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The Lisbon Treaty - Trick or Treat for the UK?

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Trick or treat? A response from President Barroso on the subject of the Lisbon Treaty would surely do a treat whereas David Cameron may not be as forthcoming. It is to say that this topic is controversial and awash with disagreement. The complexity that causes more difficulties for the case of the UK is the web of differentiation spun into the Lisbon Treaty. Consequently one must take account of this when scrutinising whether the Lisbon Treaty is indeed a trick or a treat for the UK. In the present study, the focus will be on the Area of Freedom, Security and Justice (AFSJ) and the Charter of Fundamental Human Rights because these are important areas of the Lisbon Treaty appropriate to the present issue.

It is submitted that the Lisbon Treaty could have been a treat however it has been tempered to the extent that it is no longer a simple task to distinguish a treat from a trick. It is certain that the institutional changes promulgated by the Lisbon Treaty are seminal and must be given due regard but the effect of these changes may have been whittled away by the UK's opt outs.

The Area of Freedom, Security and Justice (AFSJ) will be scrutinised as it is the object of many changes posited by the Lisbon Treaty since the preceding European Union structure was *depillarised*¹ facilitating the coalescence of the first and third pillars now housed under Title V (AFSJ) of the TFEU. The European Community is therefore abolished and the European Union is to replace and succeed the EC². It should be noted that the Lisbon Treaty does not constitute a third Treaty, it merely

¹ This alludes to the three pillars that made up the European Union and the first pillar named European Community law (EC law).

amends the TEU and TEC and annexes 11 new Protocols³ to them. It has also renamed the TEC to the Treaty on the Functioning of the European Union (TFEU)⁴.

This change is significant because it marks the former FSJ⁵ moving away from intergovernmental consensus to QMV, co-decision and greater ECJ jurisdiction⁶. Though painful for eurosceptics, this transformation provides a clear understandable alternative to the former system. The lines of demarcation between the old first and third pillars were becoming more and more transparent making it difficult to distinguish where the ECJ's jurisdiction laid. This is aptly illustrated in the *Pupino case*⁷.

Before the Lisbon Treaty, decisions taken by the Council concerning the AFSJ could only be adopted by unanimity, with the European Parliament having advisory powers. This is almost completely overturned under Title V of the TFEU in accordance with the ordinary legislative procedure, i.e. establishing qualified majority and co-decision with the European Parliament. The greater involvement of the European Parliament in the AFSJ (co-decision) is a noteworthy change lending legitimacy to EU action in the field of criminal justice as propounded by Maria Fletcher⁸. The co-decision process shall bring greater democratic accountability and transparency in the field of criminal law and policing⁹.

² Art. 1 para 3 TEU

³ There is an additional protocol which modifies the pre-existing Treaty Protocols.

⁴ House of Lords, *The Treaty of Lisbon: an impact assessment*. 10th report of Session 2007-08. HL paper 62-I. Page. 15.

⁵ Cooperation in the field of Justice and Home Affairs

⁶ The current Art.35 TUE, which limited the ECJ's jurisdiction under the third pillar is therefore repealed by the Lisbon Treaty.

⁷ Case C-105/03 Criminal Proceedings against Maria Pupino [2005] ECR I-5285

⁸ House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, page 116, para 6.29.

⁹ *Ibid.*

It is clear that the modifications made in the AFSJ constitute a significant change, giving credence to the Lisbon treaty being a treat which will affect all the Member States. QMV, Title V and the ECJ's enhanced jurisdiction illustrate the depth of the transformation. Professor Jo Shaw goes as far as to say that the AFSJ provides for the 'most substantial substantive and procedural changes' of the Lisbon Treaty¹⁰. However such a profession may be premature as the Lisbon Treaty is littered with provisions encouraging flexibility and expressions of differentiation (I.e. enhanced cooperation). In the case of the UK two arrangements are present which Ladenburger terms 'quid pro quo' as the price for communitarisation¹¹. These dampen the changes vastly. The first is an institutional arrangement called the emergency brake procedure¹² which provides Member States with a device to offset the risks prompted by the removal of the national veto. This ought to be used when a Member State considers that the draft legislation 'would affect fundamental aspects of its criminal justice system¹³'. The second 'quid pro quo', discussed below, is specific to the UK (and Ireland) and is a complex set of 'opt-out/opt-in' provisions annexed under various protocols.

