

# THE TREATY OF LISBON AND SCOTS LAW

LOUISE FALCONER & IAIN MCIVER

This briefing looks at how the Treaty of Lisbon ('the Lisbon Treaty') approaches the 'area of freedom, security and justice' and the implications of this for Scotland.

The framework and procedures of the Lisbon Treaty raise issues particular to Scotland's position. After describing the framework of the Lisbon Treaty and the United Kingdom's position, this briefing examines how the Lisbon Treaty is significant for Scotland given that large parts of civil and criminal law are devolved and that Scotland has its own legal system. The briefing then looks at the implications of the opt-in procedure, the enhanced role of national parliaments and the substantive proposals on freedom, security and justice.

The briefing also considers three chapters within the Lisbon Treaty that may have significant consequences for Scotland's devolved responsibilities: judicial cooperation in civil matters, cooperation in criminal matters and proposals for a European Public Prosecutor.

Finally, this briefing outlines the importance of the Charter of Fundamental Rights for Scotland and its possible implications for the competence of the Scottish Parliament.

The briefing also contains a glossary of commonly used terms.

*Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Iain McIver on extension 85294 or email [iain.mciver@scottish.parliament.uk](mailto:iain.mciver@scottish.parliament.uk). Members of the public or external organisations may comment on this briefing by emailing us at [spice@scottish.parliament.uk](mailto:spice@scottish.parliament.uk). However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at [sp.info@scottish.parliament.uk](mailto:sp.info@scottish.parliament.uk).*

*Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.*

[www.scottish.parliament.uk](http://www.scottish.parliament.uk)

## SPICe briefing

7 May 2008

08/26



The Scottish  
Parliament

## CONTENTS

<b>KEY POINTS OF THE BRIEFING.....</b>	<b>3</b>
<b>BACKGROUND.....</b>	<b>4</b>
<b>FREEDOM, SECURITY AND JUSTICE BEFORE THE LISBON TREATY .....</b>	<b>5</b>
THE CURRENT EUROPEAN UNION FRAMEWORK FOR JUSTICE ISSUES .....	5
THE UK AND THE EU .....	6
<i>The Opt-in .....</i>	<i>6</i>
<b>THE TREATY OF LISBON FRAMEWORK .....</b>	<b>7</b>
THE COLLAPSE OF THE PILLAR STRUCTURE .....	7
THE CHARTER OF FUNDAMENTAL RIGHTS .....	7
THE UK POSITION.....	8
<i>The Protocol on the position of the United Kingdom and Ireland .....</i>	<i>8</i>
<i>Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.....</i>	<i>9</i>
<b>IMPLICATIONS FOR SCOTLAND OF PROVISIONS ON FREEDOM, SECURITY AND JUSTICE.....</b>	<b>11</b>
<i>The significance of freedom, security and justice issues for Scotland .....</i>	<i>11</i>
<i>The UK opt-in in the Scottish context.....</i>	<i>12</i>
<i>The role of national parliaments.....</i>	<i>12</i>
<i>Judicial cooperation in civil matters .....</i>	<i>12</i>
<i>Judicial cooperation in criminal matters.....</i>	<i>13</i>
<i>European Public Prosecutor .....</i>	<i>14</i>
<i>Scotland and the Charter of Fundamental Rights.....</i>	<i>15</i>
<b>LOOKING FORWARD .....</b>	<b>16</b>
<b>GLOSSARY .....</b>	<b>17</b>
<b>SOURCES .....</b>	<b>19</b>
<b>PROTOCOL ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE .....</b>	<b>22</b>
<b>PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION TO POLAND AND TO THE UNITED KINGDOM [EXTRACT] .....</b>	<b>25</b>

## KEY POINTS OF THE BRIEFING

- The Treaty of Lisbon ('the Lisbon Treaty') was signed by the Heads of State and Governments of the European Union's 27 Member States on 12 December 2007. Subject to ratification, it will come into force in January 2009.
- The Lisbon Treaty reinforces the EU's objective of offering citizens an area of freedom, security and justice (FSJ). The scope of FSJ is broad and some of the most controversial changes introduced by the Lisbon Treaty are in this area.
- The EU's competencies in pursuing an area of freedom, security and justice overlap with large areas of Scotland's devolved powers in criminal and civil justice.
- It is anticipated that the Lisbon Treaty will result in an increase in EU activity and legislative change in justice issues. Due to the European Parliament's extension of powers in this area, the Scottish Government has announced there will be greater engagement with the European Parliament and its Members that have a particular interest in justice matters.
- The UK Government has maintained a consistent stance in its approach to EU justice issues. The Government has stated cooperation with the EU 'must not affect fundamental aspects of our criminal justice system nor undermine our ability to safeguard national security'.
- There are two key reasons why changes to the EU regime for dealing with justice issues are significant for Scotland. First, large parts of civil and criminal law are devolved under the Scotland Act (1998) and so are within the competence of the Scottish Parliament. Secondly, Scotland has its own legal system with many laws and structures that are different from other parts of the UK. As a result, the impact in Scotland of EU justice policy is not necessarily the same as in the rest of the UK.
- The extension of the UK's right to opt-in to aspects of the Lisbon Treaty applies uniformly to the whole of the UK. This may create problems for devolved administrations that are at odds with the UK Government's position.
- The provisions on civil justice and family law in the Lisbon Treaty have changed the least and restate much of what is in current treaties, meaning there are no substantive implications for Scotland.
- The Law Society of Scotland has very serious reservations about the proposal in the Lisbon Treaty to establish a European Public Prosecutor.
- There are implications for Scotland in relation to the new Charter of Fundamental Rights ('the Charter'). Incompatibilities between the Charter and the European Convention on Human Rights could pose a significant problem for the legislative competence of the Scottish Parliament.

