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SWIMMING IN A SEA OF LAW: REFLECTIONS ON WATER BORDERS, IRISH (-BRITISH)-EURO RELATIONS AND OPTING-OUT AND OPTING-IN AFTER THE TREATY OF LISBON

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1. Introduction

The successful second referendum on the Treaty of Lisbon (Lisbon II)¹ in Ireland in October 2009 finally brought the Irish Government some respite from European Union affairs. The process of the first failed referendum in 2008 (Lisbon I) and then the extensive political campaign to ratify the Treaty a second time around brought with it a tremendous period of reflection, not merely for the Irish State but also for institutional actors, scholars and civil society alike. Many recommendations were made in this period by this broad church to reform Irish “European affairs,” by re-evaluating fundamental and broad-ranging themes such as the government referendum spending rules, referendum broadcasting rules, and the role of the Oireachtas (Irish Parliament) in European Union affairs generally.² Thus, the prolonged and tense period of crisis and reflection over a two-year period brought with it an institutionalized “think-in” as to European Union membership incomparable to any previous time in Irish history. Yet despite the long and extensive period of reflection between Lisbon I and Lisbon II, what is notable is that the Irish relationship

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1. O.J. 2007, C 306/1, which entered into force on 1 Dec. 2009.

2. Sub-Committee on Ireland’s Future in the EU, *Ireland’s Future in the European Union: Challenges, Issues and Options* (Houses of the Oireachtas, 2008); Barrett, “Building a Swiss Chalet in an Irish legal landscape? Referendums on European Union treaties in Ireland & the impact of Supreme Court jurisprudence”, 5 *EuConst* (2009), 32; Kingston, “Ireland’s options after the Lisbon Referendum: Strategies, implications and competing visions of Europe”, 34 *EL Rev.* (2009), 467; Hogan, “The Lisbon Treaty and the Irish Referendum”, 15 *EPL* (2009), 163; Broadcasting Commission of Ireland, *Guidelines in respect of coverage of the referendum on the Treaty of Lisbon and related constitutional amendments* (2009) see www.bci.ie.

with the European Union's former Third Pillar, its future participation in the Area of Freedom, Security and Justice, the Irish Schengen Protocol arrangements and Irish-British relations in a European Union context did not receive anything that could be called substantive coverage in this period.

The Irish Government commissioned research on the negative public vote on Lisbon I, and from the findings distinct trends were discernable concerning class and gender in voting patterns. Ultimately, many respondents pointed to an information deficit.³

The militarization of the European Union was a particular matter of concern to voters, and the issue was included in the Guarantees provided in 2009 by the Heads of State or Government of the European Union to assist the Irish Government in obtaining a successful result in the second referendum.⁴ Importantly, the relationship between public opinion and Irish participation in Justice and Home Affairs, the Area of Freedom, Security and Justice, and its opt-out from the Schengen Area did not – according to the research – provoke the negative referendum result. A fragile outsider stance of “opt-out/opt-in” post-Lisbon now characterizes the Irish relationship with the entire Area of Freedom, Security and Justice, in the form of Protocols and Declarations as contained in the Treaty of Lisbon. The background to this situation, in tandem with the Treaty of Lisbon revisions to the Schengen Protocol and the general context of “Irish(-British)-Euro relations” and European Union law, forms the subject of analysis here.

“British-Irish” relations, the usual alphabetical and legal⁵ formula employed to consider matters of policy between the two States, is intentionally inverted here with a view to critically tracing Irish law and policy on specific European Union issues after the Treaty of Lisbon. The elision of the two States in the title of this article and the interconnecting symbol separated by brackets are employed here as a metaphor for the complexities associated with this interconnection. Thus, the focus of this paper is on Irish-British relations and their

3. *Post-Lisbon Treaty Research Findings* (Millward Brown IMS, Dublin, 2008), www.imsl.ie/ (last visited 27 Nov. 2009), conducted on 2,101 adults.

4. See Hogan, *op. cit. supra* note 2, 163; and see Presidency Conclusions of the Brussels European Council, 18–19 June 2009 (11225/2/09, Rev. 2, 10 July 2009), discussed below in section 8.

5. See, for example, the Belfast Agreement, the peace agreement concluded on Good Friday in 1998 heralding a new era of peace in Northern Ireland, which contained two elements, one of which is entitled the British-Irish Agreement, an international agreement between the Irish and British States, implemented by the North-South Ministerial Council, a British-Irish Intergovernmental conference and the British-Irish Council. The Belfast Agreement is also known as the Good Friday Agreement and the British-Irish Agreement. See also the Irish legislation passed to give effect to the Belfast Agreement, the British-Irish Agreement Acts 1999 and 2002. Thus the term “British-Irish relations” is deeply ingrained in this usual linguistic sense as a matter of law and politics.

impact on Irish policies in a European context and the resulting legal provisions, namely the Common Travel Area between the States and the “special arrangements” provided for in the the Schengen Protocol and the special Protocols on Ireland and the UK of the Treaty of Amsterdam.

It is suggested here that the far-reaching Irish policy opt-out/opt-ins obtained in the Treaty of Lisbon do not amount to a systematic “better bargain” obtained as regards European Union affairs, but rather are the strange and unacknowledged outcome of Irish-British relations to date. Water borders and the Common Travel Area are unduly significant in accounts of “Irish-(British)-Euro” relations up to now, and a more complex set of variables provides an explanation of this phenomenon. The increased flexibility accorded to Ireland and the UK in the Treaty of Lisbon seems almost disproportionate to its effectiveness as a matter of European Union constitutional law, where variable geometry has largely been a failure in legal terms. The contention of the present author is that the assumed similarities of the positions in law and policy of the two States in European matters fails to take into account constitutional peculiarities relevant to the Irish State, and that major issues as a matter of domestic law and not European law surround the future successful operation of the Protocols, Declarations and Guarantees recently obtained by Ireland. It is also argued here that the operation of these Protocols, Declarations and Guarantees is intrinsically dependent on the future decisions of the British Government as to the Common Travel Area, the Treaty of Lisbon Transitional Provisions, and its remaining outside the Schengen Area.

The article is organized as follows: Irish-British relations as to law, policy and litigation are firstly assessed here, followed by an outline of the operation of the Common Travel Area between Ireland and the UK. The evolution of the special arrangements for Ireland and the UK under, in particular, the Schengen Protocol is then traced. The recent decisions of the Court of Justice on this Protocol are considered, followed by an analysis of the Protocols, Declarations and Guarantees obtained by Ireland in order to ratify the Treaty of Lisbon, as well as a revised Schengen Protocol and an opt-out/opt-in as to the Area of Freedom, Security and Justice. Finally, the constitutional changes made to *Bunreacht na héireann* (the Irish Constitution) so as to allow the Treaty of Lisbon to take effect in domestic law are assessed, in light of the Protocols, Declarations and Guarantees obtained.

2. Irish-British relations and their impact on Irish policies to the European Union

2.1. *Background*

An attempt is made here firstly to consider briefly the similarities and differences between Irish and British relations with the European Union, from the points of view of law, policy and litigation.

The outward indicators of “Irish-British” relations at European Union level as a matter of law and policy point to an Irish entity riding on the coattails of the British Government.⁶ The reasons commonly asserted for the close relations in law and politics in European Union affairs typically refer to the Common Travel Area between Ireland and the UK and the common law tradition shared by the two States.⁷ However, the relationship of the UK with the European Union is often depicted as awkward or troubled, earning itself a reputation as “the European Union’s trickiest customer.”⁸ This label is not however used by commentators referring to the Irish State when describing its European Union credentials. The unsuccessful Nice I and Lisbon I referenda aside, the Irish electorate has been broadly in favour of the European Union according to decades of Eurobarometer polls, unlike the British electorate.⁹ As to policy, similar to the UK and throughout many decades of European Union membership since accession, Irish concerns expressed in the lead-in to the adoption of the Constitutional Treaty (and to a lesser extent the Treaty of Lisbon, discussed here) related to tax harmonization, foreign policy and some aspects of Justice and Home Affairs, and they continue now to be areas of sensitivity, with Ireland maintaining a need for unanimity, although this position

6. See Fitzgerald, “Irish support for Blair was damaging to our interests”, (31 Oct. 2009) *Irish Times*.

7. See also Donoghue and Heintz (Eds.), *Making sense of European Justice & Home Affairs Policy: Ireland and the Lisbon Treaty* (IIEA Paper Series, 2009), www.iiea.com/publications/making-sense-of-european-justice-and-home-affairs-policy-ireland-and-the-lisbon-treaty (visited 2 Nov. 2009).

