those disgruntled Member States that do not have an opt-out or were not able to use an 'emergency brake' in the area in question.

It should be noted that the Treaty of Lisbon has introduced into the Treaties general horizontal rules concerning EU competence. JHA matters are described as a 'shared competence' between the EU and its Member States.[427] The Treaties define this concept as follows:[428]

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

It follows from the second sentence that in areas of shared competence, the EU could in principle 'occupy the field' by fully harmonizing the issue concerned.[429] However, Article 2(6) TFEU also points out that the precise 'scope' of the competence concerned is set out in the specific Treaty provisions related to each area, and in Title V of the TFEU, it is expressly stated that EU rules relating to substantive criminal law and domestic criminal procedure set 'minimum' standards only.[430] Furthermore, competence related to certain aspects of economic migration is ruled out,[431] and harmonization of national law is ruled out as regards measures concerning integration of third-country nationals and crime prevention.[432] There are also horizontal reserves of national competence in the general provisions of the JHA Title and in the TEU, discussed in detail above.[433] On the other hand, the EU has the power to 'frame a common policy on asylum, immigration and external border control',[434] which in principle suggests that the Union should be more ambitious as regards harmonization of such areas, without *requiring* the EU to harmonize the law in these areas fully.[435] But the reference to a common policy in these specific areas does not mean *a contrario* that full harmonization of the law is *excluded* in other areas (in particular, civil law, mutual recognition measures in

[427] Art 4(2)(j) TFEU. [428] Art 2(2) TFEU.

[429] On the question of external competence, see Art 3(2) TFEU and the discussion in 2.7 below. [430] Arts 82(2), 83(1), and (2) TFEU.

[431] Art 79(5) TFEU. See also Art 77(4), as regards Member States' competence to determine borders.

[432] Art 79(3) and 84 TFEU. The EU instead is limited to providing incentives, promoting, and supporting *Member States'* actions in these areas. See Art 2(5) TFEU. Oddly, these areas of activity are not listed in Art 6 TFEU, which appears prima facie to be an exhaustive list of areas where the EU can only 'support, coordinate or supplement' Member States' action.

[433] Arts 72 and 73 TFEU and Art 4(2), revised TEU, discussed in 2.2.3.2 above.

[434] Art 67(2) TFEU. See further Arts 77(2)(a), 78(1), and (2)(a)–(d), and 79(1) TFEU.

[435] Although the Treaty states that the Union 'shall' adopt 'uniform' and 'common' measures in these areas, this must be reconciled with the express allocation of JHA matters to the shared competence of the EU and the Member States.

criminal law, and policing law), since the possibility of full harmonization in areas of shared competence still applies to those parts of Title V as well.

Finally, it should be noted that the exercise of the EU's JHA competences is subject to the principles of subsidiarity and proportionality, which are discussed further elsewhere in this chapter.[436]

2.2.5. Territorial scope

Distinctions in the territorial scope of JHA measures have to some extent been created outside the EU legal framework, most prominently as regards the development of the Schengen *acquis* from 1985 onward, and also as regards the negotiation of a later treaty largely concerning police cooperation, the 'Prum Convention', among a group of Member States in 2005.[437]

Since the Treaty of Lisbon abolished the third pillar and applied normal EU rules on decision-making, legal instruments, and judicial control to all JHA matters, the question of the territorial scope of JHA measures remains the only issue that clearly differentiates JHA issues from most of the rest of EU law. The complexity of this issue results from the reluctance of several 'old' Member States to participate fully in EU integration in this area for various reasons, the unwillingness of all 'old' Member States to apply the full Schengen *acquis* immediately to new Member States, and the interest among several non-Member States in adopting the relevant EU measures.[438] The following overview addresses in turn issues specific to: the UK and Ireland; Denmark; the Member States which joined the EU in 2004 and 2007; and finally Norway, Iceland, Switzerland, and Liechtenstein. Finally, it examines the general rules in the Treaties concerning 'enhanced cooperation', which in principle allow for the adoption of measures across most areas of EU law, including JHA law, without the full participation of all Member States. These latter rules also apply whenever the UK or Ireland (and possibly in future Denmark) wish to opt in to a JHA measure that they initially opted out of.

It should also be recalled that the discretion to opt in (or out) of the Court of Justice's jurisdiction over preliminary rulings as regards third pillar measures, which still applies for a five-year transitional period as regards third pillar acts adopted before the Treaty of Lisbon entered into force, results in a different territorial scope of that jurisdiction (as distinct from a different territorial scope of

[436] See Art 5, revised TEU, and 2.5 below.

[437] On Schengen integration, see 2.2.2.3 above. For the text of the Prum Convention, see Council doc 10900/05, 7 July 2005. On its integration into the EU legal framework, see 12.6.2, 12.6.3, and 12.9 below.

[438] On the general issues regarding the integration of the Schengen *acquis* into the EU legal order, see 2.2.2.3 above.

third pillar *acts*).[439] Also, it should be recalled that even though an opt-out means that the representatives of the UK, Ireland, or Denmark respectively do not participate in the Council as regards the relevant measure, the MEPs from those states nevertheless vote on the relevant measures during the EP's proceedings; the Commissioners and Court of Justice judges from those Member States also play their normal role.

2.2.5.1. United Kingdom and Ireland

The UK and Ireland are both covered by a specific protocol on border controls, a specific protocol on the possibility of opting in to any Title IV measure, and to specific rules as regards the Schengen *acquis*. Since the Treaty of Lisbon, the UK alone also has an option to opt out of all third pillar measures adopted before the entry into force of the Treaty of Lisbon, with effect from the end of a five-year transitional period in 2014. These various opt-outs will be considered in turn.

2.2.5.1.1 Border controls

A Protocol attached to the Treaties by the Treaty of Amsterdam entitles the UK and Ireland to maintain the 'Common Travel Area' in force between them and to check individuals coming from other Member States, no matter what other Member States do and no matter what interpretation the Court of Justice may give to Article 14 EC (now Article 26 TFEU) or to anything else. This Protocol also specifically exempts the UK and Ireland from any EC (now EU) legislation requiring the abolition of border controls, thus overlapping with their general exemption from Title IV of the EC Treaty (now Title V TFEU). The Treaty of Lisbon made no substantive amendments to this Protocol; the interpretation of the Protocol is discussed further in Chapter 3.[440]

2.2.5.1.2. Title V TFEU

the"Title V Protocol"

The UK and Ireland were granted an opt-out from all of the JHA issues transferred to Title IV of the EC Treaty (immigration, asylum, and civil law) under another Protocol attached to the EC Treaty by the Treaty of Amsterdam. This Protocol was extended in scope by the Treaty of Lisbon to cover all JHA measures within the scope of Title V TFEU,[441] so now including policing and criminal law, except that Ireland has no opt-out as regards anti-terrorist sanctions.[442] The Treaty of Lisbon also made changes to the Protocol as regards the procedure for

[439] See 2.2.3.3 above. [440] See 3.2.5 below.

[441] The Treaty of Lisbon gave this Protocol a new name: the 'Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice'. This book refers to it more simply as the 'Title V Protocol' throughout. All references in this subsection are to this Protocol, unless otherwise indicated.