## BACKGROUND

The [Treaty of Lisbon](#) ('the Lisbon Treaty') was signed by the Heads of State and Governments of the European Union's 27 Member States on 12 December 2007. Subject to ratification, it will come into force in January 2009.

The Treaty was negotiated following the failure to ratify the Treaty Establishing a Constitution for Europe ('the Constitution') which had been agreed by EU Member States in 2004. The Lisbon Treaty amends the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC) which has been re-named the Treaty on the Functioning of the European Union (TFEU).

Following agreement of the Lisbon Treaty, it is now the responsibility of each Member State to ratify it. This is currently taking place across the EU; the aim is to have the Treaty ratified by all Member States by the beginning of 2009. If any Member State fails to ratify the Treaty it will not enter into force.

One of the key objectives of the EU is to offer its citizens an area of freedom, security and justice (FSJ) without internal borders. It was the 1997 Treaty of Amsterdam on the European Union (the 'Amsterdam Treaty') that initiated the concept of an area of FSJ. The Lisbon Treaty reinforces this objective.

This briefing is written on the assumption that the Lisbon Treaty will be ratified by all 27 Member States. It looks at how the Treaty approaches the 'area of freedom, security and justice' and the incorporation of the Charter of Fundamental Rights and examines the implications of these for Scotland.

Further background information on the development of justice affairs in the EU is available in the SPICe Briefing '[EU Justice and Home Affairs Policy](#)', whilst further information on the EU's history, institutions and legislative process is available in a series of SPICe Subject Maps on the European Union ([A 'Brief History](#)', [The Institutions](#)', [The Legislative Process](#)' and [The Budget](#)').

*N.B. Issues relating to EU law and justice have traditionally been referred to as 'justice and home affairs' (JHA issues). In 1997 with the Amsterdam Treaty, the concept of an 'area of freedom, security and justice' was created. The Lisbon Treaty completes the absorption of Pillar Three aspects of JHA (started by the Amsterdam Treaty) into the First Pillar and justice-related issues are now referred to under the banner term of 'freedom, security and justice' or FSJ issues.*

# FREEDOM, SECURITY AND JUSTICE BEFORE THE LISBON TREATY

## THE CURRENT EUROPEAN UNION FRAMEWORK FOR JUSTICE ISSUES

The areas in which the EU currently has competence are split between three 'Pillars'. These are: Community (First Pillar), Common Foreign and Security Policy (Second Pillar) and Justice and Home Affairs Cooperation (Third Pillar).

Issues related to freedom, security and justice (FSJ) cover a range of areas including judicial cooperation in relation to civil and criminal matters, immigration and border controls. Since 1999, justice issues have been dealt with under two different Pillars, as Table 1 indicates (Harvie-Clark 2007).

**Table 1: EU Justice and Home Affairs Framework after the Amsterdam Treaty**

Cross-Pillar objective: an area of freedom, security and justice

<b>First Pillar: European Community</b>	<b>Third Pillar: Justice and Home Affairs</b>
(Treaty Establishing the European Community, Title IV, articles 61-69)	(Treaty on European Union, Title VI, articles 29-42)
<ul style="list-style-type: none"><li>• Judicial cooperation in civil matters</li><li>• Immigration</li><li>• Asylum</li><li>• Visas</li><li>• External border controls</li></ul>	<ul style="list-style-type: none"><li>• Police and judicial cooperation in criminal matters</li></ul>

The important difference between the First and Third Pillars is the way in which legislation is made. Legislative decisions on issues under the First Pillar are made using Community procedures which involve using the co-decision process for agreeing legislation. Co-decision requires both the European Parliament and the Council of the EU to agree on a Commission proposal, including agreement on any amendments, before it can become law. This is the core legislative procedure which applies to 80% of EU legislation, including a wide range of policy areas devolved to the Scottish Parliament, such as health, education, transport, environment and culture (McIver 2007c). Under the Lisbon Treaty, the co-decision procedure will be re-named the 'Ordinary Legislative Procedure'.

Decisions in the Council of the EU made by the co-decision procedure utilise the 'qualified majority voting system'. The crucial aspect of qualified majority voting is that it prevents a single member state from blocking a proposal if they disagree with it.

Conversely, most decisions made under the Third Pillar are the sole preserve of the Council of the EU. Key decisions made in this field are required to be agreed unanimously by the government representatives of all 27 Member States in the Council. Under this procedure the European Parliament's role is limited to consultation. If a single Member State disagrees with a proposal, it can veto it and block the proposed legislation.

## THE UK AND THE EU

The UK Government has maintained a consistent stance in its approach to EU justice issues. In a recent White Paper published by the Foreign and Commonwealth Office (2007), the UK Government restated its position that cooperation with the EU 'must be in the national interest' and that it 'must not affect fundamental aspects of our criminal justice system nor undermine our ability to safeguard national security' (p.9).

### The Opt-in

During the negotiation of the Amsterdam Treaty, the UK Government (along with Ireland) was granted an opt-in arrangement on all legislation under the First Pillar. This opt-in is detailed in [Protocol 4](#) on the position of the United Kingdom and Ireland and is annexed to the TEU and TEC.

The UK can choose at any point to opt-in to measures being negotiated or that have been agreed by the other Member States. The UK Government can only participate in the negotiation of particular legislation if it has opted in. Once it has chosen to opt-in, it cannot then opt-out at the conclusion of negotiations, even if it disagrees with the final measure. At the time of the Amsterdam Treaty, the UK Government did not seek a similar arrangement for decisions made under the Third Pillar because the method of decision-making effectively provided them with a veto on all proposals.

## THE TREATY OF LISBON FRAMEWORK

Amongst other things, the Lisbon Treaty seeks to reinforce the EU's objective of offering citizens an area of freedom, security and justice (FSJ). The scope of FSJ is broad and some of the most controversial changes introduced by the Lisbon Treaty are in this area. Topics included within the framework of FSJ include: free movement of persons, visa policy, EU external borders policy, asylum, drugs policy coordination, EU citizenship, fundamental rights, racism, and, the fight against organised crime (European Commission 2008b).