8. Fletcher, “Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom’s ‘Ins’ and ‘Outs’”, 5 *EuConst* (2009), 71, at 76, citing George, *An Awkward Partner: Britain in the European Union* (OUP, Oxford, 1998) and Wall, *Stranger in Europe: Britain and the European Union from Thatcher to Blair* (OUP, Oxford, 2008).

9. See ec.europa.eu/public_opinion/index_en.htm for the latest Irish results but cf. Flash, *Eurobarometer Attitudes towards the European Union in the UK* (Flash EB No. 274 – Gallup, 2009). On EU referendum voting patterns and statistics for Ireland, see Hogan and Whyte (Eds.), *Kelly: The Irish Constitution*, 4th ed. (Lexis-Nexis, 2003), para 5.3.45 et seq.

is rarely antagonistic and is usually rooted in the UK policy position.¹⁰ The failures of the Nice I and Lisbon I referenda have been portrayed in a variety of ways. Such portrayals, however, do not posit Euro-scepticism on the part of the Irish State or its people or relate it to Irish-British relations.

As to legal matters, Ireland of course shares a common law heritage with the UK for historical reasons but, unlike the UK, has had a strong constitutional tradition since 1937, having a written Constitution which accords express powers of judicial review to the judiciary. The Irish judiciary is overwhelmingly pro-Community. Key legal doctrines of European Union law regarding, for example, supremacy and direct effect – well-established from the outset of Irish membership of the EEC (as it then was) at the same time as the UK in 1973 – were embraced earlier and more readily than amongst the British judiciary and almost half of the Irish Supreme Court bench, including the Chief Justice, have served as former member of the Court of Justice in Luxembourg.¹¹ In the past, many UK legislative measures have been transposed into Irish law, particularly in the area of criminal law and, more controversially, in recent times relating to the incorporation of the European Convention on Human Rights.¹²

There are some who suggest that the continued Irish support for British policies in European affairs during the UK Blair Government years was to the detriment of Ireland, at the expense of developing ongoing links and strategic alliances in policy and practices with Continental countries.¹³ Moreover, it is asserted that there has been a continual “drift” by the main Irish Government party, Fianna Fáil, in power continuously for over a decade to the present day,¹⁴ towards closer association with Britain, entailing that it is now necessary to avoid feeding renewed continental suspicions that Ireland is a veritable “British

10. See Brown, *The Debate on the Future of the European Union in Ireland* (IEA, Dublin, 2003), quoting an address give by the then Minister for Foreign Affairs and current *Taoiseach*, Mr. Brian Cowen T.D., prior to the signing of the Constitutional Treaty.

11. See Fahey, *Practice and Procedure in Preliminary References to Europe: 30 years of Article 234 EC case law from the Irish Courts* (Firstlaw, Dublin, 2007), pp. 106–108, and Fahey, “A Constitutional crisis in a tea-cup: The supremacy of EC law in Ireland”, 14 EPL (2009), 515. See also Hogan and Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (Butterworths, Dublin, 1995) and Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Roundhall, 1997). See, however, on the mild reception of the Law Lords for European Community law from accession until the transfer of the Committee’s functions to the UK Supreme Court in 2009, see Arnall, “The Law Lords and the European Union: Swimming with the incoming tide”, 35 EL Rev. (2010), 57, at 81.

12. The (Irish) European Convention on Human Rights Act 2003 is largely based on the Human Rights Act 1998, despite Ireland having a written Constitution since 1937, according express powers of judicial review to the judiciary.

13. See Fitzgerald, op. cit. *supra* note 6.

14. Along with the Green Party since the General Election in 2007.

satellite.”¹⁵ This party has only recently joined the Liberal Group in the European Parliament and has come under some degree of criticism for the manner in which it has begun to operate within this political dynamic – for abstaining from critical votes, for example.¹⁶ Irish-European politics is manifestly not at the heart of mainstream European politics.

In the context of the Third Pillar, Ireland, like the UK, did not accept the jurisdiction of the Court of Justice pursuant to Article 35 TEU (pre-Lisbon) and voluminous judgments, for example, have been delivered by the Irish Supreme Court as to the European arrest warrant, often raising serious substantive and procedural issues as a matter of European Union law, in the absence of supervision from the Court of Justice.¹⁷ In more recent times, serious reservations expressed over Irish participation, for example in the European arrest warrant, are well-documented, on account of national sovereignty and Ireland’s common law criminal justice legal order.¹⁸ However, the need to respond effectively to terrorism in the wake of 11 September 2001 was prioritized by the Irish State. It is notable that accounts of the lead-in to the adoption of the European arrest warrant do not place the UK as part of the factual matrix or political dynamic operating behind Irish concerns. Ireland (but not the UK) was notably outvoted recently in the Council of Ministers during the adoption of the Data Retention Directive and litigated this isolation unsuccessfully.¹⁹ This legal challenge, on account of being outvoted, represented an unusual move for the Irish State on its own accord, since this traditionally did not lead such challenges at European Union level. Litigation trends before the Court of Justice indicate that Ireland frequently supports the UK in direct actions and preliminary references.²⁰

15. See Fitzgerald, *op. cit. supra* note 6. Arguably, he fails to consider the importance of post-Belfast Agreement Good Friday (Good Friday Agreement) Peace Deal developments in 1998 and their resulting influence on British-Irish relations.

16. Fianna Fáil were until recently part of a now defunct anti-federalist grouping within the European Parliament, demonstrating that finding a European political family has not been an easy task for the Centre-right main coalition Government party.

17. See O.J. 2005, L 327/19; O.J. 2005, C 120/24; O.J. 2005, L 327/19.

18. O’Mahony and Payne, *Negotiating European Issues: National Strategies and Priorities* (OEUE Phase I Occasional Paper 1.2–11.03), who provide a superb account of the political negotiation of the European arrest warrant from an Irish perspective.

19. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, O.J. 2006, C 237/5. See C-301/06, *Ireland v. Council and European Parliament*, [2009] ECR I-593. The actions may be attributable to the out-spoken stance of a recent Minister for Justice: see Fahey, “The Irish Challenge to the Data Retention Directive: Reflecting on Irish litigation in the European Legal Order,” Paper delivered at Society of Legal Scholars Annual Conference (Sept. 2008), available from the author.

20. Fahey, *ibid.*

In more recent times, during the Treaty of Lisbon negotiations, the Irish Minister for Foreign Affairs came under pressure domestically not to opt-out of the Charter of Fundamental Rights and not to position Ireland strategically alongside the UK and Poland, where a more hard-line negotiating stance was apparent.²¹ The influences and pressures the UK Government brought to bear on the content of the Decision in 2009 of the Heads of State and Government within the auspices of the European Council – eventually becoming a legal decision of the European Council – prior to the second Treaty of Lisbon referendum in Ireland, were of much significance and are considered below in more detail.²²

Prior to examining the Treaty of Lisbon changes – the real subject of analysis in this article – the Common Travel Area is first considered, given that it is the perceived basis for the Irish and British special arrangements in the Schengen Protocol and the special Protocols on Ireland and the UK.