[442] Art 9, as inserted by the Treaty of Lisbon. The UK made a unilateral declaration to the Treaty of Lisbon asserting that it 'intends to exercise its right' to opt in to such measures (Declaration 65 in the Final Act).

opting out of measures which amend acts which the UK and Ireland are already bound by (see discussion below). It has become evident from the case law of the Court of Justice that this Protocol does not apply to measures which build upon the Schengen *acquis*, which are governed by different rules on participation by the UK and Ireland.[443]

Ireland (but not the UK) also has an option to denounce the Protocol altogether, which it has not invoked.[444] An Irish Declaration to the Final Act of the Treaty of Lisbon referred to its 'firm intention to exercise its right... to take part in the adoption of [JHA] measures... to the maximum extent it deems possible', stated that 'Ireland will, in particular, participate to the maximum possible extent in measures in the field of police cooperation', and in the context of the possibility of relinquishing the opt-out, announced that Ireland 'intends to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon' (so by 1 December 2012).[445]

While the default position pursuant to the Title V Protocol is that the UK and Ireland opt-out of each individual JHA proposal,[446] the UK and Ireland can instead choose to 'opt-in' to each measure. To do this, they must tell the Council within a period of three months of receiving an initial proposal for a JHA act that they wish to take part in it. If one or both of these Member States opts in to a proposal, the Council then tries to agree the proposal with their participation. However, the Protocol provides that if it is not possible to obtain the agreement with the participation of the UK and Ireland after 'a reasonable period of time', the Council may go ahead and adopt the measure without them.[447] The UK and Ireland may then join in later under the general conditions applying to enhanced cooperation in the Treaties;[448] alternatively, if they decide to opt out in the first place, they can opt in after the proposal is adopted, by the same method.

In practice,[449] the UK and Irish governments have opted into: almost all civil cooperation measures; most or all of the *first-phase* measures establishing the Common European Asylum System, but only a few of the second-phase measures; a number of measures on irregular migration; but again only a few measures on visas, border controls, or legal migration. In the first few months after the

[443] Cases C-77/05 *UK v Council* [2007] ECR I-11459 and C-137/05 *UK v Council* [2007] ECR I-11593. See 2.2.5.1.3 below.

[444] Art 8 (not amended by the Treaty of Lisbon).

[445] Declaration 56 in the Final Act of the Treaty of Lisbon.

[446] Arts 1 and 2. The Treaty of Lisbon amended these articles only to update the cross-reference to the Council voting rules which apply in the event of an opt-out (now Art 238(3) TFEU).

[447] Art 3. The Treaty of Lisbon amended this article to (again) update the cross-reference to the Council voting rules which apply in the event of an opt-out (see ibid) and to provide for a special provision relating to JHA evaluations for the UK and Ireland (Art 70 TFEU, discussed in 2.2.3.2 above).

[448] Art 4. The Treaty of Lisbon amended this article to update the cross-reference to the general enhanced cooperation rules. On the substance of those rules, see 2.2.5.5 below.

[449] For further detail, see s 2.5 of chs 3–12.

Treaty of Lisbon, they opted in to most initial proposals for legislation concerning criminal law and policing and criminal law treaties. The approach of the two governments has been largely, but not entirely, consistent. There have been no cases where the Council went ahead and adopted JHA measures without either Member State's participation even though they had opted in to discussions, but in June 2010, the Spanish Council Presidency threatened that it would exclude the UK from participation in the proposed Directive establishing a European protection order (despite the UK's opt-in to discussions), because the UK was opposing the proposal, and terminating the UK's participation in negotiations would mean that there were no longer enough votes against the proposal to form a blocking minority in the Council.[450] This raises the question as to how much time has to pass before the UK's or Ireland's participation in discussions on a proposal can be terminated on the grounds that a 'reasonable period of time' has passed during which one or both Member States have blocked the proposal, or participated in a blocking minority.

Furthermore, there were three cases where the UK attempted to opt in to a proposal, but was rebuffed; each of these decisions was challenged by the UK before the Court of Justice. While the UK lost the first two of those challenges on the grounds that the measures concerned fell instead within the scope of the rules in the Schengen Protocol, at the time of writing the third challenge is still pending.[451]

There have been three occasions when Ireland initially did not participate in a proposal, but then opted in after its adoption,[452] and two other occasions when the UK did the same,[453] in each case pursuant to the enhanced cooperation rules which applied before the entry into force of the Treaty of Lisbon.[454] It should be noted that in the latter two cases, the UK opted out of the proposal, but nevertheless indicated an intention to opt in if the final text of the legislation

[450] See the press release of the JHA Council, 3–4 June 2010. The UK and the other dissenting Member States were objecting to this proposal due to (well-founded) concerns about its legal base: see 9.2.4 below. On the substance of the proposal, see 9.7.6 below; for the text, see [2010] OJ C 69/5.

[451] Cases C-77/05 and C-137/05 *UK v Council* (n 443 above) and C-482/08 *UK v Council*, pending. An Advocate-General's opinion of 24 June 2010 recommends dismissing the UK's challenge in the latter case.

[452] Dir 2001/55 on temporary protection ([2001] OJ L 212/12), Reg 1030/2002 ([2002] OJ L 157/1), and the Decision establishing a Migration Network ([2008] OJ L 131/7). The Commission approved Irish participation by means of Decisions, respectively: [2003] OJ L 251/23; Decision C(2007)4589/F of 11 Oct 2007 (not published in the OJ); and [2009] OJ L 138/53. See also the Commission opinions on Irish participation in: SEC (2003) 907, 6 Aug 2003; COM (2007) 506, 7 Sep 2007; and [2009] OJ C 1/1.

[453] Regs 593/2008 on conflict of law in contract (Rome I Reg) and 4/2009 on maintenance (respectively [2008] OJ L 177/6 and [2009] OJ L 7/1). The Commission approved UK participation by means of Decisions ([2009] OJ L 10/22 and [2009] OJ L 149/73). See also the Commission opinions on UK participation in COM (2008) 730, 7 Nov 2008 and COM (2009) 181, 21 Apr 2009.

[454] Art 11a EC, which has been replaced by Art 331(1) TFEU; see further 2.2.5.5 below.

satisfied particular concerns which the UK had about the proposal, and participated actively (albeit informally) in the negotiations to that end. On those two occasions, this tactic (which is not as such provided for expressly in the Title V Protocol) was successful.

With the application of QMV to most areas of JHA,[455] it is clear that, in the absence of any contrary provisions in the Title V Protocol, a British or Irish opt-in to a proposal will entail the possibility that those Member States could be outvoted and therefore required to apply a proposal which they disagree with.[456] If one or both Member States form part of a blocking minority in the Council, either the Council could offer sufficient concessions to the other dissenting Member States and then adopt the legislation *with* British and/or Irish participation, or it could adopt the legislation without one or both of those Member States if, after a 'reasonable period of time', their opposition is partly or wholly blocking the adoption of the proposal.[457] This may have resulted already in a greater reluctance by these States to opt in to JHA proposals, with further reluctance in future following the extension of QMV to more areas of JHA law pursuant to the Treaty of Lisbon.

A significant new provision in the Title V Protocol introduced by the Treaty of Lisbon concerns the position of the UK and Ireland when a proposal is made to amend a measure which they are already bound by.[458] This rule provides as follows:

> 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

[455] See 2.2.2.1 and 2.2.3.1 above.