All areas of FSJ will be subject to qualified majority voting<sup>1</sup> in the Council of the EU except for family law measures which will continue to require unanimity. This is a significant change to procedure. The House of Lords European Union Committee (2008a) believe that it will speed up decision-making in the Council and prevent legislation being adopted at the lowest common denominator. As a result, it anticipates there will be an increase in EU activity and legislative change in this area.

This section of the briefing looks at proposals relevant to FSJ in the Lisbon Treaty and the UK Government's position on these.

## THE COLLAPSE OF THE PILLAR STRUCTURE

The main change adopted by the Lisbon Treaty in relation to justice issues is the collapsing of the three Pillar approach.

Under the Lisbon Treaty, FSJ issues are all grouped together (Part 3, Title V TFEU) and decisions will be made using the Ordinary Legislative Procedure (previously known as co-decision). The move to have all justice issues dealt with in the same way is significant - it means qualified majority voting will be used in the Council and the ability for an individual Member State to veto a proposal is removed, except in relation to family law measures.

Justice issues in the Lisbon Treaty are dealt with in five chapters:

- General provisions
- Policies on border checks, asylum and immigration
- Judicial cooperation in civil matters
- Judicial cooperation in criminal matters
- Police cooperation

## THE CHARTER OF FUNDAMENTAL RIGHTS

The [Charter of Fundamental Rights of the European Union](#) ('the Charter') sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of EU citizens and all persons resident in the EU (European Commission 2008a).

---

<sup>1</sup> The Lisbon Treaty will change the requirements for a vote to be passed by qualified majority: it must have the support of 50% of Member States and these Member States must represent at least 60% of the EU's population.

The Charter was adapted by EU institutions in December 2007 at the same time as the Lisbon Treaty was agreed. Although the Charter will have the same legal value as the TEU and TFEU (Art 6 TEU), it has not been reproduced in the Treaties. In addition it is made clear that 'the provisions of the Charter shall not extend in any way the competencies of the Union as defined in the Treaties' (Article 6 TEU). The Charter will apply to the EU institutions and to Member States, but only when the latter are implementing EU law.

The rights guaranteed by the Charter are divided into six sections: dignity, freedoms, equality, solidarity, citizens' rights and justice.

## **THE UK POSITION**

In its 2007 White Paper, 'The Reform Treaty: The British Approach to the European Union Intergovernmental Conference', the Foreign & Commonwealth Office set out its preconditions for a new treaty. These pre-conditions were non-negotiable 'red lines'. There were four red lines, including the 'protection of the UK's common law system and police and judicial processes'. The red lines were designed to prevent a transfer of power away from the UK to the EU on issues of fundamental importance to the UK's sovereignty (Foreign & Commonwealth Office 2007).

Whether the UK Government successfully defended their 'red lines' is an issue which has generated considerable debate. The Government maintains that the UK's demands on the four red lines have been met in the Lisbon Treaty. However, one Labour MP from Scotland has stated that the safeguards in the Lisbon Treaty (like the opt-in procedure and the emergency brake – see below) would 'leak like a sieve' (Guardian 2007) and fail to protect the UK in the expected way.

### **The Protocol on the position of the United Kingdom and Ireland**

As a result of the UK losing its automatic veto in certain areas of FSJ, during the negotiation of the Lisbon Treaty the UK secured an opt-in, similar to that achieved under the Amsterdam Treaty. In its White Paper (2007, p.10), the UK Government explained its position.

'The Government [has] secured an important safeguard in negotiations: the extension of the UK's current opt-in arrangement for cooperation in asylum, immigration and civil justice to the judicial and police cooperation areas. This gives the UK the right to opt-in to new measures where it is in our national interest to do so. The Government has made it clear that we would not opt in to any proposal that was inconsistent with the UK's policy of retaining control of its borders (...)

The UK's right not to participate in new measures in the JHA area can be made to apply even where those measures build upon earlier agreements'. (Foreign and Commonwealth Office 2007)

The result of the UK Government's stance was a protocol 'on the position of the United Kingdom (and Ireland) in respect of the area of freedom, security and justice'. (A copy of the Protocol is at Annex A.) The Protocol largely mirrors the earlier Protocol agreed as part of the Amsterdam Treaty except the UK opt-ins now include chapters on judicial cooperation in criminal matters and police cooperation.



**Table 2: UK arrangements in relation to EU Freedom, Security and Justice Issues**

In summary:-

Current UK arrangements in relation to justice issues fall into two groups:

- a. judicial cooperation in civil matters, immigration, asylum, visas and external border controls are covered by co-decision procedures with an opt-in for the UK
- b. police and judicial cooperation in criminal matters are *not* covered by co-decision procedures (so there is no need for an opt-in)

Under the Lisbon Treaty, all justice issues (except family law) are covered by co-decision procedures with an opt-in for the UK

There is only one change in the Protocol compared to the Amsterdam Treaty version. The Protocol states if an existing law is amended and the UK wants to opt-out of the amendment, but the other Member States decide that this makes the measure 'inoperable', the existing law could cease to apply in the UK. Importantly, the Protocol also states that there could be financial implications for the UK (and Ireland) if the Commission proposes and the Council agrees that there are unavoidable financial consequences incurred as a result of the UK (or Ireland) ceasing to participate in those acts.

The House of Commons European Scrutiny Committee (2007a) raised a concern about the UK opt-in. In particular, it was uneasy about the opt-ins the UK had previously secured in the justice field, and how these would be affected by the new Treaty.