3. The Common Travel Area between Ireland and the UK as the basis for the arrangements in the Schengen Protocol

The Common Travel Area between Ireland and the UK is arguably the most important explanatory factor of Irish policy choices in European affairs affecting in particular its landmass and borders.²³ The Common Travel Area has its origins subsequent to the creation of the Irish Free State in 1922, when it became classed as a dominion, where previously Aliens Law had been enforced at Irish ports as in the UK.²⁴ Thus, upon the establishment of the Free State, a passport system was not established between the two countries. The account of the origins of the Common Travel Area is well documented elsewhere; suffice it to say that it was administrative and extra-legal in its origins and operation, and was maintained by both countries for obviously pragmatic purposes without complications prior to the 1990s.²⁵ Remarkably, it has no basis

21. Witness, for example, the furore at national level as to the decision of the Government on whether to opt-out of the Charter of Fundamental Rights, ultimately not taken on account of the reaction of Trade Unions in Ireland: *Irish Times*, 5 Oct. 2007; see also “Ireland and Poland get ‘opt-out’ option on EU rights charter,” *EU Observer*, 26 June 2007. Limiting the scope of the Charter represented one of the red lines of the UK (but not Irish) negotiating teams.

22. See section 8 *infra*.

23. The physical attachment of Northern Ireland, part of the UK, to the Southern Republic, remains the other critical factor in the background explanation.

24. The leading analysis considering the historical and legal motivations for its operation is that of Ryan, “The Common Travel Area between Britain and Ireland,” 64 *MLR* (2001), 855.

25. *Ibid.*

in Irish Constitutional law, despite the privileges that it bestows on citizens, for example, between Southern and Northern Ireland, an issue suggested to be here of some importance. A complicated inter-relationship between the two States exists as regards nationality and citizenship respectively for each other's citizens, whereby the privileges and benefits granted by each country to the nationals of the other are quite different. This complexity is exacerbated by the Northern Ireland question, the Good Friday Agreement, European Union Citizenship and free movement law and major changes in Citizenship and Nationality law in Ireland in 2004 following on from an immigration boom.²⁶ Unsurprisingly, leading cases in EU law as to the free movement of persons and citizenship have been generated by the water borders and travel areas between the two States.²⁷

The Common Travel Area was of enormous importance in the context of Northern Irish relations with the Republic in the South, and to the operation of trade in all parts of the island and was a feature of social interchanges there.²⁸ As Ryan states, the Common Travel Area acquired new prominence in the Treaty of Amsterdam, where it was confirmed that Britain and Ireland would remain separate from the Schengen system of open borders by means of certain Protocols attached to that Treaty and the "special relationship" between the two countries was acknowledged.²⁹ However, more recently, the Common Travel Area has been the subject of a British Government (and not Irish Government) review that could have seen its abolition by the UK, as a result of

26. *Ibid.* The Irish Constitution was amended in the wake of the Good Friday Agreement in respect of Irish Citizenship law and the immigration boom into the Celtic Tiger economy: now see Arts. 2 and 9 of the Irish Constitution and the Irish Nationality and Immigration Act 2001 and the Twenty-Seventh Amendment of the Constitution Act 2004. Prior to these changes, the entitlement of persons born on the island to citizenship was statutory in origin and not everyone born on the island was entitled to citizenship. See the account of Mulally, "Defining the limits of citizenship: Family life, immigration and 'non-nationals' in Irish law", 39 *Irish Jurist* (2004), 334, and for the position prior to the changes by way of referendum, which restricted the rights of Irish-born children to citizenship in certain instances where their parents were non-nationals, Hogan and Whyte, *op. cit. supra* note 9, para 3.3.01 onwards.

27. Case C-109/01, *Secretary of State for the Home Department v. Akrich*, [2003] ECR I-9607; Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department*, [2004] ECR I-9925; Case C-127/08, *Metock v. Minister for Justice, Equality and Law Reform*, [2008] ECR I-86241.

28. See Ryan, *op. cit. supra* note 23, 874: "The success of the common travel area in the eighty years since the establishment of the Irish Free State has been due to a combination of factors... has been a pragmatic response by Britain and Ireland to the practical and political difficulties associated with an effective immigration frontier at the Irish border..."

29. *Ibid.* Certain airline carriers, such as Ryanair, operating a significant number of routes between the UK and Ireland, still require the production of a passport from citizens travelling within the Common Travel Area and have made no special concession for this since the advent of its online check-in system. See www.ryanair.com, "Travel Documentation."

fears of terrorism. This would have resulted in passport controls on Irish citizens travelling to the UK. The potential impact on the Schengen Protocol, discussed below, of the abolition of the Common Travel Area would obviously have been dramatic. The expressed rationale for this unilateral review was essentially that, in light of dramatic increases in mobility, privileges bestowed on Common Travel Area nationals might be abused by others, for example, facilitating illegal immigration, crime, smuggling and tax evasion; it was perceived by some as leaving a critical gap in the intelligence picture.³⁰ Responses to the review of the Common Travel Area were commonly negative and thus adverse to its amendment and respondees cited travel delays, costs, burdens on airline carriers and the inadequacy of port and travel infrastructure as reasons for maintaining the status quo and not introducing passport controls.³¹ Fears were also expressed by British Conservatives that changes to the Common Travel Area could have left Northern Irish citizens isolated, even requiring them to produce a passport to enter Great Britain from Northern Ireland.³² The unilateral act of review was also portrayed with alarmist tones in the Irish media and was perceived as an insensitive attack on cordial and carefully-honed, modern day British-Irish relations. The ultimate position reached of no change was met with relief.³³

The challenges faced by land masses surrounded by waters in the context of joining the Schengen area are not, however, insurmountable.³⁴ There are various precedents involving, for example, Lithuania and Kaliningrad; a special transit document system remains a possibility, as do the type of arrangements in place for Nordic citizens in Denmark.³⁵ Arguably, however, the impact of

30. "Final Impact Assessment of Common Travel Area," (UK Home Office Border Agency, 15 Jan. 2009) www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/strengtheningthecommontravelarea/final_ia_of_cta_reform.pdf?view=Binary, (visited 2 Nov. 2009).

31. "Strengthening the Common Travel Area- Government Reponses to the Public Consultation" www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/strengtheningthecommontravelarea/, (UK Home Office Border Agency, 15 Jan. 2009) visited 2 Nov. 2009).

32. "Common Travel Area Retained," (16 July 2009) *Irish Times*.

33. *Ibid.* The House of Lords voted against the Borders, Citizenship and Immigration Bill in 2009. A joint statement was issued by both the Irish and British governments affirming the benefits of the Common Travel Area in 2008: see "Joint Statement regarding the Common Travel Area," (Department of Justice, Equality and Law Reform, 24 July 2008): see www.justice.ie/en/JELR/Pages/Joint%20Statement%20regarding%20the%20Common%20Travel%20Area, (last visited 11 Dec. 2009).

34. See the views outlined in Wiener, "Forging Flexibility- the British 'No' to Schengen", *Arena Working Papers* WP 00/1, available www.arena.uio.no/publications/wp00_1.htm, (visited 2 Nov. 2009).

35. See Protocol No. 5 on the transit of persons by land between the region of Kaliningrad and other parts of the Russian Federation in the Lithuania Accession Treaty in 2003. Also of note

constitutional rules on Irish Citizenship would affect the application of such a system to Northern Ireland. The unilateral review of the Common Travel Area in the wake of the rejection of the first Treaty of Lisbon referendum was perhaps a somewhat ill-timed move by the British Government, but nonetheless it remains extant as a key feature of the Irish-European legal landscape. The situation also remains susceptible to change in the event of a change in government in the UK.

Prior to considering all the Irish Protocols, Declarations and Guarantees associated with the Treaty of Lisbon, the Irish and UK provisions in the Schengen Protocol and the special Protocols on Ireland and the UK of the Treaty of Amsterdam merit consideration here, as they constitute the first and most important opt-out for the Irish State in the chronology of Irish-Euro relations and Ireland's water borders.

