community (first pillar) but only an EU

Division of Union competences

Articles 3 to 6 of the TFEU allocates the EU's competences to three basic categories defining the relationship between EU and national law:

- exclusive
- shared
- complementary (supporting, coordinating or supplementary) competences.

Exclusive Competences

Article 3 TFEU: "The Union shall have **exclusive** competence in the following areas:

- Customs union
- Competition rules necessary for the functioning of the internal market
- Monetary policy for Member States which have adopted the euro
- Conservation of marine biological resources under the common fisheries policy
- Common commercial policy
- Conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope

Shared Competences

Article 4 TFEU: "The Union shall **share competence** with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 [exclusive competence, above] and 6 [supporting competence, below]."

"Shared competence between the Union and the Member States applies in the following principal areas:"

Exception (not subject to doctrine of pre-emption):

- Internal market
- Social policy, for the aspects defined in the TFEU
- Economic, social and territorial cohesion
- Agriculture and fisheries, excluding conservation of marine biological resources
- Environment
- Consumer protection
- Transport Trans-European networks
- Energy
- Area of freedom, security and justice
- Common safety concerns in public health matters, for the aspects defined in the TFEU
- And any other Union competence which is not listed in this table
- The areas of research, technological development and space

Shared Competences II

"competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs" (Article 4 TFEU)
"competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs" (Article 4 TFEU)

= i.e. not really a shared competence because the latter is defined in terms of the automatic displacement of national by EU law if both the Union and Member States have decided to act.

- The areas of research, technological development and space
- The areas of development cooperation and humanitarian aid

Complementary Competences

"The Union shall have competence to carry out actions to **support, coordinate or supplement** the actions of the Member States. The areas of such action shall, at European level, be:" (Article 6 TFEU)

- Protection and improvement of human health
- Industry
- Culture
- Tourism
- Education, vocational training, youth and sport
- Civil protection
- Administrative cooperation

Complementary Competences II

- "The Member States shall **coordinate their economic policies** within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies."
"Specific provisions shall apply to those Member States whose currency is the euro." (Article 5 TFEU)
- "The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies."
(Article 5 TFEU)
- "The Union may take initiatives to ensure coordination of Member States' social policies." (Article 5 TFEU)

Jurisdiction of the ECJ – Art 263(4) TFEU

- ‘Normalisation’ of ECJ jurisdiction in relation to AFSJ measures
NB: Accelerated preliminary reference procedure
- **Abolition of all previous restrictions on the ECJ’s jurisdiction under former Art. 68(1), (2)** in relation to civil judicial cooperation and immigration and visa policy measures
- Article 263(4): **Regulatory Act**
‘Regulatory act’ is a new term which has no equivalent in the present treaties or the body of existing ECJ case law
What is clear is that the term cannot cover measures that require further implementation such as directives, and can only refer to self-executing measures. Beyond that the meaning of ‘regulatory act’ is unclear and will have to be tested through litigation. It is likely that the ECJ will have to refer to the travaux préparatoires of the Convention on the Future of Europe

Art 263(4) TFEU

Article 263 (ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against **a regulatory act** which is of direct concern to them and does not entail implementing measures.

The Charter of Fundamental Rights

- The full legal status accorded to the Charter is probably the single most important change contained in the new post-Lisbon treaty framework.
- The Charter contains 54 articles and six titles:
 1. Dignity, articles 1-5
 2. Freedoms articles, 6-19 (this is where most of the ECHR rights are to be found)
 3. Equality, articles 20-26
 4. Solidarity, articles 27-38
 5. Citizens' rights, articles 39-46
 6. Justice rights, articles 47-50.

The Charter II

What are the sources of the Charter rights?

- This is set out in the Explanations:
- The ECHR is the source of 17 rights; the EU's Social Chapter which provides the basis for the chapter on solidarity covering Art. 27 to Art. 35; the other rights have their origins in international treaties, national constitutions and the case law of the European Court of Justice.

