Seminar – Dec. 10 2012 – Opting back in to EU criminal law

Steve Peers, Professor of Law, University of Essex, speers@essex.ac.uk

Article 10, Protocol 36

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. 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.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen *acquis* integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re‐establish the

widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

Opt-in procedure I: Article 4, Schengen protocol

Ireland and the United Kingdom of Great Britain and Northern Ireland may at any time request to take part in some or all of the provisions of the Schengen *acquis*.

The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.

Opt-in procedure II – Article 4, Protocol on position of UK, etc

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 331 TFEU –

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.

The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re- examining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 330. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

See also Article 328 TFEU – [note also Art 20(1) TEU: ‘open at any time’]

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

Issues

* Transitional issue where act replaced before 1.12.2014 but replacement measure does not have to be applied until after that date (ie, victims FD)
* 10.5, protocol 36 – ‘any time afterwards’ means no upper time limit, and presumably a series of requests are possible – but what is starting time limit? After the notification, or the notification deadline, or the end of the transitional period (ie, ‘acts which have ceased to apply to it’), or the Council decision(s)?
* Will transitional decision apply to UK as such? Can it keep prior or subsequent UK EAWs (for instance) valid in other MS? Or vice versa? Could it possibly fill any gap between opting out and opting back in? Could the ‘opt-back-in’ decision fill a gap retroactively?
* When does Schengen opt-in rule apply, and when does Title V opt-in rule apply? See Statewatch analysis: <http://www.statewatch.org/analyses/no-199-uk-opt-out.pdf>
* Is discretion of Council in Schengen protocol curtailed by art 10.5, Protocol 36?
* Position of Commission under Article 331 TFEU: no role for other MS; obligation to act if criteria met? Affected by art 10.5, protocol 36? Are ‘conditions of participation’ relevant?
* Interpretation of criteria in 10.5 protocol 36- see by analogy:

Art 4.5, Schengen protocol (UK or Ireland opt-out of measure building on act they are bound by)

[possible sanction, but:] the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen *acquis*, while respecting their coherence.

Art 4a(2), Title V protocol (UK or Ireland opt-out of measure amending act they are bound by):

[test for sanction:] 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

Pre-Lisbon core – suggestion:

1. 2. liaison magistrates

2. 14. Naples II

3. 19. Europol staff regs (connected to participation in Europol)

4. 26. data protection body (connected to participation in Europol)

5. 35. Eurojust

6. 41. EAW

7. 51. Eurojust

8. 57. financial penalties

9. 66. cepol

10. 67. confiscation orders

11. 68. Swedish FD

12. 78. Eurojust

13. 80. Prum

14. 81. Prum

15. 83. prior convictions

16. 86. prisoner transfer

17. 89. EJN

18. 90. probation and parole

19. 91. personal data

20. 93. in absentia trials

21. 94. ECRIS

22. 95. ECRIS

23. 96. Europol

24. 98. pre-trial

25. 105. Europol

26. 106. Europol

27. 107. Europol

28. 109. Europol

29. 111. Schengen remnants

30-37. 112-19 Schengen

38-44. 128-34 Schengen - SIS II

1. 25. mutual assistance convention (EIO would replace)

2. 32. mutual assistance protocol (EIO would replace)

nb - 6 Europol measures, also CEPOL - number drops to 37