4. Schengen Protocol and the Irish (and UK)³⁶ arrangements: From Amsterdam to Lisbon

4.1. Background

As is well known, the Schengen Area Agreement is an awesome achievement, designed to remove border controls among the participating States. The Schengen Area covers 22 Member States (9 newer States and 13 existing States) and Iceland, Norway and Switzerland, and 400 million citizens. Ireland and the UK, however, have enjoyed the provisions of a generously negotiated opt-out opt-in from the Agreement since 1997, set out in the so-called Schengen Protocol (the full title being: Protocol integrating the Schengen acquis into the framework of the European Union). In addition, two particular Protocols for both countries accompanied the Treaty of Amsterdam: the Protocol on the application of certain aspects of Article [14 EC] to the United Kingdom and to Ireland, concerning border controls (which actually refers to the Common Travel Area); and the Protocol on the position of the United Kingdom and Ireland, which concerns the opt-out and opt-in for Title IV, the Area of Freedom

is the fact that citizens of Finland, Iceland, Norway and Sweden are free to enter, reside, study and work in Denmark, outside the Schengen Area as it is, and they do not need a visa, residence or work permit. See also the special arrangements in place for Danish Nationality for the citizens of Nordic countries Finland, Iceland, Norway and Sweden: Danish immigration Ministry www.nyidanmark.dk/en-us/citizenship/danish_nationality/nordic_nationals.htm, (last visited 8 Jan. 2009).

36. Albeit that the analysis which follows here relates solely to the Irish position where possible.

Security and Justice. Remarkably, the Irish Parliament has never debated an Irish opt-in to the Schengen Area since its negotiated opt-out opt-in.³⁷ An Irish diplomat describing the protracted and fractious Irish negotiations leading up to the Treaty of Amsterdam, put the Common Travel Area between the two States as the primary reason for the provisions negotiated for the two States, and no more.³⁸ This is unquestionably the original motivation for the Protocol opt-outs obtained by Ireland. That the Schengen *acquis* now constitutes a costly and difficult condition of accession for new applicant Member States to the European underscores the historical anomaly that the opt-out arrangements represent.³⁹

From the Treaty of Amsterdam to the Treaty of Lisbon, the position had been that Ireland and the UK were not bound by the Schengen *acquis* incorporated into Community law by the Treaties but could opt-in to all or part of Schengen, subject to a decision in favour by the Council acting with unanimous approval of the Schengen Area States.⁴⁰ Ireland and the UK are obliged to participate in measures which build upon the Schengen *acquis* into which they have already opted. Co-extensively, a “lock-out” rule applied, where other Member State could refuse their participation in measures building upon measures into which they had not already opted, the subject of recent controversial decisions of the Court, discussed below.⁴¹ Kuijper has indicated that there were those, particularly in the Commission, who would argue that the opt-in opt-out has had a particularly negative influence on Community law, especially on the scope and nature of certain Commission proposals.⁴² The special position of the United Kingdom and Ireland is now acutely unusual and complex, yet there have been many who have suggested that the traditional “water borders” explanation for the British (and correlatively Irish) “apartness” from Schengen is not an insurmountable barrier and that a British (and by extension Irish) decision to join Schengen would not necessarily imply a set-back compared to the current system of border controls.⁴³ In fact, in late 2007, Ireland

37. Senator O’Toole, 195 *Oireachtas Debates* (No. 16, 10 June, 2009): see www.oireachtas.ie.

38. McDonagh, *Original Sin in a Brave New World: An Account of the Negotiation of the Treaty of Amsterdam* (IIEA, Dublin, 1998).

39. See *supra* section 6.2.

40. In practice, Ireland and the UK carry out checks and surveillance at their borders with other EU Member States but participate to some degree in part of the Schengen *acquis*, pursuant to Decisions discussed below, section 4.2.

41. See House of Lords Select Committee on European Union, *The Treaty of Lisbon: an impact assessment* (10th Report, Session 2007-08, HL Paper 62), para 6.254, detailing the evidence of Prof. Peers.

42. Kuijper, “The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects”, 41 *CML Rev.* (2004), 609, at 621–623.

43. *Ibid.*

was repeatedly asked to join the Schengen Area, prior to the signing of the Treaty of Lisbon.⁴⁴ Accounts of the special arrangements rarely attribute “apartness” to the Irish State but rather to the UK and the narrative depicting the State actors is dramatically one-sided in this regard.

4.2. *The lexicon of the Irish and UK “special arrangements” in the Amsterdam Protocols*

The literature on the Protocol arrangements for the UK and Ireland is extensive⁴⁵ and is replete with expressions that often do not find currency in legal articles. This is arguably because the Schengen Agreement and the Amsterdam Protocols form a legal expression of a political compromise, one asserted to be so difficult now that it has reached the point that it no longer works properly. The Protocol arrangements are thus described as “special”, “alarming,” “fiendishly complicated” and “bizarre”⁴⁶ and the inherent complexity of the canvas that is the Schengen *acquis* is described almost amusingly (unintentionally) by one commentator as “mysterious law”⁴⁷ and by others as a “clever ... perhaps too clever piece of drafting.”⁴⁸ Undoubtedly, then, negative overtones have been manifest in more recent times as to “Schengen law,” disengaging it from its substantive meaning – being truly free movement – as there are now many human rights objections registered about the Agreement and its operation generally, the discussion of which is outside the scope of this work generally.⁴⁹ The point made here, however, is that the unusual lexicon which it has

44. “Ireland urged to support EU Justice, Security policy,” (19 Sep. 2007) *Irish Times*.

45. Kuijper, “Some Legal Problems Associated with the Communitarization of Policy on Visa, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen *Acquis*”, 37 CML Rev. (2000), 345, at 365; Baldaccini, Guild and Toner (Eds.), *Whose Freedom, Security & Justice? European Union Immigration and Asylum Law and Policy* (Hart, Oxford and Portland, Oregon, 2007); Hedeman Robinson, “The Area of Freedom, Security and Justice with regard to the UK, Ireland and Denmark: The Opt-in Opt-outs under the Treaty of Amsterdam” in O’Keeffe and Twomey (Eds.), *Legal Issues of the Amsterdam Treaty* (Hart, Oxford, 1999), at p. 291.

46. Kuijper, op. cit. *supra* note 44; Editorial, “Neither a bang nor a whimper”, 34 CML Rev. (1997), 767, at 770; House of Lords Select Committee on the European Union, *Schengen and the United Kingdom’s Border Controls* (7th Report, Session 1998–1999, HL Paper 37).

47. As Kuijper notes, op. cit. *supra* note 44, a key phrase employed in the Schengen Protocol so as to permit an opt-in is that the measure to which the UK or Ireland wishes to opt-in must be “building upon” the Schengen *acquis*, albeit that it was unknown what “the mysterious category of subjects building upon the Schengen *acquis*” in fact was. This phrase, “building upon,” has now been subjected to an interpretation by the Court of Justice that excludes the participation of Ireland and the UK, discussed in section 4 *infra*.

48. Editorial, op. cit. *supra* note 45, 767, at 768 and 770.

49. See Mac Einri, “The implications for Ireland and the UK arising from the development of recent EU policy on Migration” in *Ireland, Schengen and the Common Travel Area* (2002), available at migration.ucc.ie/schengencta.htm (visited 2 Nov. 2009).

generated compounds myths and reinforces public misunderstandings over European Union integration generally, and the negative lexicon is not generally Irish-specific.

The original provisions relating to the UK and Ireland of the Schengen Protocol are contained in Articles 4 and 5 thereof, which provide as follows:

“4. Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen *acquis*, may at any time request to take part in some or all of the provisions of this *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.

5...

In this context, where either Ireland or the United Kingdom or both have not notified the President of the Council in writing within a reasonable period that they wish to take part, the authorisation ... shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question...”

The Commission, has perhaps unsurprisingly, expressed its support for a strictly operational and effective opt-in regime, holding rigorously to the terms of Articles 4 and 5 of the Schengen Protocol: “The Schengen Protocol integrated the Schengen *acquis* in the framework of the European Union: ... this integration has not given rise to a renegotiation of the *acquis* as it was designed in the previous intergovernmental framework. The Commission’s view is that there are no circumstances under which a request to participate pursuant to Article 4 could be the occasion for such a renegotiation...”⁵⁰

On the basis of Article 4 of the Schengen Protocol, the Council has adopted two decisions, one for the UK⁵¹ and one for Ireland – the latter having applied two years later than the former to participate, a time lag that may be interpreted in various ways, as either tardy, uncertain, reflective, uncooperative or politically astute.⁵² There is little evidence existing to provide a determinative view. Both countries in practice participate closely in police and judicial

50. SEC(1999) 1198 final. Referred to as “Commission’s guiding principles *vis a vis* requests pursuant to Article 4 of the Schengen Protocol” in *Commission Opinion on the request by Ireland to take part in some of the provisions of the Schengen acquis* (SEC(2000) 1439 final).