'We do not understand why the UK did not interpret the red line on protection of the UK's position in a firmer form by insisting on a provision which would have preserved the effect of existing EU measures in relation to the UK, in circumstances where the UK decides not to opt in to an amending or repealing measure. This would have ensured that the UK would keep what it now holds and would more effectively have protected the UK's interests'.

In response to the Committee, the UK Government noted that any existing legislation would continue to apply indefinitely except in those cases where amendments rendered it 'inoperable'. It added that it was not possible 'to keep existing measures in tact indefinitely. By definition these are collaborative systems...' (United Kingdom Government 2007).

### **Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom**

Although broadly supportive of the aims of the Charter, the UK Government feared that if the Charter became legally binding it would create new legal obligations that would undermine national sovereignty. So it negotiated another Protocol (see Annex B) that restricts the application of the Charter in the UK and cancels out the European Court of Justice's ability to strike down UK law.

According to the UK Government's White Paper (Foreign and Commonwealth Office 2007, p.11) the Protocol would:

‘ (...) clarify beyond doubt the application of the Charter, in relation to UK laws and measures, and in particular its justiciability in relation to labour and social articles. This Protocol is legally binding and sets out clearly that the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law.’

However, according to Miller and Taylor (2007, p.35) this may not be the case:

‘Some believe the effect of the UK exemption is questionable. The *Daily Telegraph* reported on 12 July 2007 that senior EU officials believed ‘Britain’s ‘red line’ opt-out from the European Charter of Fundamental Rights is not worth the paper it is written on’. The report cited Commissioner Margot Wallström who thought the Charter would apply to huge swathes of British law and that EU citizens would be able to claim before the courts the rights enshrined in the Charter.’

## **IMPLICATIONS FOR SCOTLAND OF PROVISIONS ON FREEDOM, SECURITY AND JUSTICE**

This section of the briefing looks at how the Lisbon Treaty is significant for Scotland, including the implications of the opt-in, the enhanced role of national parliaments and, in particular, the proposals on freedom, security and justice. It includes consideration of three chapters that may have significant consequences for Scotland's devolved responsibilities: judicial cooperation in civil matters, cooperation in criminal matters and proposals for a European Public Prosecutor. Finally, this section looks at the implications for Scotland of the Charter of Fundamental Rights.

### **The significance of freedom, security and justice issues for Scotland**

Whilst relations with the EU are a reserved matter for the UK Parliament and Government, the Scotland Act 1998 gives the Scottish Parliament authority to implement EU law for Scotland where the subject matter of the new piece of legislation falls within or affects a devolved policy area.

There are two key reasons why changes to the EU regime for dealing with justice issues are significant for Scotland. First, large parts of civil and criminal law are devolved under the Scotland Act 1998 and so are within the competence of the Scottish Parliament. Secondly, Scotland has its own legal system with many laws and structures that are different from other parts of the UK, such as the Procurator Fiscal Service and the courts. As a result, the impact in Scotland of EU justice policy is not necessarily the same as in the rest of the UK. The UK Government needs to be aware of this fact when considering EU initiatives.

The current Scottish Government has committed itself to 'maximising Scotland's influence within the European Union' and has agreed on five long-term EU political objectives that 'provide a framework to align policy and decision making within the EU context with its domestic and international goals'.<sup>2</sup> One of these EU objectives relates to justice.

The EU's competencies in pursuing an area of freedom, security and justice overlap with large areas of Scotland's devolved powers on criminal and civil justice. The Scottish Government (2008) has noted that:

'EU JHA legislation has implications for Scotland's distinctive and separate legal system. It has grown considerably over the last decade and will continue to grow under the new arrangements for decision making on JHA matters. The extension of the co-decision process (legislation by the Council and European Parliament jointly) and the UK opt-ins secured during the Lisbon Treaty negotiations will have implications for how we exert Scottish influence on EU JHA policies.'

Securing recognition of Scottish interests in JHA matters at both UK and EU levels is therefore a high priority. We shall aim to send a Scottish Minister (including one or other of the Law Officers) to all JHA Council meetings, and to secure the involvement of Scottish Ministers and officials as necessary in the formulation of the UK negotiating line in JHA issues. There will also be a greater focus and engagement with the European Parliament and MEPs with a particular interest in JHA matters, given the European Parliament's extension of powers in this area.'

---

<sup>2</sup> <http://www.scotland.gov.uk/Topics/Government/International-Relations>  
*providing research and information services to the Scottish Parliament*

For background on JHA issues, see the SPICe Briefing [‘EU Justice and Home Affairs Policy’](#) (Harvie-Clark 2007).

### **The UK opt-in in the Scottish context**

In evidence recently submitted to the House of Lords European Union Committee (2008b), the Law Society of Scotland highlighted the problems of the opt-in arrangements for devolved administrations as a result of the UK only having a single right to opt-in or not. The Society agreed that the opt-in arrangement is a potential safeguard for the Scottish justice system but that at the same time, it adds a layer of complexity. It predicted that situations may arise in which the view regarding whether to opt-in or not will be different in Holyrood and Westminster and asked:

‘What happens if there is no agreement in this very public arena between the UK Parliament and the Scottish Parliament on the response to an issue, for example, of criminal policy with particular resonance in Scotland? Whilst it is clear from the Treaty that the official position is that adopted at a UK level, there are some potential issues of political tension which may have to be dealt with’ (E163).

The House of Lords European Union Committee (2008a) responded to this fear by indicating it expected the UK Government would consult closely with Scotland when considering whether to opt-in to measures in such areas.

### **The role of national parliaments**

The Lisbon Treaty establishes a special role for national parliaments, providing them with an opportunity to object to any EU legislative proposal on the grounds that it does not conform to the principles of ‘subsidiarity’. The principle of subsidiarity is aimed at ensuring that decisions are taken at the most effective level of government and, in particular, to make sure that action at the EU level is more appropriate than action at member state level. For further general information on subsidiarity, see the SPICe Briefing [The Subsidiarity Protocol in the Treaty of Lisbon](#)’ (McIver 2008).