The Charter – Art 51(1)

- Article 51 (Scope)

“1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are **implementing** Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”
- The key word is “implementing Union law”.
- Article 6 (1), TEU post-Lisbon: The Charter is to be interpreted with due regard to the Explanations.
- Is the phrase ‘implementing Union law’ synonymous with ‘scope of Community law’ as used by the ECJ in most of its ‘common law’ on the extent of the ECJ’s power to review national law for its compliance with rights acknowledge in EC law.
- It is unlikely that the phrase “implementing Union law” as interpreted in the light of the Explanations will restrict the application of the Charter and prevent it from being applied to national law, at least to national law in so far as it is deemed to be connected with EU law in some sense. 15 years of post Keck case law suggest that the four freedoms will continue to provide a vehicle for revising a wide range of national measures with a view to ensuring compliance with EU law. A good recent example is the Country Alliance case where the House of Lords opined that articles 38 and 49 Charter were at least potentially engaged by the Hunting Act.

The Charter – Art. 52(5)

- Article 52(5) – Rights/principles

“The provisions of this Charter which contain principles may be implemented by legislature and executive acts taken by institutions, bodies, offices, and agencies of the Union, and by acts of Member States when they are implementing Union Law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”

- Art. 52(5) was added at the behest of the UK government, and it is very unclear how principles can be meaningfully distinguished from rights.
- This was part of a more general problem concerning the relationship between Charter rights and rights as general principles of EU law
- David Anderson has suggested that a potential solution to this problem might be to treat the Charter as *lex specialis*.

The Charter – The Protocol applicable to Poland and the UK

- Protocol 7 applicable to Poland and the UK

“Article 1

1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.”

“Article 2

To the extent that a provision of a Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”

- Whereas in most other EU Member States the Charter will generally apply not only to EU law but likewise to all national law implementing obligations under EU law, the UK’s position is governed by **Protocol 7 of the Treaty of Lisbon**. The Protocol is often wrongly described as an opt-out. The first paragraph will ensure that no court – neither the national court nor the ECJ – will be able to annul any provision of UK national law on the grounds that it is in breach with any of the Charter rights.
- However, the Court of Justice will not merely use the Charter to annul EU law or implementing national legislation. It will **also refer to the Charter as a source for interpreting the EC and EU Treaties as well as EU legislation** adopted under the treaties. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, **the duty to interpret the measure in accordance with the ruling arises, not under the Charter, but under the UK’s other Treaty obligation.**

The Charter – The Protocol II

- At the same time the principle of the uniform application of Community law which is well-established and entrenched in Community law since the early days of the Community, will prevent the Court from developing two lines of interpretation for Community law – one based on the Charter for most other Members States and a Charter-free interpretation for the UK. If the ECJ will draw on the Charter as a new source for interpreting measures of Union law such as Directives, the resulting interpretation would be binding in the UK, because of the UK's treaty obligations, notably the **duty of loyal co-operation under former Art 10 EC** and, in a more restricted sense, also under Article 3 TEU. **These obligations are not excluded by the Protocol.** On the contrary, and as the recitals make clear, the Protocol is subject to those obligations. **Indirectly, therefore, the Charter will affect law in the UK – it will do so simply by influencing the interpretation of EU law which is directly applicable or directly effective within the UK.**
- The protocol will not prevent the justiciability of the Charter in UK law. Instead the protocol is more likely to serve as an aid to interpretation of the horizontal clauses in the Charter.