51. Decision 2000/365/EC, O.J. 2000, L 131/43.

52. Decision 2002/192/EC, O.J. 2002, L 64/20. Twenty-seven acts are enumerated here. However, see Peers, *Statewatch Analysis EU Lisbon Treaty, (No. 4) UK and Irish opt-outs from European Union Justice and Home Affairs Law* (26 June 2009) (www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf) (visited 2 Nov. 2009), Annex IV, The author made a Freedom of Information request to the Irish Department of Justice in Oct. 2009 for a complete listing of Irish opt-ins and opt-outs from EU Justice and Home Affairs since the ratification of the Treaty of Amsterdam to date pursuant to (1) Schengen Acquis and (2) EC

cooperation in criminal matters, the fight against drugs and the Schengen Information System. The Decision from 2002 as to Ireland begins with the first recital as follows, in atypical format; the language is worth recalling:

“whereas (1) Ireland has a *special position* ... Article 6(2): From the date of the adoption of this Decision, Ireland shall be *deemed irrevocably* to have notified the President of the Council...”⁵³ (emphasis supplied).

A Declaration on Article 4 of the Schengen Protocol was annexed to the Final Act of the Treaty of Amsterdam inviting the Council to seek the opinion of the Commission before deciding on a request, and to use their best efforts to allow the UK and Ireland if they wished to use Article 4.⁵⁴ Of course the ultimate question that remains in all matters of European Union law and policy is – to rephrase the question put by Peers – just how “ECJ proofed” could the text be?⁵⁵ The Court of Justice has recently put that question to bed in a particularly controversial decision which is considered below, and whereby the answer is that no text is unequivocally “ECJ proofed” and that the substance of the Declaration was readily capable of being overlooked.⁵⁶ The “special position” is referred to frequently throughout the text of the decisions pursuant to Articles 4 and 5 as to the place of Ireland and the UK and their unusual treatment.

However, the “special” character of the decision is adversely affected by recent judgments of the Court of Justice and is the subject of analysis in the next section.

5. Decisions of the Court of Justice on the Schengen Protocol prior to the Treaty of Lisbon changes

There are only two decisions of the Court of Justice to date on the Schengen Protocol arrangements for the UK and Ireland that have provoked much by way of comment.⁵⁷ Both of the decisions relate to attempts by the UK, and not

Immigration, Asylum & Civil law, and was contacted by the Department of Justice to withdraw the request.

53. Emphasis added.

54. See Declarations No. 45 on Art. 4 of the Schengen Protocol and Declaration No. 46 on Art. 5 of the Schengen Protocol.

55. Peers, “Caveat Emptor: Integrating the Schengen *Acquis* into the European Union legal order”, 2 *CYELS* (2000), 87.

56. Alternatively, the Council’s wish is evident – that the final judgment is for the Court of Justice: Kuijper, *op. cit. supra* note 44, at 353.

57. Cases C-77/05, *United Kingdom v. Council of the European Union*, [2007] ECR I-11459; Case C-137/05, *United Kingdom v. Council of the European Union*, [2007] ECR I-11593. See Rijpma, annotation of Case C-77/05, *United Kingdom v. Council* and Case C-137/05, *United Kingdom v. Council*, 45 *CML Rev.* (2008), 835; Fletcher, *op. cit. supra* note 8; Peers, *op. cit.*

Ireland, to avail of the provisions of the Protocol and to take part in certain Schengen measures. In reality, Ireland is substantially affected by the outcome of the cases despite its peripheral place in the particular proceedings, and the two referenda campaigns in Ireland took surprisingly little interest in the decisions. Notably, at UK Cabinet level, the decision had been taken that a narrow view would be adopted of what constituted a “proposal to build upon the Schengen *acquis*”, limiting this to proposals which amended or supplemented an existing Schengen measure, and the view had been expressed that the UK would never wish to take part in a measure to build upon a measure forming part of the Schengen *acquis* without first having elected to be bound by that original measure.⁵⁸ Little evidence exists as a matter of scholarly or official documentation as to the operation of Articles 4 and 5 from an Irish perspective. The importance of the decisions of the Court of Justice then merits their consideration in this light.

Thus, in *United Kingdom v. Council*,⁵⁹ the UK, supported by Ireland, sought the annulment of Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders.⁶⁰ The Commission put forward the proposal to establish the agency in 2003, and in 2004 the UK confirmed to the Council its intention to take part in the adoption of Regulation No. 2007/2004 pursuant to the procedure set out in Article 5(1) of the Schengen Protocol, set out above. Despite the UK’s notification, it was not allowed to take part in the Regulation adopted, on the ground that it constituted a development of provisions of the Schengen *acquis* in which the UK did not take part. The UK then challenged the refusal to allow it to take part, alleging that the refusal constituted a breach of Article 5 of the Protocol, and that the system as set out in Article 5 was not subordinate to that established in Article 4 and was incompatible with Declaration No. 45 of the Treaty of Amsterdam on the Schengen Protocol.

The Court of Justice, in a particularly controversial judgment, upheld the refusal to allow the UK to take part, and held that: “... participation of a

supra note 51; House of Lords Select Committee on European Union, cited *supra* note 40, considered above here in further detail; House of Lords Select Committee on European Union, *UK Participation in the Schengen Acquis* (5th Report, Session 1999–2000, HL Paper 34); Kingston, *op. cit.* *supra* note 2.

58. See House of Lords Select Committee on European Scrutiny, *The Incorporation of Schengen into the European Union* (31st Report, 1997–1998 Session, HL Paper 139).

59. In the first case (Case C-77/05), Ireland, Poland and the Slovak Republic supported the UK, while Spain and the Commission supported the Council. However, in the next decision discussed, Poland did support the UK and there too the Netherlands supported the Council.

60. Council Regulation (EC) No. 2007/2004 of 26 Oct. 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders, O.J. 2004, L 349/1.

Member State in the adoption of a measure pursuant to Article 5(1) of the Schengen Protocol is conceivable only to the extent that that State has accepted the area of the Schengen *acquis* which is the context of the measure or of which it is a development...⁶¹ The Court held that checks on persons at the external borders of the Member States had to be regarded as constituting elements of the Schengen *acquis* and that the Regulation constituted a measure to build upon the Schengen *acquis*. The Court thus held that the two articles of the Protocol could not be read independently from each other, the effectiveness rationale being of significance in its reasoning.

Another decision was delivered the same day, and with essentially similar facts, *United Kingdom v. Council of the European Union*⁶² the UK also there sought the annulment of Council Regulation (EC) No. 2252/2004 on the standards for security features and biometrics in passports and travel documents issued by Member States,⁶³ whereby the UK had been excluded from participation in its application. Ireland once again supported the UK in the proceedings before the Court.⁶⁴ Again, the UK submitted that the Council had been wrong to classify the Regulation as a measure developing provisions of the Schengen *acquis*. The Court, similarly rejecting the claim, held that checks on persons at the external borders constituted elements of the Schengen *acquis*.

The Court thus held that there was no basis for a distinction to be drawn between Schengen-related and Schengen-integral measures, the effectiveness rationale or *l'effet utile*, being employed here once more.

There is a widespread consensus that the decisions of the Court were unexpected and set a tone that is strangely antagonistic towards any future participation of the UK in the Schengen measures, decisions that will have repercussions for Ireland clearly.⁶⁵ They have been depicted as sending out a powerful message to the beneficiaries of generously negotiated opt-outs that that “one cannot have one’s cake and eat it.”⁶⁶ Notably, the judgment of the Court was delivered just a few days after the signing of the Treaty of Lisbon on 13 December 2007, containing an even more far-reaching opt-out for the UK and Ireland than that contained in the Constitutional Treaty, albeit with a

61. Paras. 62–63.

62. Case C-137/05, *United Kingdom v. Council*, cited *supra* note 56.

63. Council Regulation (EC) No. 2252/2004 of 13 Dec. 2004 on standards for security features and biometrics in passports and travel documents issued by Member States. O.J. 2004, L 385/1.