Significantly, from a regional parliamentary point of view, the subsidiarity protocol states that ‘it will be for each national parliament to consult (...), where appropriate, regional parliaments’. This means that regional parliaments may get an opportunity to provide an opinion on whether a legislative proposal, including those relating to FSJ, breach subsidiarity principles.

It has been recognised that the UK Government must fully inform itself of the potential effects of justice proposals on the different internal legal systems in the UK, and, that this is particularly important for Scotland due to its devolved competencies in criminal law (House of Lords European Union Committee 2008a). In its memorandum to the Lords European Union Committee (2008b), the Law Society of Scotland welcomed the enhanced and formal roles of national and regional parliaments in scrutinising policy proposals under the Treaty. However, it expressed concern that the short time scales for consultation set out in the Lisbon Treaty meant that meaningful consultation of any body other than Westminster will be very difficult in practical terms, jeopardising a comprehensive UK response.

### **Judicial cooperation in civil matters**

Extension of the competence of the EU into the area of civil justice began in 1997, when the objective of establishing ‘an area of freedom, security and justice’ was included in the Amsterdam Treaty. The Commission has said: ‘the prime object of the European judicial area,

indeed, is to simplify the legal context within the Union' (Hodges 2007). The rationale was that simplification would reduce costs, and hence enhance economic growth.

The Lisbon Treaty sets out areas in which the EU will develop judicial cooperation in civil matters with cross-border implications 'based on the principle of mutual recognition of judgements (...) [and which] may include the adoption of measures for the approximation of the laws and regulations of the Member States'. Measures that may be adopted include those relating to, for example, cooperation in the taking of evidence, the development of alternative dispute resolution and support for the training of the judiciary.

In evidence to the House of Lords (2008b), a representative of the Law Society of Scotland concluded that the provisions on civil justice and family law in the Lisbon Treaty have changed the least and restate much of what is in current treaties. For instance, although the list of matters for judicial cooperation includes alternative dispute settlement, it was argued that the Commission's work on the Mediation Directive means that this provision is 'window dressing' and is merely restating what is already underway. In terms of family law, the requirement to act by unanimity after consultation under the Special Legislative Procedures<sup>3</sup> remains unchanged.

That the Union shall ensure 'effective access to justice' is a new requirement contained in the Treaty. Both the European Commission and national governments have expressed support for a policy of enhancing access to justice. The rationale is to enable, and encourage, citizens and businesses to enforce their rights, so as to ensure that society and the economic system are 'dynamic' (Hodges 2007).

The House of Lords European Union Select Committee (2003) noted in an earlier report on a similar provision that 'the implications (most notably financial) of these statements on access to justice may be considerable'. The Committee did not elaborate on what those implications might be, but for Scotland there could be consequences for the provision of legal aid, depending on the compliance of the existing legal aid framework with EU requirements.

### **Judicial cooperation in criminal matters**

The Lisbon Treaty reinforces and consolidates the principle of mutual recognition, allowing a court in one EU country to recognise and enforce a criminal conviction from another. It also explicitly permits the EU to establish minimum rules relating to mutual admissibility of evidence, the rights of individuals in criminal procedure and the rights of victims.

The House of Lords' European Union Committee has expressed particular concern about the proposal (now in the Treaty) to give the European Parliament power to adopt measures relating to the admissibility of evidence. 'Rules on the admissibility of evidence may be closely related to the mode of trial (...) That such rules could be changed without the consent of a Member State is, we believe, unacceptable' (2003). The Committee believed that any EU legislation in this area would have substantial effects on procedure in even purely domestic criminal cases (Miller 2007). The UK Government stated in its response to the House of Lords European Union Committee that it shared the Committee's concerns that the rules of evidence could be changed without consent but that 'we recognise that it may be necessary to develop some light minimum standards' (Miller 2007). The UK's opt-in will apply to any such proposals.

---

<sup>3</sup> Special legislative procedure involves legislation being adopted by the Council alone or, more rarely, by the European Parliament alone, rather than by the two institutions jointly. The outcome of using the Special Legislative Procedure would be either legislation of the Council adopted after consulting Parliament, or legislation of the Parliament adopted after consulting the Council.

The inclusion in the Lisbon Treaty of an 'emergency brake' procedure (Article 69B) does partly mitigate the fact that Member States have lost their ability to veto proposals on criminal law and policing issues. The Lisbon Treaty provides that where a member of the Council of the EU considers that a draft directive would affect fundamental aspects of its criminal justice system, it can halt the legislative process while the matter is referred to the European Council, which would then decide by unanimity. The European Council has four months to refer the draft back to the Council of the EU.

However, Sir David Edward, a former judge of the European Court of Justice and Honorary Professor at the School of Law, University of Edinburgh believes that the 'emergency brake' may not prove sufficient to avoid the adoption of a measure that would create serious difficulties for the UK's legal systems. As a consequence, he states that the UK was right to opt-out of the FSJ measures in the way it has (House of Lords European Union Committee 2008b).

The Treaty also provides that in case of disagreement, and if at least nine Member States want to continue work on the draft directive concerned, they can. In other words, although the Treaty can effectively provide Member States with a veto on proposals, it also gives like-minded Member States the opportunity to proceed with a proposal as a group if a quorum supports the proposal. An agreement between like-minded Member States would become legislation in those countries and Member States not involved may have the opportunity to opt-in to the legislation at some point in the future.