Protocol (No. 36) on Transitional Provisions states that the whole scheme of judicial enforcement applicable to other EU policy areas will only apply to policing and criminal law measures adopted under the pre-existing third pillar of the EU (Title VI EU) five years after the entry into force of the TFEU. However the United Kingdom,

¹⁰ House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, page 110, para 6.6

¹¹ C. Ladenburger, '*Police and Criminal Law in the Treaty of Lisbon - A New Dimension for the Community Method*', 4 *European Constitutional Law Review* (2008) p. 20 at p.31

¹² Arts 83(3) and 69B(3) TFEU.

¹³ Article 82(3) TFEU

under Article 10(4) may choose whether to accept the full jurisdiction of the ECJ even after the five year period. This exception gives the UK the choice of opting-out in the future.

In the TFEU¹⁴ Protocol (No.19) Article 5(2) is amended to confer a new right upon the UK and Ireland enabling them to opt-out of Schengen building measures even if they had already opted in to the underlying Schengen *acquis*, thereby repealing Article 8(2) of the UK Decision¹⁵. Consequently the changes mean that the UK may avoid participating in measures that further develop a part of the *acquis* in which it is already partaking in.

The UK government was also able to negotiate a furtherance of a pre-Lisbon opt-out¹⁶. Protocol (No.21) of the TFEU extends the UK's opt-out to all policy areas in the scope of the AFSJ objective, so that the UK's existing opt-out of asylum, immigration and civil (pursuant to Title IV EC, pre-Lisbon) is extended to include policing and criminal matters for the first time. This boundary (criminal justice) was another one of the 'red lines' that was not to be crossed in the lead up to the Lisbon Treaty¹⁷. Article 2 of the protocol establishes the principle whereby any legal measures adopted under the scope of the AFSJ, or any judgment held by the ECJ shall not be binding or applicable in the UK.

¹⁴ Protocol (No.19) on the Schengen *acquis* Integrated into the Framework of the European Union.

¹⁵ See Professor Peers in House of Lords, *The Treaty of Lisbon: an impact assessment*. 10th report of Session 2007-08. HL paper 62-I. Page 160, para 6.253.

¹⁶ TFEU, Protocol (No.21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice.

¹⁷ Fletcher, Maria. *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'*. *European Constitutional Law Review* (2009). 5: 71-98, T.M.C. Asser Press and Contributors. Page 93.

The significant changes mentioned above, have been severely detracted from by the protocols. The quid pro quos espoused by Ladenburger resemble the trick or treat nature of the Lisbon Treaty in regard of the UK. For every change the Treaty posits like QMV, a countermeasure such as the emergency break or an opt-out accompanies it. It is submitted that the countermeasures and protocols outweigh the changes because they strip the Lisbon Treaty of authority. Nonetheless it is difficult to say how the Treaty will affect the UK because it has the option of choosing its own path. Regarding the AFSJ it is stipulated that treaties will be found wanting while tricks abound in their many forms. The reasoning behind this may well have been the need to ratify the Lisbon Treaty in parliament without having to call a referendum. Such an outcome could have been troublesome in a eurosceptic country who if had looked closer at the Treaty might have found a resemblance to the Constitutional Treaty.