[456] On this issue, see further the report of the EU Select Committee of the House of Lords on the 'Rome II' proposal (8th Report, 2003–04), paras 80–81.

[457] See the example of the European protection order proposal, discussed above.

[458] Art 4a, as inserted by the Treaty of Lisbon.

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.

It can be seen that in principle the Protocol applies as usual to such cases.[459] However, it is possible for the Council, acting by QMV on a Commission proposal,[460] to determine that the non-participation of the UK or Ireland in the proposed amended measure makes the application of the existing measure 'inoperable' for other Member States or the EU, to urge the UK or Ireland to notify its intention to opt in to the proposal while under discussion or after its adoption.[461] If the UK or Ireland fail to do so, the existing measure ceases to apply to them.[462] The Council, acting by QMV, may also impose financial sanctions on the UK or Ireland subject to certain conditions.[463] However, it is always open to the UK or Ireland to opt in to the original act and its amending measure after the latter is adopted.[464] These provisions have not yet been applied in practice, although the UK and Ireland have opted out of several measures which would amend asylum legislation in which they already participate.[465]

The key question as regards these provisions is the definition of when the non-participation of the UK or Ireland in a measure should be considered to render that measure 'inoperable' as regards other Member States or the Union, for only in that case could the UK or Ireland be excluded from the existing measure or subjected to sanctions. Given that the EU has been able to tolerate prolonged periods when different versions of the same measure apply to most Member States on the one hand, and to Denmark or associated States on the other hand, the best interpretation of this rule is that it only applies where the non-participation of the UK or Ireland would make it genuinely and objectively *impossible* for the measure to apply in different forms in the UK or Ireland on the one hand and the other Member States on the other hand. It is not sufficient that it is *more difficult* to apply the two different sets of rules. Also, it should be noted that the high threshold is an

[459] Art 4a(1). The following analysis of these new rules draws upon S Peers, 'In a World of Their Own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon' (2008–09) 10 CYELS 383.

[460] The Council acts only with the votes of the participating Member States: Art 4a(2), third sub-paragraph. For the applicable voting rules, see Art 238(3) TFEU. There is no role for the EP.

[461] Art 4a(2), first sub-paragraph. [462] Art 4a(2), second sub-paragraph.

[463] Art 4a(3). Note that in this case, the UK and Ireland will participate in the vote. Again there is no role for the EP.

[464] Art 4a(4). Read literally, the UK or Ireland could opt in to either the original act or the act amending it, but this would undercut the purpose of Art 4a(2) and so is presumably ruled out (see by analogy Cases C-77/05 and C-137/05, n 443 above).

[465] For details of the measures concerned, see 5.2.5 below.

entirely objective test, applying not only if the UK or Ireland are reluctant to be excluded from the relevant pre-existing measure but also if those Member States are enthusiastic about the prospect of releasing themselves from their pre-existing obligations. The separate question of whether the UK and Ireland remain bound by a measure which they originally participated in, but which is repealed by a later measure which they did *not* participate in, is considered further below.[466]

The Protocol also specifies that non-participation in JHA measures exempts the UK and Ireland from the costs related to those specific measures,[467] and provides that the UK and Ireland are not bound by the general rules on data protection that may be adopted pursuant to Article 16 TFEU to the extent that they are not bound by the underlying policing or criminal law measure to which those general rules relate.[468]

The forced termination of participation in prior EU measures will presumably have the impact (as regards criminal law in particular) that any Council of Europe Conventions which had been disapplied in relations between Member States by the prior EU measures would then re-apply in relations between the UK and/or Ireland, on the one hand, and the other Member States, on the other, since the legal basis for disapplying those measures as between those States would no longer be in force.[469] It is even possible that *earlier* EU measures which had been repealed or disapplied as between those States by the prior EU act which no longer applied would also come back into application.[470]

2.2.5.1.3. *Schengen Protocol*

The Protocol on the Schengen *acquis* (the 'Schengen Protocol') gave the UK and Ireland the possibility of applying to participate in only part of the Schengen *acquis*, subject to a decision in favour by the Council, acting with the unanimous approval of the Schengen States.[471] The Council accepted the UK's application for partial participation in Schengen in 2000, and the parallel Irish application in 2002,[472] although the partial participation of these Member States in the Schengen rules only took effect (for the UK) or will take effect (for Ireland)

[466] See 2.2.5.1.5.

[467] Art 5, Title V Protocol. The Treaty of Lisbon amended this Art to provide that the Council could decide, acting with the unanimity of all Member States, to charge these costs to the UK or Ireland nonetheless. Obviously the latter Member States are unlikely to agree to this.

[468] Art 6a, Title V Protocol, inserted by the Treaty of Lisbon. See more generally 12.2.4 and 12.2.5 below.

[469] For example, the Council of Europe Convention on extradition and its Protocols would re-apply between those States if the Framework Decision on the European Arrest Warrant were disapplied between them.

[470] For example, the Schengen Convention provisions on extradition would arguably apply if the EAW Framework Decision were disapplied, and the Dublin Convention would arguably apply if the Dublin II Reg were disapplied.

[471] Art 4, Schengen Protocol. This provision has not been amended by the Treaty of Lisbon.

[472] Decisions 2000/365/EC ([2000] OJ L 131/43) and 2002/192/EC ([2002] OJ L 64/20).

when the Council approved or later approves it separately.[473] Both Member States participate (or will participate) in almost all of the criminal law and policing provisions of Schengen,[474] as well as the provisions on control of irregular migration.[475] However, they do not, or will not, participate in any of the rules relating to visas, border controls, or freedom to travel. Following this distinction, they will participate in the SIS to the extent that it applies to policing and judicial cooperation, but not as it applies to immigration. The Decision on UK participation sets out a more limited list of Schengen rules that will apply to Gibraltar, and provides that the UK may request the partial participation of the Channel Islands and Isle of Man in some Schengen rules (subject to unanimous approval of the Schengen States).[476]

Both Decisions initially also purported to require UK and Irish participation in measures building on the Schengen *acquis* which were adopted after the integration of the Schengen *acquis* into the EC and EU legal order. This applies to certain measures concerning the SIS,[477] to three other adopted measures (for Ireland),[478] and to all proposals and initiatives which build upon those portions of the Schengen *acquis* which the UK and Ireland participate in (each State 'shall be deemed irrevocably' to have notified its intention to 'take part in' such measures).[479]

As regards measures building on the Schengen *acquis* which the UK and Ireland are not purportedly obliged to opt into, the Schengen Protocol states that '[p]roposals and initiatives to build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties'.[480] The UK and Ireland took the view that the Title IV Protocol (as it then was) therefore applied if they wished to opt in to such measures—ie they did not need the Council's approval to opt in. Conversely, the Council and Commission took the view that the UK and Ireland could *not* opt in to Title IV proposals where these measures built upon those provisions of the *acquis* which the UK and Ireland had *not* opted into. This dispute was ultimately settled by the Court of Justice, when the UK challenged its exclusion from the EU legislation on security features for EU passports and the creation of Frontex,

So with the Court's decision (also on UK's involvement in VIS for law enforcement purposes) approval of the Council is needed. See next page.

[473] See Art 6 of Decision 2000/365/EC and Art 4 of Decision 2002/192/EC (both ibid). The Council decided that the UK can participate in the Schengen *acquis* which it has opted into, except as regards the SIS (which will be subject to a later decision), from 1 Jan 2005 ([2004] OJ L 395/70), but no such decision has yet been adopted as regards Ireland.

