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The UK's Block-Opt-Out – Serious Effects or Yet Another Peculiarity in EU-UK Relations?

On December 1st the pre-Lisbon Treaty 3rd pillar acquis on police and judicial cooperation in criminal matters ceases to apply to the United Kingdom (UK). These days in which the EU is challenged by crises such as in the Ukraine or moved by institutional reforms such as the newly structured European Commission, this so-called 'block-opt-out' of the UK risks to take effect rather unnoticed. Yet, given the densely interrelated measures within police and judicial cooperation in criminal matters and the entire Area of Freedom, Security and Justice (AFSJ) it is important to assess the implications of this opt-out. Will there be substantial effects on coherence and operability within policing and criminal law or can this merely be perceived as yet another peculiarity in EU-UK relations? This question shall be answered in light of differentiated integration and its effects in the AFSJ.

Differentiated Integration in the Area of Freedom, Security and Justice: Cherry-Picking at its Best?

Differentiated integration in the AFSJ including the Schengen acquis is of highly volatile nature. Other than in other policy areas subject to forms of pre-defined differentiation (e.g. the Euro) where you can clearly distinguish those Member States participating from those Member States with a derogation in the AFJS the UK, Ireland and Denmark have the right to decide on an ad hoc basis whether to participate in individual policy measures. It is often claimed that this cherry-picking option allows these three Member States to 'get the best of both worlds'. However, the highly complex legal procedures for opting-in and -out have inbuilt provisions that aim at preserving both the coherence and the operability of the AFSJ acquis. The basic principle that counts is 'once you are in you remain in and once you are out you remain out'. This produces mechanisms of so-called 'opt-in/opt-out spill-overs' by which the UK, Ireland and Denmark will be required or urged to participate in a measure that is closely linked to a measure of which they form already part and vice versa. The aim is to subordinate the freedom of choice to the coherence and operability of the AFSJ acquis.

Block-Opt-Out: What is It?

Prior to the Lisbon Treaty police and judicial cooperation in criminal matters formed the 3rd pillar acquis. This implied that it was subject to intergovernmental decision-making. Thus, differentiated integration of the pre-Lisbon Treaty era did not include 3rd pillar legislation except for the Schengen-based measures because neither the UK nor Ireland have signed the Schengen Agreement. Instead, the UK, Ireland and Denmark were entitled to a veto. Additionally, the competences of both the European Commission and the Court of Justice of the European Union (CJEU) were limited. The Lisbon Treaty abolished the pillar structure altogether implying the communitarisation of the policing and criminal justice legal procedures and acquis. Yet, Article 10 of Protocol 36 annexed to the Lisbon Treaty defined a transitional period of five years before the full powers of the Commission and the CJEU were to take effect regarding the 130 acts adopted before the entry into force of the Lisbon Treaty. Only from 1 December 2014 onwards the Commission as the guardian of the treaties shall have the right to bring infringement procedures against Member States to the CJEU and the CJEU shall have full jurisdiction including proceedings for a preliminary ruling. The UK negotiated the extension of the opt-out/opt-in procedures to the police and judicial cooperation in criminal matters. Additionally, Article 10 of Protocol 36 defines the UK's right to decide by June 2014 the latest whether or not the full powers of the Commission and the CJEU will be acceptable regarding the pre-Lisbon acquis in this policy area. In case of rejecting these powers the relevant measures will cease to be applicable to the UK with the end of the transitional period. The Council without the participation of the UK will determine the necessary consequential and transitional arrangements including potential financial consequences that the UK will be obliged to bear.

The UK notified the Council of the decision to implement this block-opt-out already in 2013.¹ At the same time it wishes to make use of the option provided by Article 10 of Protocol 36 to opt-back-in to measures that are subject to this block-opt-out.

A list of 35 measures² was presented and has been informally negotiated with the Council and the Commission. However, this opt-out and opt-back-in is subject to a clear-cut two-step approach. The block-opt-out will take effect on 1 December 2014 and the decision on the opt-back-in will be subject to the general opt-out/opt-in procedures applicable to the UK in the AFSJ and taken only afterwards – by the Council regarding Schengen-based measures and by the Commission regarding the remaining acts. This implies that for the time being the UK will not apply under EU law the acts of police and judicial cooperation in criminal matters that were adopted prior to the Lisbon Treaty.

Block-Opt-Out: What is at Stake?

In terms of ‘differentiated integration at work’ i.e. the implementation of legal opt-out or opt-in rights two aspects need consideration regarding the UK’s block-opt-out. First, Article 10 of Protocol 36 gives yet again special treatment to the UK. Second, the coherence and operability of the policing and criminal justice *acquis* might be substantially affected.