The Charter of Fundamental Rights has also been the provocateur of much debate in the UK. This is especially so because of the government's sturdy 'red lines', one of which was to protect the UK from the consequences of the Charter of Fundamental Rights status change¹⁸. The Lisbon Treaty is to change the legal status of the Charter of Fundamental Rights which provides that the Charter will have the same legal value as the Treaties¹⁹. Is this a trick or treat for the UK? Similar to the AFSJ this section can be misleading because while the Charter may appear to be daunting in regards of powerful constitutional consequences such as its directly effective provisions, the Charter in actuality is tricky because of the limitations that surround it and its general nature. Article 51 completely restricts the context in which the Charter can be used.

¹⁸ Tony Blair, the then British Prime Minister, described these red lines to the Liaison Committee of the 18 June 2007 (reported in the House of Commons' European Scrutiny Committee's 35th Report, para. 52) in the following terms: 'First we will not accept a treaty that allows the charter of fundamental rights to change UK law in any way...'

Furthermore, the Charter is a reaffirmation of rights which for the most part are already legislated for²⁰. This does not diminish the effectiveness of the Charter, for it has been widely cited that the Charter has brought about clarification to the rights, freedoms and principles available to European citizens²¹.

Moreover the Charter is further dulled down by the UK believing it necessary to annex protocol 7 to the Lisbon Treaty (an ostensible opt-out). This is because the Charter legislates on some sensitive issues with regards to the UK despite the fact that the Charter professes to reaffirm existing rights. This has caused controversy as some proponents like David Heathcoat-Amory MP believe the Charter created new rights, namely, Article 13, which provided that the arts and scientific research should be free of constraint, and Article 29, which asserted that everyone had the right of access to a free placement service²².

The protocol has been hailed as an opt-out by many academics and newspapers however Article 1(1) of the Protocol is not an opt-out and as such the UK has not opted-out of the Charter. It is a clarification of the Charter of Fundamental Rights as the UK believed the distinctions between principles and rights were found to be too imprecise. On the other hand the UK has opted-out of a particular area of the Charter where it feels the most vulnerable, the solidarity title (IV). However it should be noted that the UK's fears are misplaced, for the use of the Article 1(2) is of limited use in reality. Nevertheless its promulgation can be explained for two reasons. The belt and braces argument and fodder for eurosceptics.

¹⁹ Article 6(1) TEU

²⁰ See where the Charter derives from and general principles of Community law.

²¹ See comments of Dr Eve Sariyannidou in EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, Page 93, para 5.41.

Catherine Barnard explains that ‘for a eurosceptic prone audience, the UK government has been willing to let [protocol 7] be referred to as an opt-out. Yet for more informed audiences the UK government insists that it is not an opt-out but merely a clarification²³’. It is suggested by Catherine Barnard that the Protocol was used to differentiate the Lisbon Treaty from the Constitutional Treaty, thus permitting the parliament to ratify the Lisbon Treaty without calling, what is thought would have been, an unpredictable if not unsuccessful referendum. Bernard called this ‘an exercise in smoke and mirrors²⁴, which though uncovered was successful in achieving its aim.

The AFSJ and the Charter of Fundamental human rights illustrate how tricky these sections of the Lisbon Treaty are. While each purports to revolutionise EU law, differentiation stands in the way. These significant reforms have all been tempered by the preponderance of the UK’s variable geometry. Variable Geometry is a term depicting the lack of uniformity between Member States in the EU. For example, different measures and regulations may apply to one Member State and not another. Indeed Maria Fletcher purports that the Lisbon Treaty ‘permits an unprecedented degree of differentiation - much of which relates to the UK [...]’²⁵ It is to be concluded that when asking the question trick or treat in regard to the Lisbon Treaty; a treat may be given but it is sure to come with a bag of tricks.

²² Ibid, para 5.39.

²³ Griller, Stefan, Ziller, Jacques (eds). *‘The Lisbon Treaty Eu constitutionalism without a constitutional treaty?’* (2008) SpringerWienNewYork, Austria. Page 258.

²⁴ Ibid. Page 281.

²⁵ Fletcher, Maria. ", *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom’s ‘Ins’ and ‘Outs’.*" *European Constitutional Law Review*

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