The Charter – Accession to the ECHR

- Rationale: the Member States have transferred more and more powers to the EU but the latter is not answerable to Strasbourg for the powers it has acquired.
- Case examples: *Matthews*, and *Bosphorus v. Ireland*, paras 55-6, 115
- With the *Bosphorus* judgment, the ECtHR also introduced a new theory for justifying interference with human rights by Member States when applying Community acts. The Court had always emphasized that it is sufficient *in abstracto* that an act has been adopted by an international organization that provides an equivalent standard of human rights protection compared to the ECHR. In the *Bosphorus* judgment, **the Court applied a more concrete test to conclude to the general equivalence of human rights protection at Community level by reviewing the Community's substantive guarantees and procedural mechanisms for potential 'manifest deficiency'**. On the one hand, the ECtHR clarified its ambition to examine the specific circumstances of future cases in order to effectively review potential shortcomings in the protection of human rights at Community level. On the other hand, this also indicates that the Court will not fully review Community acts, but rather engage in a general abstract review of the Community system.
- **Accession** is now rendered possible by the Treaty of Lisbon. However, accession would pose the following big questions:
 - what would happen to the *Solange* doctrine,
 - would the EU continue to profit from a presumption of compliance,
 - should there continue to be a lower level of scrutiny for the EU?
- A problem would arise in particular, if a Member State were taken to Strasbourg over a breach of the Convention by a national law implementing EU law. Who would be held responsible? Could EU law continue to enjoy the *Bosphorus* presumption when the reason for the presumption has gone?

The Charter – Parallel jurisdiction of ECJ and ECtHR

- An important consequence of giving the Charter legally binding status will be that the ECJ will be increasingly, and more often even than so far, asked to interpret the ECHR, given that many Charter rights are derived from that instrument. The **risk is that a difference in approach may develop between the Strasbourg and Luxembourg Courts**, including differences over criminal matters.
- Cases:
 - KB v NHS [2004] Case C-117/01 ECR-I – 541
 - Grant v South West Trains Case C-249/96
 - P v S Cases C-13-94For all these, see Craig/de Burca, EU law, 4th ed, pp. 408-09
- Key Problem: **How to avoid divergence!**
- Article 52(3)

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of the those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”
- Analogy:

Human Rights 1998: Duty of UK courts to take account of the jurisprudence of the ECtHR.
- Proliferation of HR regimes in Europe

The problem of Overlapping/Parallel HR jurisdiction also exists in the relationship between the national legal orders of Member States and the ECJ and ECtHR respectively, esp in the two courts’ respective relationship with national constitutional courts, where the proliferation of human rights jurisdictions in Europe may likewise lead to conflicting jurisdictional claims and rights interpretations.

In the UK: litigants may challenge national law both on Charter and HRA grounds provided the measures can be shown to have some tenuous relationship with EU law. What will happen if national courts and the ECJ disagree about whether the national law in question can be regarded as ‘implementing Union law’?

The Charter – Other problems and effects

- **The conflict between Fundamental Freedoms and Charter rights**
- Traditionally the four freedoms and the prohibitions of sex and national discrimination were the constitutional rights of the EU legal order.
- The Treaty of Lisbon accords the Charter the same legal status as the treaties so that there exists no hierarchy of norms between the freedoms and the charter.
- How will the emerging conflict between fundamental freedoms versus charter rights be resolved by the Court of Justice?
- **Greater Legal Uncertainty**
Recent ECJ case law suggests that human rights in the EU legal order tend to make decisions more unpredictable in cases where HRs conflict with each other and with other principles of Community law.
- *Schmidberger v Austria* Case C-112/00
ECJ: freedoms of expression and of assembly as recognized by the Charter and the ECHR may take precedence over the Community free movement principle
- *Omega Spielhallen* Case C-36/02
ECJ: right to human dignity may likewise justify restriction of the freedoms to provide trans-national services and of establishment.
- *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* Case C-438/05
ECJ appears to suggest that the Charter right to strike may only justify restriction of the free movement of goods if it meets additional conditions, esp.
if it represents overriding reasons of public interest, such as the protection of certain works, and the principle of proportionality.
- Possible Interpretations:
- Some commentators suggest the Viking/Laval may be the beginning of the ECJ's development of two classes of rights doctrine similar to the distinction between unqualified/qualified rights in the ECHR.
- The more realistic view may be that recent cases including *Viking/Laval* indicate that the Court was developing its line in *Schmidberger* which confirms that there is **no clear hierarchy**. The Court appears to take the view that the two sets of provisions **should be made to co-exist pragmatically and as best as possible on a case-by-case basis**.