[474] Art 1 of each Decision. The exceptions are cross-border hot pursuit by police (for the UK) and cross-border police hot pursuit and surveillance (for Ireland).

[475] Arts 26 and 27 of the Convention; see further 7.5.1 and 7.5.3 below.

[476] Art 5, Decision on UK participation.

[477] Art 5(1), Decision on Irish participation; Art 7(1), Decision on UK participation.

[478] Art 2(2), Decision on Irish participation.

[479] Art 6(2), Decision on Irish participation; Art 8(2), Decision on UK participation. On the date of application of measures building on the Schengen *acquis*, see Art 6(3) and 8(3) of the respective Decisions. On the practical application of these provisions, see s 2.5 of chs 3–7.

[480] Art 5(1), Schengen Protocol, not amended by the Treaty of Lisbon.

the EU borders agency.[481] A further case is pending on the question of whether access to the Visa Information System by UK law enforcement officials can be restricted.[482]

In the Court's view, the Commission and Council were correct: in order to preserve the 'effectiveness' of the rules on the UK and Ireland's participation in the Schengen *acquis*, there was a necessary link between the question of their participation in the original *acquis* and their participation in measures building upon it. Moreover, the Court adopted in these cases a broad interpretation of measures building upon the *acquis*, ruling that both measures *built* upon the *acquis* even though they did not actually *amend* it, because they were sufficiently linked to the control of external borders.[483]

The Treaty of Lisbon did not amend the provisions of the Schengen Protocol dealing with this issue, so presumably the Court's prior case law continues to apply. On the other hand, the Treaty of Lisbon *did* amend the rules governing the position if the UK and Ireland wish to opt out of a measure building upon a provision of the *acquis* which they are already bound by.[484] These rules now provide that the UK and Ireland can opt out of a proposal measure which builds on the parts of the Schengen *acquis* in which they already participate, if they notify the Council of their position within three months. In that case, the UK and Ireland will not be bound by the proposal, but the procedure to adopt it will be suspended until that notification is withdrawn (ie the UK or Ireland decides that it wishes to opt in after all) or until the end of a separate procedure to remove the UK or Ireland from their participation in aspects of the Schengen *acquis*, 'to the extent considered necessary by the Council' by a QMV on a Commission proposal. 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', and must 'act within four months of the Commission proposal'.

If the Council has not acted within that period, any Member State 'may' refer the matter to the European Council, which must then, at its next meeting, acting by QMV on a Commission proposal, take a decision pursuant to the same criteria which apply to the Council. If *that* process fails, the decision-making procedure concerning the original proposal resumes, but in the event that the proposed measure is adopted, then the *Commission* must decide to terminate the UK or Ireland's participation in the Schengen *acquis* by the time that measure is

[481] Cases C-77/05 *UK v Council* and C-137/05 *UK v Council* (n 443 above).

[482] Case C-482/08 *UK v Council*, pending (opinion of 24 June 2010).

[483] For criticism of the approach ultimately adopted by the Court, see the second edition of this book, at pp 58–59.

[484] Art 5(2)–(5), Schengen Protocol. The previous Art 5(2) of the Protocol was repealed by the Treaty of Lisbon.

adopted, applying the same criteria, unless the UK and Ireland decide to opt in to the proposal after all.

It can be seen that these rules have effectively replaced the previous purported obligation to opt in to any measure building upon those provisions of the *acquis* which the UK and Ireland already participate in. These rules also apply to the policing and criminal law provisions of the Schengen *acquis*, which the UK and Ireland currently participate in widely. Unlike the revised provisions of the Title V Protocol, the process of excluding the UK and Ireland from the underlying measures is intended to be automatic, with the Council, the European Council, and the Commission called upon in turn to adopt the measure necessary to terminate part of the UK's or Ireland's participation in the Schengen *acquis*.[485]

2.2.5.1.4. Pre-existing third pillar measures

The fourth and final JHA opt-out applies, unlike the others, to the UK alone, not also to Ireland. It was inserted into the Treaties for the first time by the Treaty of Lisbon, and appears in the transitional Protocol which governs various aspects of the transition between the previous Treaty rules and the rules in the Treaty of Lisbon. This Protocol was already considered above as regards its rules on the legal effect of third pillar measures adopted before the entry into force of the Treaty of Lisbon ('pre-existing third pillar measures'), as well as the Court of Justice's jurisdiction over such acts,[486] but it also contains a special rule permitting the UK to opt-out of the application of all pre-existing third pillar measures which have not been amended at the end of the five-year transitional period applying to the Court's jurisdiction—so by 1 December 2014. There is no possibility for the UK to invoke such an opt-out before or after that date.[487]

In order to invoke this opt-out, the UK would have to notify the Council '[a]t the latest' six months before the end of the transitional period (so by 1 June 2014) that it objects to the powers of the EU institutions (ie the Court of Justice and the Commission, as regards infringement proceedings) becoming applicable to those measures. This would trigger the non-application of the acts concerned. Such an opt-out would not apply to any post-Lisbon policing and criminal law acts, or to any pre-existing third pillar measures which had been amended after the entry into force of the Treaty of Lisbon, in which the UK participates.

As a consequence, the Council, by QMV on a Commission proposal without UK participation, 'shall determine the necessary consequential and transitional arrangements'.[488] Also, the Council, acting by QMV on a Commission proposal *with* UK participation, 'may also adopt a decision determining that the United

[485] For a detailed discussion of these provisions, see Peers, n 459 above.
[486] See 2.2.3.3 above. [487] Art 10(4), first sub-paragraph, transitional protocol.
[488] Art 10(4), second sub-paragraph, transitional protocol.

Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred' by its ceased participation.[489]

However, the UK may 'at any time afterwards' notify the Council that it wishes to participate in pre-existing third pillar measures which it has opted out of.[490] Presumably the word 'afterwards' refers to a time after the *initial notification* of the opt-out, so it would be possible for the UK to opt back in to some pre-existing third pillar measures already during the six-month time period before the opt-out takes effect. In that case, the UK would in effect only be opting out of *part* of its pre-existing third pillar commitments. But as the wording of this provision makes clear ('at any time'), the UK could wait until any future date to embark upon this volte-face. Implicitly, it would be possible for the UK to opt back in to such measures in stages. The Protocol explicitly confirms that if the UK does opt back in to any measures, the jurisdiction of the Court of Justice and the Commission's powers over infringement actions will be applicable.

If the UK did wish to opt back in to participate in pre-existing third pillar measures it had opted out of, the relevant provisions of the Title V Protocol and the Schengen Protocol would apply, with the addition of a requirement that the EU institutions and the UK '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'.

Time will tell whether this option appeals to the UK in 2014. In any case, this opt-out will only be relevant to the extent that pre-existing third pillar measures have not been amended in the meantime.

2.2.5.1.5. Opt-out by repeal?

The final issue as regards the JHA opt-outs of the UK and Ireland (which is potentially also relevant to Denmark) is the question of what happens when the UK or Ireland are bound by an existing JHA measure, but when that measure is repealed (not simply amended) by a later measure in which those Member States do *not* participate. Can it be argued that since the original JHA measure has been rescinded as regards most Member States, its repeal is also effective to those Member States which did not participate in its repeal? This has already happened in the case of the original measure establishing the EU's visa list,[491] and it might happen as regards much of the EU's first-phase asylum legislation.[492]

[489] Art 10(4), third sub-paragraph, transitional protocol.