64. The UK was supported by Ireland and the Slovak Republic, whereas the Council was supported by Spain, the Netherlands and the Commission.

65. On the contrary, see Fletcher, *op. cit. supra* note 8, who states (at 87) “[t]here is nothing in Article 5 of the Schengen Protocol regarding the UK or Ireland’s participation in measures building on the *acquis* requiring them to have first participated in the original measure...”

66. Rijkma, *op. cit. supra* note 56, at 851.

softer Irish position.⁶⁷ Perhaps the Court's judgments could contribute to the UK and Ireland's integration in this part of (formerly) EC law, by confronting these Member States with the undesirable consequences of their non-participation in parts of the Schengen *acquis*, but the legal likelihood of this is far from apparent in the short term; and, rather, the negative interpretation is suggested here to be the more realistic one, i.e. that the "outsider" Member States will less likely join in and that constitutional differentiation will become more real and hard-edged in future times, with less opting in.⁶⁸ Irish commentators have described the decisions of the Court interpreting the UK opt-out opt-in as being both harsh and surprising and as disapproving of the UK and Irish "pick and choose" *à la carte* constitutional differentiation.⁶⁹ Others have suggested more benevolently that the cases did not concern the extent to which the UK could be forced to participate in a measure in which it did not want to take part, but rather the extent to which it was blocked from participating in a measure in which it did want to take part, a distinction of no small importance, that is prior to the changes effectuated by the Treaty of Lisbon.⁷⁰

Whatever view is correct, what is notable in both instances is that both the UK (and Ireland in support) sought to rely upon the Declarations attached to the Treaty relating to the Protocol, and in both instances the Court neither referred to nor appeared to take into account the Declarations in its decision. Of course, strictly speaking, Declarations are not legally binding. However, it is difficult to suggest that a purposive or teleological interpretation of a text which results in a highly exclusionary and antagonistic approach to constitutional differentiation assists with the effectiveness or *effet utile* of the text. This principle is employed here as legal whitewash for the Court overtly intervening so as to thwart variable geometry taking place. Rijpma⁷¹ asserts, it is submitted here with much force, that the decision of the Court is *explicable* in so far as the Court wanted to bring back the focus on the underlying rationale of the Schengen *acquis*, namely the free movement of European Union citizens as part of the wider single market project. Whether this will be the *net result* of the decision of the Court remains questionable given that the reaction to the decision seems to consider the decision to be dissuasive and discouraging to UK participation and no more.⁷² It is easy then to conclude that variable

67. See the discussion above in section 6.

68. See Rijpma, *op. cit. supra* note 56.

69. See Kingston, *op. cit. supra* note 2, 851–852.

70. See House of Lords Select Committee on European Union, cited *supra* note 40, outlining the contentions of Prof. Shaw, at para 6.255.

71. See Rijpma, *op. cit. supra* note 56.

72. It is suggested here that it is not unduly pessimistic to assert as Rijpma, *ibid.* does, that as the Court gave a very broad interpretation of the concept of "proposals and initiatives to build upon the Schengen *acquis*" and given that very few measures that have their legal basis in

geometry has not really been much of a success nor is it likely to be in the future.⁷³ The strong reaction provoked by the interventionist decisions of the Court further demonstrates that constitutional differentiation is a means of understanding a compromise that is more political than legal, and the Court cannot be relied upon as a matter of law to support or sustain the political concept of constitutional differentiation.

The opt-outs and opt-ins negotiated, as set out in the Treaty of Lisbon, discussed next, appear all the more futile in the wake of the decisions of the Court.

6. Treaty of Lisbon and the Irish protocols and declarations employed to ratify the Treaty of Lisbon

6.1. The 2007 Intergovernmental Conference (IGC) mandate and the Irish negotiating position for the Treaty of Lisbon

An opt-out from the entire Area of Freedom, Security and Justice eventually secured by the UK and Ireland in the Treaty of Lisbon, however, was not part of the failed Constitutional Treaty and at no point was such an opt-out even the subject of discussion as part of the negotiations for the Constitutional Treaty.⁷⁴ Working Group X on Freedom Security and Justice in their Final Report to the Convention on the Future of Europe had as a general concern the opt-in opt-out arrangements for the UK and Ireland.⁷⁵ Formerly, in the Constitutional Treaty, it was provided (in Protocol No. 19) thereto, that Ireland and the UK would have a range of opt-outs from policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation. In the lead-up to the adoption of the Treaty of Lisbon, the Irish State was publicly urged by the EU Justice Commissioner to support

(former) Title IV EC will fail to qualify as a Schengen developing measure, consequently the scope of the Title IV EC Protocol has been drastically reduced. The restrictive approach of the Court here is particularly striking. Importantly, Rijpma, (*ibid.*) suggests that the Court's judgment casts doubt on the Council's past practice of allowing the UK and Ireland to participate under Art. 3 of the Title IV EC Protocol, for example, the ARGO programme for administrative cooperation in the fields of asylum, visa, immigration and external borders and Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (O.J. 2001, L 149/34), whereas Fletcher (*op. cit. supra* note 8, 97) states that a key finding of the decision of the Court casts doubt on the validity of Art. 8(2) of the UK Decision and Art. 6(2) of the Irish Decision taken previously pursuant to the provisions of the Schengen Protocol.

73. This is the thrust of the comments of Kuijper, *op. cit. supra* note 41, 609.

74. Peers, *op. cit. supra* note 51, 8.

75. Convention on the Future of Europe Final Report of Working Group X, "Freedom, Security and Justice", (Conv. 426/02, 2 Dec. 2002; WG X 14), 25.

justice and security policies and not to remove itself from such matters.⁷⁶ The revised Schengen Protocol does not differ substantially in its current format to that as attached to the Constitutional Treaty, rendering the (opt-in) opt-out as to the Area of Freedom, Security and Justice all the more remarkable, as considered below. Efforts were made during the Finnish Presidency in 2006 to implement some of the Justice and Home Affairs communitarizing provisions of the Constitutional Treaty but these were not supported by even a bare majority of Member States. It is said that it came as a surprise to many that under the German Presidency of 2007 such rapid progress was made in creating a successor document to the Constitutional Treaty with all of the major provisions on Justice and Home Affairs which figured in the Constitutional Treaty.⁷⁷ However, the political context had altered by 2007, particularly with the advent of new leaders in the UK, France and Germany.

In the Intergovernmental Conference (IGC) mandate in 2007 to “de-constitutionalize” the Constitutional Treaty, it was expressly stated that the Irish position on the scope of the Schengen Protocol and the Protocol on the position of UK and Ireland (the Title IV EC Protocol) and changes thereto would be reserved at that point in time. It provided that:

“Moreover, the scope of the Protocol on the position of the United Kingdom and Ireland (1997) will be extended so as to include, in relation to the UK, and on the same terms, the Chapters on judicial cooperation in criminal matters and on police cooperation. It may also address the application of the Protocol in relation to Schengen building measures and amendments to existing measures. This extension will take account of the UK’s position under the previously existing Union *acquis* in these areas. *Ireland will determine in due course its position with regard to that extension.*”⁷⁸

As far as Ireland’s role in the European Union is concerned, 2007 may be summarized as a year where the State remained committed to preserving the main body of the Lisbon Treaty and implementing the Lisbon Strategy for jobs and economic growth.⁷⁹ Many events were hosted by the Irish State in 2007 to celebrate the fiftieth anniversary of the signing of the Treaty of Rome.⁸⁰ Politically and institutionally – and both prior to and subsequent to the

76. *Supra* note 44; “State could be left out of EU justice measures”, (5 Oct. 2007) *Irish Times*.

77. Donnelly, “Justice and Home Affairs in the Lisbon Treaty: A Constitutionalising Clarification”, 1 *EIPA Scope* (2008), 21.