The Charter – Other problems and effects

- **Further legal uncertainty resulting from the full incorporation of the Charter**

Relationship between EU and international law

- *Kadi Case C-402/05*

The Court has ruled that human rights under Community law may take precedence over international law. The Court held that the Council Regulation be declared invalid on the grounds that it is in breach of the right to property under the Charter and the ECHR.

Review of EU acts, especially self-executing acts

- **Commission decisions and competition enforcement procedures in particular may now be open to challenges under the Charter either in the national courts or via extended access under Art 263 TFEU**

Review of EU criminal law

- **The full legal effect of the Charter and its application to national implementing Union law with the extension of the ECJ's jurisdiction to EU criminal legislation means that in principle all national legislation implementing EU Framework Decisions and future directives and other measures will be open to J.R. on the grounds of alleged non-compliance with the Charter.**
- **Nb: Transitional provisions esp. in relation to the UK**

The Abolition of the Pillar Structure and the AFSJ (AREA OF FREEDOM, SECURITY AND JUSTICE) - Overview

- Merging of pillars
- Institutional changes: EP & ECJ
- Extension of qualified majority voting & EP co-decision
- Unified set of legal instruments: directives become the normal instrument for AFSJ measures
- Substantive changes (criminal law harmonisation and competence to establish a European Public Prosecutor)
- New arrangements for enhanced cooperation
- emergency brake mechanism
- UK opt out

AFSJ – Areas covered

Broadly those formerly covered by the Third Pillar (JHA) up to the Treaty of Nice

- Border checks, visas and free movement (Art. 77 TFEU)
- Common **asylum** policy (Art 78)
- Common **immigration** policy (Art. 79)
- Judicial cooperation in **civil** matters (Art. 81)
- Judicial cooperation in **criminal matters** (Art. 82)
- **Police cooperation** (Art. 87)

General Principles: Article 67

1. The Union shall constitute **an area of freedom, security and justice** with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the **absence of internal border controls** for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third country nationals...
3. The Union shall endeavour to ensure **a high level of security** through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.
4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

AFSJ - Institutional Changes

- I. Increase in powers of the EP through the extension of ordinary legislative procedure
 - 1) Financial aspects of anti terrorism legislation (Art. 75 [ex Art 60 TEC])
 - 2) Measures on border checks and visas (Art. 77(2) [ex 62 TEC]):
 - (a) common policy on visas and other short stay residence permits;
 - (b) checks on persons crossing external borders;
 - (c) conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
 - (d) measures necessary for the gradual establishment of an integrated management system for external borders;
 - (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.
 - 3) Measures to develop a common policy on
 - asylum, subsidiary protection and temporary protection (Art. 78 [ex Arts 63 (1)(2), 64(2) TEC])
 - 4) Measures to develop a common immigration policy (Art. 79 [ex Art. 63 (3)(4)])

AFSJ - Institutional Changes II

Increase in powers of the ECJ through

– the abolition of limitations of Article 68 TEC

- Only courts of last instance
- No jurisdiction on measures relating to the

- maintenance of law and order and the safeguarding of internal security (cf Arts 72, 276 TFEU)

– the abolition of limitations of Article 35 TEU

Article 35

– Provided for an optional jurisdiction of the ECJ

– No jurisdiction to review validity or proportionality of

- national acts relating to the maintenance of law and
- order and the safeguarding of internal security (Cf
- Arts. 72, 276 TFEU)
- – Limited direct actions
- • Under Lisbon, the jurisdiction of the ECJ applies
- fully on AFSJ measures including, judicial review,
- preliminary references, actions in damages and
- enforcement actions (but see Art 276)

AFSJ – Criminal Law

Judicial cooperation in criminal matters covers:

- 1) **mutual recognition** of judgments (Art. 82)
- 2) **approximation** of criminal laws (Art. 83)

AFSJ - Legal bases of approximation

1) Serious crime areas (**Art 83(1)**):

“Areas of particularly **serious crime with a cross-border dimension** resulting from the nature or impact of such offences or from a special need to combat them on a common basis”

These are: terrorism; trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, organised crime