[490] Art 10(5), transitional protocol.

[491] Reg 539/2001, [2001] OJ L 81/1.

[492] The UK and Ireland participated in the first-phase legislation concerning asylum procedures and the 'qualification' of refugees and persons needing subsidiary protection, and the UK participated in the first-phase legislation on reception conditions for asylum seekers, but they have opted out of the proposals which would repeal those measures. For more detail, see 5.2.5 below.

There is no express provision of the relevant Protocols addressing this issue. However, it is strongly arguable that in this scenario, the measure concerned would *not* be repealed as regards the UK or Ireland, and would therefore also continue to bind the other Member States as regards their relations with the UK and Ireland. The drafters of the Treaty of Lisbon specifically considered the issue of the termination of the participation of the UK and Ireland in JHA measures in which they already participate, and provided for two routes for the EU institutions to terminate the participation of those Member States in existing JHA measures, and one route for the UK to terminate its participation in some JHA measures unilaterally. Moreover, since the termination of participation of a Member State in an EU measure in which it already participates is a profound departure from the priniciple of the uniform application of EU law, any possibility of terminating that participation must be expressly and unambiguously provided for. It will still remain open for the EU institutions to terminate the UK or Ireland's participation in a pre-existing measure which has been repealed pursuant to the specific provisions of the revised Schengen and Title V Protocols, or for the UK to terminate its participation in pre-existing third pillar measures as from 1 December 2014, as discussed above, where the relevant conditions are met. But there is no additional unwritten rule allowing the UK or Ireland to end their participation in existing measures which have been repealed.

In one case, the Council has agreed to repeal an existing JHA measure only as regards the Member States which participate in the measure repealing it, leaving the existing measure in force as regards the UK.[493] If the interpretation above is correct, this is not the exercise of an option for the participating Member States, but merely a confirmation of their obligation, given that they presumably do not wish to terminate the UK's participation in the prior legislation on the grounds that the application of two different regimes is 'inoperable'. The Commission appears to accept this interpretation.[493a] It might be argued that it is not practical to leave one measure in force in only one or two Member States. But in fact the measure concerned will still be in force *as between* the UK or Ireland and *all of the other Member States*, since the latter can only repeal their obligations *to each other* when repealing the existing measure, unless they validly invoke the special rules in the Title V or the Schengen Protocol to terminate the UK's or Ireland's participation in the prior measure. Those special rules were designed precisely to deal with the practical issues that might result from the non-participation of the UK and Ireland in a JHA measure, in light of their previous participation in a measure.

[493] See the Council first-reading position on the proposed Reg on social security for third-country nationals (Council doc 11160/10, 26 July 2010). This measure must still be agreed with the EP before adoption.

[493a] 'Given that the United Kingdom will not take part in this proposal but will continue to apply [the prior Regulation], *it is not possible to repeal the latter completely*.' (COM (2010) 448, 2 Sep 2010, emphasis added).

In the event that the following analysis is not correct, it should be noted as regards criminal law measures that any Council of Europe treaties which had been disapplied by the EU measures being repealed would then re-apply as between the UK, Ireland, and the other Member States following the repeal of the EU measure.[494]

2.2.5.2. Denmark

The non-participation of Denmark in JHA matters did *not* begin, as is often thought, when a Decision of the Heads of State and Government (known as the Edinburgh Decision) was adopted in 1992 to attempt to persuade Danish voters to support the Maastricht Treaty.[495] In fact, Section D of this Decision stated unambiguously and without exception that 'Denmark will participate fully in cooperation on justice and home affairs on the basis of the provisions of Title VI of the Treaty on European Union' (referring to the original third pillar, which was the basis for most JHA cooperation at the time of the Maastricht Treaty). Denmark did not object to JHA cooperation in principle, but rather to the idea that JHA cooperation should take place within the framework of supranational EC law (as it then was). This view was to have a substantial effect on the position of Denmark as regards JHA cooperation in the Treaty of Amsterdam, and subsequently the Treaty of Lisbon.

In order to exempt Denmark from JHA matters that were transferred to EC law by means of the Treaty of Amsterdam, a general 'Protocol on the position on Denmark' (the 'Danish Protocol') governed Denmark's status as regards measures concerning, inter alia, immigration, asylum, and civil law (the former Title IV EC),[496] while the Schengen Protocol originally set out special rules for Denmark as regards the integration of that *acquis* into the EU legal order.[497] However, following the Treaty of Lisbon, all of the special rules relating to Denmark as regards the Schengen *acquis* appear in the Danish Protocol.

According to the Danish Protocol in its original form, Denmark was exempted from *almost* all Title IV EC measures,[498] except for measures determining a list of third countries whose nationals require visas to cross the external borders of the Member States, or of measures determining a common visa format,[499] as both of these issues were already within EC competence prior to the Treaty of

[494] See 2.2.5.1.2 above, *mutatis mutandis*. [495] [1992] OJ C 348/1.

[496] The Danish Protocol also contains an opt-out relating to defence (originally Art 6 of the Protocol, renumbered Art 5 and amended by the Treaty of Lisbon), which is not further considered here. All further references in this subsection are to the Danish Protocol unless otherwise indicated.

[497] Art 3, Schengen Protocol: see discussion below. The Treaty of Lisbon amended this Art to refer instead to the Danish Protocol as regards Danish participation in acts building upon the Schengen *acquis*. [498] Arts 1–3.

[499] Art 4, which was subsequently renumbered Art 6 (but not amended) by the Treaty of Lisbon.

Amsterdam.[500] In conjunction with the termination of the third pillar by the Treaty of Lisbon, the Protocol was enlarged in scope by that Treaty to exempt Denmark from policing and criminal law measures adopted after the entry into force of that Treaty.[501] Third pillar acts adopted *before* the entry into force of the Treaty of Lisbon 'which are amended shall continue to be binding upon and applicable to Denmark unchanged'.[502]

There are special rules relating to Denmark's continued connection with the Schengen *acquis*. First of all, the Schengen Protocol originally provided that those provisions of the *acquis* that were allocated to Title IV of the EC Treaty following the Treaty of Amsterdam (ie immigration provisions of the Schengen *acquis*) still continued to have the effect of public international law, rather than EC law, in Denmark.[503] However, this rule was deleted by the Treaty of Lisbon. As for measures which build upon the Schengen *acquis* and also fall within the scope of Title V TFEU, Denmark has six months to decide whether to apply each such measure within its national law.[504] If it does so, this decision creates 'an obligation under international law' between Denmark and the other Member States participating in the measure. If Denmark fails to apply such a measure, the other Schengen States and Denmark 'will consider appropriate measures to be taken'.[505] In practice, Denmark has consistently opted into all such measures building upon the Schengen *acquis*.[506]

Otherwise, unlike the UK or Ireland, Denmark does not have the ability to opt in to specific JHA measures, either when they are initially adopted or at a later date. If Denmark wishes to change this position, initially, the Protocol only gave Denmark the possibility of denouncing 'all or part' of the Danish Protocol, in which case it has to immediately apply all measures adopted in the relevant field without any need for the Commission or Council to approve its intention to apply those measures.[507] The Treaty of Lisbon now gives Denmark a further option: it may decide to replace the rules concerning its JHA opt-out with a

[500] On the interpretation of this clause in practice, see 4.2.5 below.