The separation of FSJ issues between the First Pillar and the Third Pillar (see above) created a number of difficulties for progressing justice issues (Bacquias 2008). Most notably, the unanimity rule in the Council of the EU when dealing with Third Pillar issues slowed, and at times, blocked the adoption of new measures. At the same time, the European Parliament's very limited role in relation to Third Pillar issues could, it has been argued, result in a 'closed door' tendency in policy-making. The Law Society of Scotland (2008) considers that one of the real benefits of the Lisbon Treaty will be the transfer of criminal law to the Ordinary Legislative Procedure (currently known as the co-decision procedure) of the Union. In their view, it should improve the consistency, transparency and comprehensibility of law-making.

## **European Public Prosecutor**

The Lisbon Treaty gives the Council of the European Union an explicit power to establish a European Public Prosecutor's Office (EPPO), giving the EU the power of prosecution for the first time. The European Public Prosecutor (EPP) would exercise the functions of a prosecutor in the courts of the Member States. At this stage the functions would be limited to those needed to 'combat crimes affecting the financial interests of the Union', but the Council may extend the powers of the EPPO to include serious crime with cross-border dimensions.

The idea of establishing an EPPO was first floated in 1997 but has not had full support from Member States. The UK in particular has been opposed to the idea; the House of Lords first raised its objections in 1999 and the European Scrutiny Committee said in 2002 that it was particularly concerned about 'putting the prosecution function completely beyond the reach of democratic accountability' (Miller 2007).

The Law Society of Scotland has also had very serious reservations about the proposal from its inception. In its memorandum to the House of Lords' European Union Committee (2008b), it identified three principal concerns:

- in Scotland, the Lord Advocate is entrenched as head of the system of criminal prosecution, as set out under the Scotland Act 1998. The establishment of an EPP

would necessarily cut across her function. It also raises the questions of how the EPP would, in practice, operate directly in the courts of Member States and how it would fit into the various national legal systems

- although 'fraud' is one of the areas which could be covered by the work of the EPP, the scope of this offence has still not been defined for the purposes of EU law. Previous attempts at a definition have been at odds with the current definition of fraud in Scots law
- one version of the EPPO proposal envisaged the investigatory stages of a prosecution being directed by a judge. Such a system is unknown in Scots law. There is the possibility for the judicial procedures of the EPPO, whatever the model, to conflict with the constitutional principles of at least some jurisdictions

Sir David Edward (House of Lords European Union Committee 2008b) has agreed that the establishment of the EPPO would raise serious problems in Scotland, and in a different way, England and Wales. The Law Society of England and Wales has also objected to the idea.

The UK Government shared these concerns and tabled an amendment to remove the relevant article from the Constitution. In the end however, the UK Government did accept that the proposal should be included in the Lisbon Treaty. The UK opt-in would apply to establishment of an EPPO, so it could not operate within the UK without Government's agreement.

## **Scotland and the Charter of Fundamental Rights**

According to the Scotland Act 1998, the Scottish Parliament has no power to legislate in a way which is incompatible with the European Convention on Human Rights (ECHR) (s.29 of the Scotland Act 1998). Similarly, the Scottish Government has no power to make subordinate legislation or to take executive action which is incompatible with the ECHR (s.57 of the Scotland Act 1998). Procedures for ensuring this compliance are established by the Scotland Act 1998 (ss. 31-33).

The Law Society of Scotland (2008) has identified two potential problems in relation to the creation of the dual human rights jurisdiction of the EU (the Charter) and the Council of Europe (the ECHR). The first relates to the lack of legal certainty around the practical effect of the Charter and its inter-relationship with the ECHR. The second problem flows from the first: since legislation passed by the Scottish Parliament must be consistent with both EU law and ECHR rights, any possible inconsistencies between the two would pose a particularly significant problem for the Scottish Parliament.

Sir David Edward (House of Lords European Union Committee 2008b) has also recognised difficulties in bringing the area of FSJ fully within the jurisdiction of the European Court of Justice (ECJ). The ECJ has jurisdiction to give preliminary rulings on the interpretation of EU law when requested by a court of a Member State. Sir David Edward's view is that delays inherent in such an application – like preparing and translating submissions and evidence – could create problems for a Scottish court were it to consider it necessary to obtain a preliminary ruling from the ECJ prior to the commencement of a trial. Scottish solemn criminal procedure mandates that where an accused has been remanded in custody to await trial, the preliminary hearing must take place within 110 days of full committal and the trial itself must start within 140 days (the '110/140 days rule'). Even with the requirement added by the Lisbon Treaty that the ECJ must 'act with the minimum delay', there is still the concern that delays in obtaining a ruling could make compliance with Scottish domestic deadlines in some criminal cases significantly more difficult.

## LOOKING FORWARD

Assuming that the Lisbon Treaty is ratified, Jerome Bacquias at the European Policy Centre (2008) predicts that there will be a number of trends likely to characterise the post-2009 period:

- decision-making: qualified majority voting should make it easier to adopt legislation. But a complicated and unpredictable balance of power will emerge from the Council's new voting rules, the increased involvement of the European Parliament, the extended UK opt-in and the emergency brake procedures
- policy: the Lisbon Treaty will provide the EU with the mechanisms to explore new policies, for example, training judges at the EU level and building up common asylum policy
- ECJ: extending the Court's jurisdiction and incorporating the Charter in the Treaty may lead to an appropriate balance between liberty and security in EU policy

Bacquias does warn however that 'the numerous exceptions and loopholes retained – and the new ones created – by the Lisbon Treaty show that, torn between new opportunities and renewed constraints, the area of freedom, security and justice could well become a giant with feet of clay' (p.4).



## GLOSSARY

**Co-decision procedure:** gives the European Parliament the power to adopt legislation jointly with the Council of the European Union, requiring the two bodies to agree on an identical text before any proposal can become law.

**Council of the European Union:** is the Union's main decision-making body. Its meetings are attended by Member State ministers, and it is thus the institution which represents the Member States. The Council's headquarters are in Brussels.

**European Commission:** a politically independent institution. It prepares and then implements the legislative instruments adopted by the Council and the European Parliament in connection with Community policies.