78. IGC Mandate, Council of the European Union, (11218/07, Brussels, 26 June 2007), (1) p. 8. Emphasis supplied.

79. See Rees, “Ireland’s Foreign Relations in 2007”, 19 *Irish Studies in International Affairs* (2008), 227.

80. *Ibid.*

negotiation of the Treaty of Lisbon – an outwardly “negative” policy position as to the communitarization of the entire Area of Freedom, Security and Justice is not generally discernible as a matter of politics. It is thus particularly remarkable that at no stage throughout period, in the literature, publications, Lisbon I and II referenda in Ireland or in the IGC mandate that led to the drafting of the Treaty of Lisbon, was there any evidence of an overtly antagonistic or protective nationalistic stance being adopted by the Irish Government as to the Area of Freedom, Security and Justice and on the contrary, the narrative was in the other direction, i.e. that the State was being urged to participate in Justice measures. Moreover, Ladenburger has stated that the IGC mandate: “... left one single matter open for intense negotiation in the group of legal experts... it [concerned] how to articulate the relationship between the extension of the UK’s (and Ireland’s) opt-out opt-in regimes to the Third Pillar area and the pre-existing obligations of the United Kingdom in this area, in the light of communitarisation. *The UK made three concrete requests ...all based on the same motivation: not to be forced into any communitarised legislation against the UK’s will...*”⁸¹

It is hard to attribute or relate such motivations to the Irish position to the same degree and they certainly do not receive official recognition during this period in the Irish media nor in the scholarship generally.⁸² Remarkably, at the same time as Ireland obtained such a far-reaching opt out from the Area of Freedom, Security and Justice in the Treaty of Lisbon, the Danish Government set out plans to hold a referendum on the Danish opt-outs in the Area of Freedom, Security and Justice, ultimately abandoned, but nonetheless demonstrating that the isolationist stance of the Danish, interpreted far beyond that intended, was increasingly viewed with unease both at home and abroad.⁸³

The next issue for consideration is the revisions to the Schengen Protocol after the Treaty of Lisbon, specific to Ireland and the UK.

6.2. *The revised Schengen Protocol after Lisbon*

The most significant of the minor revisions to the Schengen Protocol (Protocol No. 19) made by the Treaty of Lisbon, is a substantially more detailed Article

81. Ladenburger, “Police and Criminal law in the Treaty of Lisbon: A New Dimension for the Community Method”, 4 *EuConst* (2008), 20, at 28. Emphasis supplied by the present author.

82. As to which, see Smyth, “Justice co-operation- opting in or just opting out?”, *Irish Times*, 5 May, 2008..

83. Kuijper, *op. cit. supra* note 41, 621–623; see the account also in (8 Aug. 2008) *EU Business* www.eubusiness.com/news-eu/1218205023.2/ (last visited 26 Nov. 2009). Kuijper pointedly comments that other Member States have been somewhat unsophisticated at this game – they have permitted not only the UK and Ireland, but even Denmark, with its rather atypical views in this field, to influence instruments in the field of asylum and immigration.

5, according more freedom to the UK and Ireland to opt-in or remain outside with increased flexibility.⁸⁴ There was much confusion domestically as to whether the position negotiated amounted to more of an opt-out than an opt-out opt-in.⁸⁵ It must be noted that the language surrounding the revised procedures for opting-in is more conciliatory in tone than the recent decisions of the Court of Justice might have suggested, discussed above. Article 5(3) thereof encourages the “widest possible participation” of the UK and Ireland ensuring operability whilst “respecting coherence.”⁸⁶ The new right set out in Article 5 entails that the UK and Ireland may opt-out of measures building upon the Schengen *acquis* which they have already opted-out from. This creates a degree of circularity in the sense that the recent decisions of the Court of Justice only refused an entitlement to opt-in to building measures. And so now there is an express right to opt-out of building measures (subject to a strict interpretation of “building” because of the decision of the Court) where there was an opt-out from those Schengen *acquis* provisions that the measures sought to build upon. However, the prospective coherence of such an opt-out is now a legally relevant factor as noted above – an issue of importance in light of the decision of the Court and one readily inviting litigation. Notably, Article 7 now provides that for the purposes of negotiations for the admission of new Member States, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission. Thus the Irish and UK positions must be regarded as peculiarly anomalous given this non-negotiability for candidate States.

Peers has asserted that the UK has been particularly cooperative in respect of the operation of the Protocol opt-in to date and also that other States have assisted with a smooth and non-antagonistic attitude to the operation of the Protocol.⁸⁷ Ireland must also be interpreted as co-operating less actively and

84. House of Lords Select Committee on European Union, cited *supra* note 40.

85. Smyth, *op. cit. supra* note 81.

86. Similar to Art. 4a of the Protocol on the position of the UK and Ireland as to the Area of Freedom, Security and Justice (after Lisbon) discussed *infra*, but without financial penalty to the same extent, the latter being dealt with in a Declaration, discussed below. See House of Lords Select Committee on European Union, cited *supra* note 40, para 6.281. Declaration No. 47 provides that the UK and Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of their participation in some or all of the *acquis*.

87. Peers, *op. cit. supra* note 51, 6, who states that inclusion rather than exclusion has been fostered through successful cooperation amongst those inside and outside the Protocol. Arguably then, this context renders the content of the revised Protocol and Declaration all the more difficult to assess, given the climate of antagonism and separateness that the provisions outline. Peers suggests that there has been no case where, after the UK or Ireland opted into a proposal, they blocked agreement on that proposal resulting in the other Member States going ahead without

less proactively, as the discussion above in section 4.2 indicates as to its opting-in actions and the timing thereof to date. Wiener contended less than a decade ago that the British “no” to Schengen had been substantial in its contribution towards forging flexibility as a constitutional principle in the European polity, thereby demonstrating how the Schengen process, as constitutionally divisive as it might appear, has in fact contributed to further European integration.⁸⁸ However, a decade later, if this in fact were the case, surely the Court would not have delivered the decisions that it did recently and the flexibility of the arrangements now existing would be unnecessary.⁸⁹

6.3. *Protocol (No. 21) on the position of the UK and Ireland as to the Area of Freedom, Security and Justice*

Arguably, the most significant new provision of the Treaty of Lisbon regarding Ireland is Protocol (No. 21) concerning the Area of Freedom, Security and Justice. First and foremost, it is considerably wider than any of its previous incarnations. There are essentially two changes made generally to this Protocol attached to the Treaty of Lisbon when compared with the Constitutional Treaty. The two changes relate firstly, to the scope of the opt-in and secondly, as to the repercussions of non-participation in an amending measure. The Protocol constitutes an opt-out from the entire Area of Freedom, Security and Justice and the language of Article 2 of Protocol No. 21 is particularly striking in so far as the opt-out position achieved is the most far-reaching of the opt-outs generally for the UK and Ireland and excludes the applicability of *inter alia* any decision of the Court of Justice interpreting any provision of the Area of Freedom, Security and Justice.⁹⁰ While viewed as increased flexibility from a UK perspective,⁹¹ when read with the opt-ins negotiated from an Irish perspective, these provisions arguably amount to further isolation on the basis that Ireland will avail itself less often of the provisions than the UK, if history is to be judged correctly, and never proactively. The reasons commonly asserted for the need for such an opt-out relate firstly, to the Common Travel Area shared by Ireland with the UK and secondly, the common law tradition shared by a small minority of States within the European Union, a tradition that is

them, suggesting that the UK Home Office is particularly keen to avoid this ever happening, and that so far it has succeeded.

88. Wiener, *op. cit. supra* note 33.

89. See also Protocol (No. 20) on the application of Art. 26 TFEU (ex 14 EC) to the UK and Ireland, which is not the subject of analysis in the main text for reasons of space.

