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## The Lisbon Treaty and External Relations

**UKAEL Seminar**  
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## Common Commercial Policy: Revamped and Expanded

- “trade in services” and “commercial aspects of intellectual property”
- EU exclusive competence matches the scope of the WTO agreements (see, on services, Opinion 1/08)
- what are the “commercial” aspects of IP outside the WTO context?



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- Unanimity rule for agreements on services, IP and foreign direct investment:
  1. “provisions for which unanimity is required for the adoption of internal rules”
  2. Cultural and audiovisual services “where these agreements risk seriously prejudicing the Union’s cultural and linguistic diversity”
  3. Social, education and health services “where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them”

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## New powers foreign direct investment

- Questions of scope; and effect on existing treaties
- Scope: *travaux* not helpful
- “direct” implies some limitation
- Portfolio investment?
- Investment liberalization v investment protection?
- Expropriation?
- Cf distinction establishment and movement of capital



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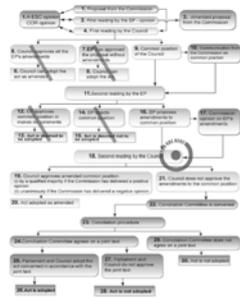
## Effects of the new powers

- Existing BITs: not illegal; grandfathering regulation
- Amendments and new BITs by Member States: Member States may be “empowered” (Art 2(1) TFEU)
- EU policy: investor-State arbitration? mixed agreements?
- Intra-EU BITs: not covered by Art 207 TFEU

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## Role EP in trade

- Ordinary legislative procedure (co-decision)!
- For “measures defining the framework for implementing the CCP”
- Further implementation by Commission? (Art 291 TFEU)
- Consent to trade agreements



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## Treaty-making powers

- Single provision covering CFSP agreements and other (former EC) agreements (Art 218 TFEU)
- Choice of negotiators
- Greater role EP, but not for initiation
- Mixed agreements: the elephant in the room



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## EU law and international law

- Hardly regulated, but for Art 3(5) TFEU: “in relations with the wider world the EU shall contribute ... to the strict observance and the development of international law, including respect for the principles of the UN Charter”
- Member State agreements?
- Dualism? Primacy of EU law over international law?

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## Common Foreign and Security Policy

- Significant institutional changes
- Legal no-men's land
- “Restrictive measures” (Art 215 TFEU), also against individuals (Mugabe in the ECJ?)



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## THE AREA OF FREEDOM, SECURITY AND JUSTICE UNDER THE LISBON TREATY

Takis Tridimas  
Sir John Lubbock Professor of Banking Law, CCLS, Queen  
Mary University of London and Matrix Chambers

### 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

### Overview

- Substantive changes (criminal law harmonisation and competence to establish a European Public Prosecutor)
- New arrangements for enhanced cooperation – emergency brake mechanism
- UK opt-out

### Depillarisation

- The Treaty of Lisbon continues the work of the ECJ.
- Depillarisation through:
- Exportation of *acquis* to third pillar: *Pupino*
- First pillar imperialism and policing the boundaries: *Criminal penalties cases*; *ECOWAS case*
- Use of first pillar measures to achieve 2<sup>nd</sup> pillar objectives: *Kadi*

## Areas covered by AFSJ

- Border checks, visas and free movement (Art. 77)
- 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.

## Institutional Changes

- Increase in powers of the EP through the extension of ordinary legislative procedure
- 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)

- Increase in powers of the EP
- 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)])

## Criminal law

Judicial cooperation in criminal matters covers:

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

## 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

Council may unanimously extend the list

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

## 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”

## 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

## 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.

## Enhanced cooperation

- European Public Prosecutor's Office
- Measures to establish police cooperation
  
- Enhanced cooperation vis-à-vis opt outs

## Distinct features

- Measures relating to judicial cooperation in criminal matters and police cooperation between Member States may be adopted on a proposal by the Commission or on the initiative of quarter of Member States (Art 76)
- Role of national parliaments in monitoring subsidiarity (Art 69)
- EU competence must not affect the exercise of MS responsibilities with regard to maintenance of law and order and the safeguarding of internal security (Art 72; Art 276)

## 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

## 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

## 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.

## 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)