[501] Arts 1–3. The Treaty of Lisbon amended Arts 1 and 2 to this end, and updated the cross-reference to the Council voting rules which apply when Denmark does not participate in measures (see Art 238(3) TFEU). It also added a new Art 2a concerning data protection, which is equivalent to a clause inserted into the Title V Protocol for the UK and Ireland (see 2.2.5.1.2 above).

[502] Art 2, final sentence. Presumably the word 'amended' means amendments which are adopted after the Treaty of Lisbon entered into force, and also has the same meaning as it does in the Title V Protocol relating to the UK and Ireland (2.2.5.1 above) and in the transitional Protocol to the Treaty of Lisbon (2.2.3.3 above).

[503] Previous Art 3, Schengen Protocol.

[504] Art 5(1), renumbered Art 4(1) and amended by the Treaty of Lisbon as regards its scope, to refer to all JHA measures which build on the Schengen *acquis*, not just measures within the scope of the previous Title IV EC.

[505] Art 5(2), renumbered Art 4(2) and amended by the Treaty of Lisbon to refer also to Denmark's participation in any such decision. There is no indication of the voting rule applicable or what the 'appropriate measures' might entail.

[506] See s 2.5 of chs 3–4 and 6–7.

[507] Art 7, not amended by the Treaty of Lisbon.

different set of rules, which is almost identical to the Title V opt-outs for the UK and Ireland.[508] The only differences between the two opt-out rules are that first, if Denmark chooses this option, the previous Schengen *acquis* and prior acts building upon the Schengen *acquis* will apply fully to Denmark as EU law, rather than international law, six months after the Danish decision takes effect.[509] Second, there is no special rule on evaluations relating to Denmark.[510] Also, the Annex to the Danish Protocol differs from the Protocol concerning the UK, Ireland, and Schengen in that Denmark must make a decision on whether to apply measures building upon the Schengen *acquis* six months after their adoption; if it does not, the participating Member States and Denmark 'will consider appropriate measures to be taken'.[511] Furthermore, once Denmark opts in to a measure building on the Schengen *acquis*, it must opt in to any future measures that build upon that act to the extent that those future measures also build upon the Schengen *acquis*.[512] In practice, Denmark has not yet notified the other Member States that it wishes to apply the new opt-out rules. If it does so, obviously the new Danish rules should be interpreted consistently with the UK and Irish opt-out rules, *mutatis mutandis*.

In any event, there is a declaration to the Treaty of Lisbon concerning the adoption of acts which are partly applicable to Denmark and partly not applicable to that country, because they have a 'legal base' partly regarding JHA, pursuant to the Danish Protocol. In that case, 'Denmark declares that it will not use its voting right to prevent the adoption of the provisions which are not applicable to Denmark'.[513]

One peculiarity of the Danish position is that in the absence of a possibility for Denmark to opt in to Title IV measures (now extended to all JHA measures), the EC (as it then was) and Denmark were nevertheless willing in certain cases to negotiate international treaties regarding Danish participation. These treaties concern participation in measures concerning responsibility for asylum applications, civil and commercial jurisdiction, and service of documents, which Denmark had applied or agreed to before the adoption of Community acts on these subjects. The treaties require Denmark to apply the Community acts, with minor amendments to the civil jurisdiction rules (but not to the other two measures); moreover the relevant jurisdiction of the Court of Justice is applicable to Denmark, and has therefore been expanded pursuant

[508] Art 8(1), inserted by the Treaty of Lisbon, referring to an Annex inserted by the Treaty of Lisbon. This option is expressly 'without prejudice' to the possibility that Denmark can invoke Art 7 of the Protocol in order to relinquish any form of JHA opt-out entirely.

[509] Art 8(2), inserted by the Treaty of Lisbon.

[510] Compare Art 3 of the Title V Protocol to Art 3 of the Annex to the Danish Protocol.

[511] Art 6(1) of the Annex.

[512] Art 6(2) of the Annex. Presumably the concept of 'building upon' such an act has the same meaning as 'building upon' the Schengen *acquis* (see 2.2.5.1.3 above).

[513] Declaration 48 in the Final Act.

to the Treaty of Lisbon.[514] Denmark may refuse to apply subsequent measures amending or implementing the EC acts, but in such cases, the relevant treaty will be terminated.

2.2.5.3. Accession States

The Schengen Protocol specifies that all future Member States were to be bound by the entire Schengen *acquis*.[515] This was implemented first of all by the 2003 Accession Treaty,[516] which specifies that the ten new Member States which joined the EU pursuant to that Treaty applied as from the date of accession (1 May 2004) the measures in the *acquis* as integrated into the EC and EU Treaties 'and acts building on it or otherwise related to it', as referred to in Article 3(1) of the Act of Accession and listed in Annex 1 to the Act, along with other such measures adopted between agreement of the Accession Treaty and the date of accession. However, there was a delay in applying the remaining provisions of the Schengen *acquis* (or measures building upon it).[517] Those measures were *binding* on the new Member States as from 1 May 2004, but did not *apply* until a unanimous Council decision by the representatives of the Member States fully applying the Schengen *acquis* at that time and the Member State(s) seeking to participate fully. The UK and Ireland participated in that decision to the extent that they had opted in to the *acquis*. The Act of Accession further provides that the agreements associating Norway and Iceland with the Schengen rules, as referred to in the Schengen Protocol, were binding on the new Member States as from the date of their accession to the EU.[518]

More precisely, the provisions of the Schengen *acquis* and the measures building upon it which applied as from 1 May 2004 in the new Member States are the rules on: external border controls (except for checks in the SIS); certain aspects of visas (particularly the visa list and visa format); irregular migration; policing (other than hot pursuit and surveillance); criminal law cooperation (except for references to the SIS); drugs; firearms; and data protection (to the extent that the other Schengen rules apply).

Conversely, the rules on abolition of internal border controls; other aspects of the common visa policy; freedom to travel; cross-border hot pursuit and surveillance by police officers; and the SIS did not apply in practice until the later Council decision. As for Schengen-related measures adopted after agreement on the Accession Treaty, and subsequently adopted after accession, each measure

[514] For the text of the treaties, see [2006] OJ L 66/38 (asylum responsibility); [2005] OJ L 299/61 (jurisdiction rules); and [2005] OJ L 300/53 (service of documents). The asylum treaty entered into force on 1 Apr 2006 ([2006] OJ L 96/9), and the civil law treaties entered into force on 1 July 2007.

[515] Art 8, Schengen Protocol, renumbered Art 7 by the Treaty of Lisbon.

[516] [2003] OJ L 236/33 (Act of Accession).

[517] Art 3(2), Act of Accession, ibid.

[518] Art 3(3), Act of Accession.

indicated whether it applied immediately or after a delay to the new Member States.