**European Council:** is the term used to describe the regular meetings of the Heads of State or Government of the Member States. Its role is to define the general political guidelines of the EU. It does not enact legislation and is not an institution.

**European Parliament:** is the assembly of the representatives of the 492 million Union citizens. There are 785 representatives, distributed between Member States by reference to their population.

**European Court of Justice (ECJ):** ensures compliance with the law in the interpretation and application of the founding Treaties. It is composed of the same number of judges as there are Member States and therefore at present has 27 judges.

**European Convention on Human Rights (ECHR):** established a system of international protection for human rights, offering individuals the possibility of applying to the courts for the enforcement of their rights.

**Opting out:** is an exemption granted to a country that does not wish to join the other Member States in a particular area of Community cooperation as a way of avoiding a general stalemate.

**Ordinary Legislative Procedure (previously known as the co-decision procedure):** the Commission makes a proposal; the Council and the Parliament discuss it and may each make changes; the final decision is made by the Council and the Parliament jointly (the co-decision procedure). The Lisbon Treaty extends this Ordinary Legislative Procedure to a number of new areas.

**Qualified majority:** is the number of votes required in the Council for a decision to be adopted. The Lisbon Treaty will change the requirements for a vote to be passed by qualified majority so that a proposal must have the support of 50% of Member States and these Member States must represent at least 60% of the EU's population.

**Special Legislative Procedure:** involves legislation being adopted by the Council alone or, more rarely, by the European Parliament alone, rather than by the two institutions jointly. The outcome of using the Special Legislative Procedure would be either legislation of the Council being adopted after consulting Parliament, or legislation of the Parliament being adopted after consulting the Council.

**Subsidiarity:** is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level.

**Treaty establishing the European Community (TEC):** original full name was the Treaty establishing the European Economic Community, later renamed to Treaty establishing the European Community. The Lisbon Treaty will amend both the Treaty on European Union and the Treaty establishing the European Community. The Lisbon Treaty will amend both the Treaty on European Union and the Treaty establishing the European Community.

**Treaty on European Union (TEU):** was signed in 1992 in Maastricht, entered into force on November 1, 1993. It led to the creation of the European Union. The Lisbon Treaty will amend both the Treaty on European Union and the Treaty establishing the European Community.

**Treaty on the Functioning of the European Union (TFEU):** is the renamed version of the Treaty establishing the European Community.

## SOURCES

- Bacquias, J. (2008) *Freedom, Security and Justice: The New Lisbon (Treaty) Agenda*. Brussels: European Policy Centre. Available at: [http://www.epc.eu/TEWN/pdf/873079151\\_Freedom,%20security%20and%20justice.pdf](http://www.epc.eu/TEWN/pdf/873079151_Freedom,%20security%20and%20justice.pdf)
- Carter, C et al. (2005) *Scotland and the European Union*, Briefing no. 27. Edinburgh: Economic and Social Research Council. Available at: <http://www.devolution.ac.uk/pdfdata/Briefing%2027%20-%20Scott.pdf>
- Duff, A. (2008) *True Guide to the Treaty of Lisbon*. Brussels: Alliance of Liberals and Democrats for Europe. Available at: <http://www.alde.eu/fileadmin/files/Download/True-Guide-NEW.pdf>
- EurLex. (1997) *Treaty of Amsterdam* [Online]. Available at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html> [Accessed 7 May 2008]
- EUROPA (2008a). *Gateway to the European Union* [Online]. Available at: [http://europa.eu/index\\_en.htm](http://europa.eu/index_en.htm) [Accessed 30 April 2008]
- EUROPA. (2008b) *Treaty of Lisbon* [Online]. Available at <http://www.consilium.europa.eu/showPage.asp?lang=en&id=1296&mode=g&name=> [Accessed 30 April 2008]
- European Commission. (2008a) *Charter of Fundamental Rights* [Online]. Available at: [http://ec.europa.eu/justice\\_home/unit/charte/index\\_en.html](http://ec.europa.eu/justice_home/unit/charte/index_en.html) [Accessed 30 April 2008]
- European Commission. (2008b) *Freedom Security and Justice* [Online]. Available at [http://ec.europa.eu/justice\\_home/fsj/intro/fsj\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm) [Accessed 30 April 2008]
- Foreign and Commonwealth Office. (2007) *The Reform Treaty: The British Approach to the European Union Intergovernmental Conference*, Cm 7174. London: Stationary Office Available at [http://www.fco.gov.uk/resources/en/pdf/pdf18/fco\\_beu\\_eureformtreatywhitepaper](http://www.fco.gov.uk/resources/en/pdf/pdf18/fco_beu_eureformtreatywhitepaper)
- Foreign and Commonwealth Office. (2008) *Britain in the European Union* [Online]. Available at: <http://www.fco.gov.uk/en/fco-in-action/institutions/britain-in-the-european-union/> [Accessed 30 April 2008]
- Guardian. (10 October 2007) *MPs point to flaws in Brown's 'red line' EU treaty safeguards* [online]. Available at: <http://www.guardian.co.uk/politics/2007/oct/10/uk.eu> [Accessed 7 May 2008]
- Harvie-Clark, S. (2007) *EU Justice and Home Affairs Policy*. SPICe Briefing 07/38. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/research/briefings-07/SB07-38.pdf>
- Hodges, C. (2007) *Europeanization of Civil Justice: Trends and Issues*, Civil Justice Quarterly 26 (26 Jan) p. 96-123
- House of Commons European Scrutiny Committee. (2007). *3<sup>rd</sup> Report 2007/08 European Union Inter-Governmental Conference: Follow up Report*, HC 16-iii London: House of Commons. Available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