1) On the special treatment of the UK: The five years transitional period for the full powers of the Commission and the CJEU is applicable to all EU Member States except for the UK and Denmark. The latter represents a special case of participation in the AFSJ under the Lisbon Treaty. Denmark is not prepared to participate in the AFSJ other than subject to intergovernmental cooperation. Given the full communitarisation of this *acquis* by the Lisbon Treaty, Denmark has the right to apply the acts adopted in the field of police and judicial cooperation in criminal matters before the entering into force of the Lisbon Treaty “unchanged” (Art. 2, Protocol 22). The UK on the other hand negotiated the block-opt-out including the right to determine the scope of its participation by cherry-picking the acts of interest afterwards. Set aside the fact that this block-opt-out only adds to the already existing substantial opt-out and opt-in rights extending the privileged position of the UK, two aspects might actually strain the patience of the other EU Member States. The announcement of the referendum on the EU membership of the UK in 2017 combined with the plans to negotiate the repatriation of competences puts the legal certainty of the UK opt-in position in police and judicial cooperation in criminal matters at stake. Additionally, the UK has combined opt-in ambitions with requests to amend certain rules – e.g. the UK requests to include a form of proportionality assessment for the transmission

of European Arrest Warrants (EAW) through the Schengen Information System (SIS II). Such a conditional opt-in combined with the general ambition to repatriate competences is not well perceived by the other EU Member States.³

2) On the coherence and operability of the policing and criminal justice *acquis*: In general the volatility of British participation in police and judicial cooperation in criminal matters due to the opt-out and opt-in rights including the block-opt-out does not represent a problem. The coherence and operability of the policing and criminal justice area will not be severely affected if the UK decides to refrain from the application of certain standards or individual measures. The case is different, however, if systems of mutual recognition are directly or indirectly concerned. Equal participation in the EAW for instance can only be provided if the UK is also prepared to apply the Directives on access to a lawyer, translation and interpretation and the right to information in criminal procedures. This means that great attention will have to be paid to allow for the mechanisms of opt-in/opt-out spill-over taking effect. To this end the list of the 35 acts that the UK wishes to opt-back-in is thoroughly assessed by the so-called ‘Friends of the Presidency Group’. This list includes the main features of the police and judicial cooperation in criminal matters such as the EAW, the Schengen-based police cooperation measures, Europol and Eurojust. With the aim to ensure coherence and operability of the policy area this list was extended to include Council Decisions implementing the Europol Decision and establishing the European Judicial Network. Furthermore, since the list excluded the so-called Prüm Decisions on cross-border exchange of information on DNA, licence plate information and fingerprints, the Council defined financial consequences linked to this non-participation amounting to some 1.5 Mio Euros that the UK will have to bear if it does not opt-back-in to Prüm in the near future.⁴ Finally, the scope of the opt-back-in might change over time given the continued so-called ‘Lisbonisation’ of the policing and criminal matters *acquis* in terms of the amendment, replacement or repeal of pre-Lisbon 3rd pillar acts under the Lisbon Treaty. The UK has opted-in to the acts that have been amended or replaced so far reducing the scope of the block-opt-out. Provisions on Eurojust and Europol are very likely to be subject to the Lisbonisation procedure next, which will question the UK’s continued participation. On the one hand, the UK will be obliged to officially opt-in again if the interest to participate remains. On the

other hand the Commission will have the opportunity to verify the operability and coherence of the acquis when it decides on the UK's opt-in request.

Conclusions

Without doubt the block-opt-out represents an extreme form of volatility in the AFSJ adding to the complexity and scope of the already existing opt-in and opt-out rights of the UK. However, the UK is the only country that is entitled to this procedure. Therefore, it is very unlikely that the police and judicial cooperation in criminal matters risks to disintegrate into variable geometries as is suspected by some studies.⁵ Nevertheless, the UK's cherry-picking might jeopardise the coherence and operability of the police and judicial cooperation in criminal matters. In order to avoid this the legal provisions that allow for mechanisms of opt-in-/opt-out spill-over will have to take full effect and the legal certainty of the UK's participation will have to be granted.

References

- 1) *For considerations on this decision see Stephen Booth, Christopher Howarth and Vincenzo Scarpetta: An unavoidable choice: More or less EU control over UK policing and criminal law, open europe, January 2012.*
- 2) *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union, presented to Parliament by the Secretary of State for the Home Department by Command of her Majesty, July 2013.*
- 3) *Steve Peers: The UK opt-out from Justice and Home Affairs law: the other Member States finally lose patience, statewatch analysis, 26 March 2014.*
- 4) *Council Decision 14018/14 determining certain direct financial consequences incurred as a result of the cessation of the participation of the United Kingdom of Great Britain and Northern Ireland in certain acts of the Union in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty, 09. Oktober 2014.*
- 5) *Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele: The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?, Document requested by the Committee on Civil Liberties, Justice and Home Affairs, European Parliament, 2014.*

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