The Act of Accession also provided that the new Member States had to accede to JHA conventions or instruments 'which are inseparable from the attainment of the objectives of' the EU Treaty,[519] whether those measures were opened for signature by the old Member States or drawn up by the Council in accordance with Title VI of the EU Treaty (ie the old third pillar); the new Member States also had to take the administrative and other measures necessary to facilitate JHA cooperation. Similarly, the new Member States had to accede to Conventions drawn up on the basis of Article 293 EC (since repealed by the Treaty of Lisbon) and those inseparable from the objectives of the EC Treaty.[520] They also had to accede to treaties established on the basis of Article 38 EU (external third pillar treaties).[521] In practice, the new Member States quickly ratified a significant number of Conventions and Protocols, although this ratification process is not yet complete.[522]

Next, the Act of Accession provided that until the end of 2006, there were transitional funds to assist with the application of EU law including, inter alia, assistance to implement JHA obligations,[523] along with a specific facility to assist new Member States with external land borders to apply their Schengen obligations, by funding buildings, equipment, and training.[524]

A specific JHA safeguard is set out in the Act, providing that for three years after the date of accession (so up until 1 May 2007), the Commission could have taken 'appropriate measures' if there had been insufficient application of a measure concerning mutual recognition in civil law or criminal law by a new Member State.[525] In practice, this safeguard clause was not applied. Also, a Protocol relating to the UK's military base on the island of Cyprus contains specific rules on border control.[526] Finally, Annex II to the Act of Accession contains a list of technical amendments to existing measures made necessary by accession.[527] Point 18 of this Annex lists amendments to JHA civil law measures; the Common Consular Instructions (concerning Schengen visa applications); the Border Manual (for use by external border guards); and the EC's visa list Regulation.

Ultimately nine of the ten Member States to join the EU in 2004 participated in the full Schengen system as from December 2007, and from March 2008 as regards air borders.[528] Only Cyprus was left out of the extension of the Schengen zone, because of the practical difficulties controlling the borders as long as the

[519] Art 3(4), Act of Accession. [520] Art 5(2), Act of Accession.
[521] For details on these treaties, see 2.7.2 below.
[522] For ratification details, see Appendix I. [523] Art 34, Act of Accession.
[524] Art 35, Act of Accession. [525] Art 39, Act of Accession.
[526] Protocol 3 to the Act of Accession.
[527] See Art 20 of the Act of Accession, which gives effect to Annex II.
[528] [2007] OJ L 323/34.

country is divided. However, Cyprus has expressed an intention of applying the provisions of the Schengen *acquis* relating to visas; the Council has not yet acted on this request.[529] Specific issues relating to northern Cyprus have also arisen as regards the territorial scope of the EU's civil law legislation.[530]

The model set out in the 2003 Treaty of Accession was largely copied in the 2005 Treaty of Accession with Romania and Bulgaria, in force from 1 January 2007, except that this time most JHA Conventions applied to the new Member States from a date decided by the Council, acting unanimously.[531] Again the special JHA safeguard was not applied within its three-year period of applicability.[532]

2.2.5.4. Norway, Iceland, Switzerland, and Liechtenstein

As noted above, Norway and Iceland are in a distinct position as non-EU States whose participation in the Schengen rules was necessary if Sweden, Denmark, and Finland were to be able to participate in Schengen, because none of these States wished to relinquish the existing Nordic Passport Union. In fact, Norway and Iceland had already agreed to an association agreement with the Schengen States before the Treaty of Amsterdam was signed.[533] The Schengen Protocol therefore provided for conclusion of a replacement association agreement with Norway and Iceland, as well as for a separate agreement with those States concerning UK and Irish participation in the Schengen rules.[534] These treaties were agreed in 1999,[535] and the Schengen area was extended to Norway and Iceland in March 2001, at the same time it was extended to Nordic EU Member States.[536]

The Schengen association treaty requires Norway and Iceland to apply the Schengen *acquis*, including EC measures related to the *acquis*, as it existed in spring 1999. A Mixed Committee established by the treaty is a forum for discussions about implementation of the *acquis* and concerning measures building upon it.[537] If Norway or Iceland do not accept a measure building

[529] See 4.2.5 below.

[530] Case C-420/07 *Apostolides* [2009] ECR I-3571; see further 8.2.5 below.

[531] Art 3 and Annex I to Act of Accession ([2005] OJ L 157/203). In practice, the Council extended the application of all relevant Conventions to Romania and Bulgaria by the end of 2007: [2007] OJ L 200/47 (Europol); [2007] OJ L 307/20 (CIS); [2008] OJ L 9/23 (anti-fraud Convention); [2007] OJ L 304/34 (corruption); [2008] OJ L 9/21 (Naples II); [2007] OJ L 307/18 (mutual assistance); [2007] OJ L 307/22 (driving disqualification); and [2007] OJ L 347/1 (Rome Convention).

[532] Art 38 of the Act of Accession (ibid). There were regular reports from the Commission on the application by Romania and Bulgaria of, inter alia, standards regarding judicial reform. The most recent reports are in COM (2010) 112 and 113, 23 Mar 2010.

[533] Council doc 11780/97, 28 Oct 1997.

[534] Art 6, Schengen Protocol. The Treaty of Lisbon made a minor amendment to this Art, to delete a reference to the pre-Amsterdam association treaty with Norway and Iceland (ibid).

[535] See respectively [1999] OJ L 176/35 and [2000] OJ L 15/1; both treaties entered into force on 26 June 2000 ([2000] OJ L 149/36). See also a Decision on implementation of the first treaty (Decision 1999/437/EC, [1999] OJ L 176/31).

[536] Decision 2000/777 ([2000] OJ L 309/24).

[537] Arts 2–5 of the treaty; and see Decision 1/99 of the Mixed Committee, adopting its rules of procedure ([1999] OJ C 211/9). These rules were later amended by Decision 1/2004 ([2004] OJ C 308/1).

upon the *acquis*, the treaty is terminated regarding them, although the Mixed Committee may decide to retain it in force.[538] The parties must keep the judgments of the Court of Justice, and of Norwegian and Icelandic courts, under close review.[539] If a 'substantial difference' develops in judicial interpretation or national application of the agreement, and the Mixed Committee cannot agree a measure to ensure uniform interpretation or application of the treaty, or if a dispute relating to the agreement otherwise develops, then the Mixed Committee has a fixed period to settle the dispute, otherwise the agreement is terminated.[540]

It is striking that this treaty, in accordance with the Schengen Protocol, was negotiated by the Council, not the Commission, which normally negotiates treaties on behalf of the EC. Moreover, although the treaty was concluded by the Council, it is not clear whether the treaty also binds the EU as such, although the treaty does state that it creates obligations for the Community and its Member States.[541] It is not clear whether the Court of Justice has jurisdiction to interpret the agreement as far as the Community, the Union, or both is concerned, although in one judgment the Court's jurisdiction as regards the third pillar provisions of the treaty was assumed.[542]

In practice, the treaty has entailed Norwegian and Icelandic acceptance of most measures concerning visas, border control, and irregular migration, and certain measures concerning policing and criminal law.[543] Also, Norway and Iceland agreed a similar treaty on asylum responsibility, paralleling the EU Member States' Dublin Convention, which entered into force in March 2001 at the same time that their Schengen association agreement was applied.[544] Furthermore, those States ultimately agreed to further treaties associating them with the EU's mutual assistance Convention and Protocol;[545] the surrender of fugitives (a version of the EU's European arrest warrant);[546] the 'Prum Decision' relating to police cooperation;[547] the borders agency (Frontex);[548] the EU's borders funds

[538] Art 8 of the treaty. [539] Art 9 of the treaty. [540] Arts 10 and 11 of the treaty.