House of Commons European Scrutiny Committee. (2007b). *Letter to the Rt. Hon. David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs* 11 October 2007 [Online]. Available at: <http://www.parliament.uk/documents/upload/miliband111007.pdf> [Accessed 30 April 2008]

House of Lords Constitution Committee. (2008) *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution* HL paper 84. London: Stationary Office. Available at: <http://www.parliament.the-stationery-office.com/pa/ld200708/ldselect/ldconst/84/84.pdf>

House of Lords European Union Committee. (2008a) 10<sup>th</sup> Report 2007-08: *The Treaty of Lisbon: An Impact Assessment Vol I Report*, HL paper 62-i. London: Stationary Office. Available at: <http://www.parliament.the-stationery-office.com/pa/ld200708/ldselect/ldeucom/62/62.pdf>

House of Lords European Union Committee. (2008b) 10<sup>th</sup> Report 2007-08: *The Treaty of Lisbon: An Impact Assessment Vol II Evidence*, HL paper 62-ii. London: Stationary Office. Available at: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62ii.pdf>

House of Lords European Union Select Committee. (2003) 16<sup>th</sup> Report 2002-03. *The Future of Europe: Constitutional Treaty - Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice)*. London: Stationary Office. Available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/81/81.pdf>

The Law Society. (2008) *A Guide to the Treaty of Lisbon: European Union Insight*. The Law Society. Available at: [http://lawsociety.org.uk/documents/downloads/guide\\_to\\_treaty\\_of\\_lisbon.pdf](http://lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf)

Mclver, I. (2007) *The European Union: A Brief History*. SPICe Subject Map 07-01. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/business/research/pdf\\_subj\\_maps/SMSP07-01.pdf](http://www.scottish.parliament.uk/business/research/pdf_subj_maps/SMSP07-01.pdf)

Mclver, I. (2007) *The European Union: The Institutions*. SPICe Subject Map 07-02. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/research/subject/documents/SMSP07-02.pdf>

Mclver, I. (2007) *The European Union: The Legislative Process*. SPICe Subject Map 07-03. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/business/research/pdf\\_subj\\_maps/SMSP07-03.pdf](http://www.scottish.parliament.uk/business/research/pdf_subj_maps/SMSP07-03.pdf)

Mclver, I. (2007) *The European Union: The Budget*. SPICe Briefing 07-04. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/business/research/pdf\\_subj\\_maps/SMSP07-04.pdf](http://www.scottish.parliament.uk/business/research/pdf_subj_maps/SMSP07-04.pdf)

Mclver, I. (2008) *The Subsidiarity Protocol in the Treaty of Lisbon*. SPICe Briefing 08/21. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/research/briefings-08/SB08-21.pdf>

Miller, V and Taylor, C. (2007) *The EU Reform Treaty: Amendments to the Treaty on European Union*, House of Commons Library Research Paper 07/80. London: House of Commons. Available at: <http://www.parliament.uk/commons/lib/research/rp2007/rp07-080.pdf>

Miller, V. (2007) *The Treaty of Lisbon: Amendments to the Treaty establishing the European Community*, House of Commons Library Research Paper 07/86. London: House of Commons. Available at: <http://www.parliament.uk/commons/lib/research/rp2007/rp07-086.pdf>

Scottish Government. (2008) *Action Plan on European Engagement* [Online]. Available at: <http://www.scotland.gov.uk/Publications/2008/04/23142943/3> [Accessed 7 May 2008]

United Kingdom Government. (2007) *European Union Intergovernmental Conference; Government Responses to the Committee's Thirty-fifth Report of Session 2006-2007 and the Committee's Third Report of Session 2007-2008*, HC 179. London: Stationary Office. Available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/179/179.pdf>

## **PROTOCOL ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE**

### Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland shall be necessary for decisions of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.

### Article 2

In consequence of Article 1 and subject to Article 3,4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competencies, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of the Union law as they apply to the United Kingdom or Ireland.

### Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure whereupon that State shall be entitled to do so.

The unanimity of the members of the Council, with the exception of a member which has not made any such notification, shall be necessary for decisions of the Council which must be adopted unanimously. A measure adopted under this paragraph shall be binding upon all Member States which took part in its adoption.

Measures adopted pursuant to Article 70 of the Treaty on the Functioning of the European Union shall lay down the conditions for the participation of the United Kingdom and Ireland in the evaluations concerning the areas covered by Title V of Part Three of that Treaty.

For the purposes of this article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.

2. If after a reasonable period of time, a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland. In that case Article 2 applies.

## Article 4

The United Kingdom or Ireland may at any time after the adoption of a measure by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article 331(1) of the Treaty on the Functioning of the European Union shall apply *mutatis mutandis*.

### Article 4a

1. The provisions of this Protocol apply for the United Kingdom and Ireland also to measures proposed or adopted pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to make a notification under Article 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council.

If at the expiry of that period of two months from the Council's determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating or having participated in the adoption of the amending measure. 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.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that the United Kingdom or Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.

4. This Article shall be without prejudice to Article 4.

## Article 5

A Member State which is not bound by a measure adopted pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union shall bear no financial consequences of that measure other than administrative costs entailed for the institutions, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

## Article 6

Where, in cases referred to in this Protocol, the United Kingdom or Ireland is bound by a measure adopted by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, the relevant provisions of the Treaties shall apply to that State in relation to that measure.

#### Article 6a

The United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 16 of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of that Treaty where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 16.

#### Article 7

Articles 3, 4 and 4a shall be without prejudice to the Protocol on the Schengen *acquis* integrated into the framework of the European Union.

#### Article 8

Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of this Protocol. In that case, the normal treaty provisions will apply to Ireland.

#### Article 9

With regard to Ireland, this Protocol shall not apply to Article 75 of the Treaty on the Functioning of the European Union.



## **PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION TO POLAND AND TO THE UNITED KINGDOM [EXTRACT]**

### 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 the 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 the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.'