The Council may unanimously extend the list

AFSJ - Legal bases of approximation II

- 2) Where approximation is **essential to ensure**
- **effective implementation of a Union policy** in
 - an area which has been subject to
 - harmonisation (**Art 83(2)**)
 - More open ended mandate based on *ECJ case law: C 176/03 C 440/05*.
 - The UK can opt out **only if Art 83(2) supersedes the common law power established by the above judgments**

AFSJ - Approximation

- is pursued through **directives**
- adopted under **ordinary legislative procedure**
- provides for minimum rules
- may concern definition of criminal offences
- and sanctions
- is subject to the “emergency brake mechanism”

AFSJ – Emergency Brake

It applies to:

- Draft directives to facilitate **mutual recognition of judgments** in the field of police and criminal cooperation
- **Approximation** of criminal laws

AFSJ – Emergency Brake

Where a member of the Council considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the **ordinary legislative procedure shall be suspended**. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorization to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

AFSJ – UK opt-in

UK opt – in: Protocol 21

- The **default position** is that the UK is **not part of AFSJ**.

As a result:

- It does not take part in the adoption of title V measures
- The following are not binding on the UK:
 - Title V provisions
 - measures adopted pursuant to that Title
 - international agreements
 - ECJ judgments

AFSJ - Opt in possibilities

- *Ex ante*: Notification to the President of the Council within 3 months of presentation of proposal (Art 3)
- But note that the UK does not take part as equal partner in the negotiations: reasonable period condition (Art 3(2))
- After adoption of a measure (Art 4):
Procedure for enhanced cooperation applies

AFSJ - Amendment of existing acts: Art 4a

- Provisions of protocol apply also to AFSJ measures amending existing measures by which UK is bound
- However, if Council considers that the non-participation of the UK in the amended measure makes its application inoperable, it may urge UK to opt in
- If no opt in, existing measure no longer applies
- Ireland may notify the Council that it no longer wishes to be covered by the Protocol. No such reserve made by the UK.

AFSJ – Transitional opt - out

In relation to Union acts in the field of police cooperation and judicial cooperation on criminal matters which were **adopted before** the entry into force of the Lisbon Treaty, **the Commission will not enjoy the power to bring enforcement proceedings and the powers of the ECJ will be governed by the existing Treaties.** This transitional arrangement **will cease to have effect five years** after the entry into force of the Lisbon Treaty. Within five years from the entry into force of the Treaty of Lisbon, **the United Kingdom may** notify the Council that it does not accept the powers of the Commission and the ECJ in relation to the above acts in which case such acts will cease to apply to it **from the date of the expiry of the transitional period** (transitional opt out mechanism)

Conclusion

- The limits of EU power still well circumscribed under Lisbon
- The Areas of High Politics remain largely with the Member States.
- EU still only spends about 1% of GNI
- EU would not have:
 - An army
 - A police force
 - Tax-raising powers
 - The right to issue passports or birth certificates
 - The ability to set school curricula
 - Though certain powers agreed in area of policing and judicial cooperation (UK opt-in)

Conclusion II

- So the Treaty can be seen as essentially modest in scope (involving far lesser degree of loss of national sovereignty than either the SEA or the TEU)
 - no new legal order
 - the UK already has opt-outs on Euro and Schengen, emergency brakes on criminal law and social policy and opt-ins on all the repressive measures
- View from the Lords

“The House of Lords Constitution Committee has concluded that the Lisbon Treaty and the European Union (Amendment) Bill are likely to have no major damaging impact on the constitution of the UK.”

Press release, March 28th 2008

More info

- Overview of Treaty:
http://www.europa.eu/lisbon_treaty/glance/index_en.htm
- Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union
<http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>
- http://www.europa.eu/lisbon_treaty/faq/index_en.htm#2
- BBC summary: <http://news.bbc.co.uk/2/hi/europe/6928737.stm>
- Commons European Scrutiny Committee:
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>
- Foreign Office guide to the treaty:
<http://www.fco.gov.uk/en/global-issues/institutions/britain-in-the-european-union/eu-lisbon-treaty1/what-the-lisbon-treaty-will-do>