[541] Arts 8(3) and 15(4) of the treaty. On the issue of EU legal personality, see 2.7 below.

[542] Case C-436/04 *Van Esbroek* [2006] ECR I-2333.

[543] See s 2.5 of chs 3–4, 6–7, and 9–12 below. [544] [2001] OJ L 93/38. See 5.2.5 below.

[545] [2004] OJ L 26/1. The treaty has not yet entered into force. The Commission proposed its conclusion after the entry into force of the Treaty of Lisbon (COM (2009) 704, 17 Dec 2009). See further 9.2.5 below.

[546] [2006] OJ L 292/1. The treaty has not yet entered into force. The Commission proposed its conclusion after the entry into force of the Treaty of Lisbon (COM (2009) 705, 17 Dec 2009). See further 9.2.5 below.

[547] [2009] OJ L 353/1. The treaty has been signed and applies provisionally, but has not yet entered into force (the EU concluded the treaty in July 2010, but the associated states have not ratified it yet). See further 12.2.5 below.

[548] [2007] OJ L 188/19. The treaty has not yet entered into force, but is being applied provisionally.

legislation;[549] and participation in comitology committees connected to the Schengen *acquis*.[550]

As for Switzerland, it agreed a treaty associating itself with the Schengen *acquis* in 2004, along with a parallel treaty on its application of the EU's asylum responsibility rules; these treaties entered into force on 1 March 2008,[551] and were applied as from 12 December 2008 (29 March 2009 as regards Schengen air borders).[552] These two agreements are essentially identical to the Schengen and asylum responsibility agreements with Norway and Iceland, except that: the Schengen treaty is expressly with the Community and Union (and creates obligations for the EC, the EU, and Member States); Liechtenstein may accede to either treaty; there is an obligation to negotiate parallel treaties with Denmark (as regards matters within the scope of the former Title IV of the EC Treaty),[553] Norway, and Iceland; Switzerland is not obliged to apply a particular rule relating to mutual criminal assistance; and the Schengen and asylum responsibility treaties are linked (denunciation of one will terminate the application of the other one).[554] A Protocol concerning accession of Liechtenstein to these treaties was agreed in 2006, but is not yet in force.[555] Also, Switzerland and Liechtenstein have agreed a treaty with the EC concerning their relationship with Frontex (paralleling the agreement with Norway and Iceland on this subject),[556] and are also parties to the treaties concerning association with the Borders Funds and comitology committees.[557] However, unlike Norway and Iceland, Switzerland and Liechtenstein have not agreed any further treaties relating to mutual assistance, the surrender procedure, or the Prum Decision on police cooperation with the EU.

[549] [2010] OJ L 169/22. The treaty has been signed, but is not yet in force.

[550] COM (2009) 605 and 606, 30 Oct 2009. The Council has agreed to sign this treaty, but it has not yet entered into force.

[551] [2008] OJ L 53/13 and 52. On the date of entry into force, see [2008] OJ L 53/18.

[552] [2008] OJ L 327/15 (Decision on full extension of Schengen *acquis*). For the rules of procedure of the Mixed Committee, see [2004] OJ C 308/2.

[553] As regards asylum responsibility, the EC (now EU) also had to be party to this parallel treaty alongside Switzerland and Liechtenstein. This treaty is in force as between the EU and Switzerland ([2009] OJ L 191/6).

[554] Arts 7(5) 13, 15, 16, and 18 of the Schengen treaty and Arts 11 and 14–16 of the asylum responsibility treaty. On the specific legislation which Switzerland applies, see s 2.5 of chs 3–7 and 9–12.

[555] COM (2006) 752–754, 1 and 4 Dec 2006. The Protocols were signed in 2008 ([2008] OJ L 83/3 and 5 as regards the Schengen Protocols; the signature relating to the Protocol on asylum responsibility was not published). Following the entry into force of the Treaty of Lisbon, the Protocol will be approved in the form of two revised Council decisions: see Council doc 6077/10, 26 Apr 2010. See also the amendment to the EU/Switzerland (Schengen) Mixed Committee rules of procedure ([2008] OJ L 83/37).

[556] COM (2009) 255, 4 June 2009. The treaty entered into force between the EU and Switzerland on 1 Aug 2010, but has not yet entered into force between the EU and Liechtenstein.

[557] [2010] OJ L 169/22 and COM (2009) 605 and 606 (nn 549 and 550 above).

2.2.5.5. General rules on enhanced cooperation

General provisions on 'enhanced cooperation', ie the process of some Member States participating in EU measures without some other Member States, were first introduced in the Treaty of Amsterdam, and these provisions were amended by the Treaty of Nice.[558] These rules were never in fact used, except in the context of the UK and Ireland opting in to immigration, asylum, and civil law measures after those measures had already been adopted.[559] However, it is striking to note that there were two attempts to use these provisions in the JHA area: as regards a proposal on criminal suspects' rights, where enhanced cooperation failed because there were insufficient votes in the Council to support authorization of enhanced cooperation when the issue was raised informally;[560] and as regards the 'Rome III' proposal for choice of law on divorce, because the Commission did not respond, before the Treaty of Lisbon entered into force, to a group of Member States which requested authorization for enhanced cooperation.[561]

The Treaty of Lisbon subsequently amended the enhanced cooperation rules again, inter alia, in order to merge the separate rules governing the former first and third pillars.[562] The basic rule is that a group of Member States may establish enhanced cooperation among themselves, within the context of the EU's non-exclusive competences, by 'applying the relevant provisions of the Treaties'.[563] In other words, once enhanced cooperation has been approved, the normal rules on competence and decision-making (for example, unanimity as regards family law measures) will apply. Enhanced cooperation is authorized by the Council 'as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole', and at least nine Member States must participate.[564] Furthermore, enhanced cooperation must: 'aim to further the objectives of the Union, protect its interests and reinforce its integration process'; 'comply with the Treaties and Union law'; not 'undermine' the internal market or 'distort' competition, etc; and 'respect the competences, rights and obligations of those Member States which do not participate in it'. But in return, the non-participants 'shall not impede its implementation by the participating Member States'.[565] The Treaties are silent on the question of enhanced cooperation *outside* the EU legal framework, but of course there are prior examples of this taking place (the Schengen and Prum Conventions). It should follow

[558] See Arts 11 and 11a EC and Arts 43-45, previous TEU. There were specific rules for the third pillar in the prior Arts 40, 40a, and 40b TEU.

[559] See 2.2.5.1 above.

[560] See 2.2.3.4.1 above.

[561] On the substance of the Rome III proposal, see 8.6 below.

[562] Art 20, revised TEU and Arts 326–334 TFEU. There remain some distinct rules for foreign policy enhanced cooperation, which are not considered further here (Arts 328(2), 329(2), and 331(2) TFEU).

[563] Art 20(1), revised TEU, first sub-paragraph. All JHA matters are shared competences, and so are therefore non-exclusive: see Art 4(2)(j) TFEU and the discussion in 2.2.4 above.

[564] Art 20(2), revised TEU.

[565] Art 20(1), revised TEU, second sub-paragraph, and Arts 326 and 327 TFEU.