90. Title V of Part III TFEU.

91. House of Lords Select Committee on European Union, cited *supra* note 40, para 6 261.

asserted to require special treatment in this regard.⁹² However, neither reason represents an absolute barrier to change. Notably, Ireland has been asked in recent times to join the Schengen Area.⁹³ The disadvantages of this position for Ireland are patently that it has no voice or voting rights. On the contrary, however, the Irish Oireachtas Joint Committee on European Affairs issued a statement in 2008 declaring that the opt-out opt-in position negotiated would ultimately protect Ireland's legal system.⁹⁴

As for the specific terms of the Protocol, the provisions of Articles 3 and 4 of the Protocol provide for the practical operation of the opt-in procedure, while Article 4a provides for penalties for the financial consequences of non-participation, to the detriment of the States seeking to avail of constitutional flexibility. Notably, the Council may urge the UK or Ireland to participate where they are not participating, which as Peers optimistically suggests, may operate as an incentive to opt-in and also co-extensively give the UK and Ireland an opportunity to rid themselves of obligations.⁹⁵ It remains plausible, however, that this provision could result in a serious political incident or at least a damaging battle against isolation, and that the UK would be more likely to offload obligations than Ireland. Ireland would be in great danger of serious isolation if it chose not to remain wedded to the UK in such a situation. Moreover, the possibility for incoherence is great, if for example, a measure such as the European arrest warrant is amended.⁹⁶ It is not inconceivable that the UK or Ireland could be ejected from the European arrest warrant in the event of the States not participating in a building measure, with the result that the existing system is found inoperable by the remainder of States.⁹⁷ Article 4a is suggested to be a veritable double-edged sword, although the accuracy of the weaponry metaphors depends much on political will in the future. Importantly, a decision on "inoperability" would be amenable to review before the Court of Justice.⁹⁸ Perhaps, of course, the real effect of these ambiguities will be limited and the uncertainties surrounding the Irish and UK (and Danish) positions in the field may not materialize as a result of careful political management. In neither Ireland nor the UK is there any systematic parliamentary

92. See Donoghue and Heintz, *op. cit. supra* note 7.

93. See *supra* notes 44 and 76.

94. "Oireachtas Committee backs Lisbon Treaty" (Houses of the Oireachtas, 29 May 2008), see www.oireachtas.ie/viewdoc.asp?fn=/documents/press/document229.htm, (last visited 29 Dec. 2009).

95. See Peers, *op. cit. supra* note 51.

96. *Id.*, 9.

97. And see the analysis set out in House of Lords Select Committee on European Union, cited *supra* note 40, para 6.264.

98. *Id.*, para 6.265.

scrutiny of a decision to opt-in to a particular measure under this Protocol, although the House of Lords has recently made efforts to redress this.⁹⁹ When viewed overall, the opt-in mechanism in the Protocol does not necessarily neutralize the impact of the extensive opt-outs obtained, given the practical difficulties involved in opting-in.¹⁰⁰

Of much importance, then, in light of the above, pursuant to Article 8 of the Protocol,¹⁰¹ Ireland may notify the Council that it no longer wishes to be covered by the terms of the Protocol. As will be explained below, then the normal Treaty provisions will apply to Ireland by way of parliamentary ratification only and not by referendum. Article 8, however, has to be construed along with Declaration (No. 56) annexed to the Treaty of Lisbon such that the position of Ireland is subject to review in three years time, i.e. in late 2012.¹⁰² This is not without its own complications, from the point of view of domestic constitutional law, considered below.¹⁰³ Hinarejos adverts to arguments made against the Lisbon Treaty in recent times which included assertions that it was not a solution to any pressing problem but rather an unnecessary step that would pose problems of its own.¹⁰⁴ It is suggested here that the breadth of the Protocol as to Ireland and the Area of Freedom, Security and Justice is also accurately captured by this comment.

Related to this Protocol then is a Declaration negotiated by Ireland covering the terms of its opt-out and opt-in, discussed here next.

99. House of Lords European Union Committee, *Enhanced scrutiny of EU legislation with a United Kingdom opt-in* (2nd Report, Session 2008-09, HL Paper 25). Cf. Mance, "Opting into Community law and interpreting Convention rights: is the United Kingdom more or less committed?", 3 *PL* (2009), 544.

100. There are those who suggest that the enthusiasm of the UK for common action in Justice and Home Affairs sits oddly with the generalized opt-in/ opt-out from all newly communitarized areas of JHA. The incongruousness between the British positions in negotiations to the Constitutional Treaty and the Treaty of Lisbon are explained on the basis of the difference in British governments negotiating the Treaty: Donnelly, *op. cit. supra* note 76.

101. Ireland did already have this possibility under Art. 8 of the Protocol on the position of the UK and Ireland of the Treaty of Amsterdam, but, as is explained below, the domestic constitutional situation has now changed, and under Lisbon this option is the subject of a Declaration.

102. The Lisbon Treaty entered into force on 1 Dec. 2009. Note that Art. 9 provides that the Protocol does not apply in the case of Ireland to Art. 75 TFEU. See the Twenty-Eighth Amendment to the Constitution (Treaty of Lisbon) Act 2009, for the domestic provisions: see www.oireachtas.ie.

103. Section 9 *infra*.

104. Hinarejos, "The Lisbon Treaty versus standing still: A view from the Third Pillar", 5 *EuConst* (2009), 99.

6.4. *Declaration (No. 56) by Ireland annexed to the Lisbon Treaty on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice*

Declaration (No. 56) by Ireland, annexed to the Lisbon Treaty on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice,¹⁰⁵ provides that:

“... Accordingly, Ireland *declares its firm intention* to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice *to take part* in the adoption of measures pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union to the *maximum extent it deems possible*.

Ireland will, in particular, participate to the *maximum possible extent* in measures in the field of police cooperation.

Furthermore, Ireland recalls that in accordance with Article 8 of the Protocol it may notify the Council in writing that it no longer wishes to be covered by the terms of the Protocol. *Ireland intends to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon.*”¹⁰⁶

The provisions of Declaration No. 56 hence have to be construed alongside Article 8 of the above Protocol. Notably, the wholehearted participation of the Irish State in the Area of Freedom, Security and Justice is expressed in the Declaration, notwithstanding the content of the Protocol attached to the Treaty of Lisbon. The temporal period set out in this Declaration is of tremendous importance for two specific reasons. Firstly, there is the complication that another referendum will not ostensibly be required as a matter of domestic constitutional law in three years' time in the event that a positive decision is taken to participate in this corpus of law, as provision was made for this in the amendment to ratify the Treaty, as set out above. However, if this parliamentary ratification could take place in isolation without a review of the Common Travel Area, it remains a matter of no small importance, considered below in more detail given its implications. Secondly, in so far as there is a five-year time lag prior to the Court of Justice gaining jurisdiction over the Area of Freedom, Security and Justice,¹⁰⁷ this occurs simultaneously with the Transitional Provisions as to the Area of Freedom, Security and Justice as to the UK becoming operative, discussed next, whereby the UK gains breathing

105. CIG 3/1/07, Rev. 1.

106. Emphasis added.

107. See the discussion here of the Protocol relating to the Transitional Provisions: section 5(f).

space to reconsider the implications of the ending of the five-year Transitional Provisions during which time the Court of Justice does not have jurisdiction. Thus the three-year period might more appropriately have been drafted as a five-year period. The UK “wait and see” provisions are, of course, politically explicable, but as a matter of law, lack rationality and coherence, which embodies in one sense constitutional differentiation but in another, empties the substance thereof.

The significance of the final “Irish” provisions – i.e. Article 8 of the Protocol on the Area of Freedom, Security and Justice and abovementioned Declaration, are far from negligible. Ireland appears to stand in a default position of absolute exclusion subject to a position of possible participation. The combined impact of the Protocol, Declaration and Transitional Provisions (notwithstanding that the latter do not apply as such to Ireland but ultimately will have some bearing on the reality of the Irish position), is a sprawling mish-mash of inexplicable separateness and the potentiality for inclusion. While the possibilities for differentiation enshrined in the Treaty of Lisbon are unparalleled in the history of the European Union project, their impacts are unique to Ireland and the UK, arguably partially “going Danish,” i.e. replicating the tenuous Danish position to date, which itself is under review. Their peculiarity surely entails that there is a high likelihood that the Court will consider their content in the near future.¹⁰⁸ The overall stance adopted both legally and politically by Ireland appears thus to be in the realm of the constitutional chameleon, as far as is optically and legally possible.¹⁰⁹

A related Protocol which affects the Area of Freedom, Security and Justice is next considered here.

6.5. *Protocol (No. 36) on Transitional Provisions*

Protocol (No. 36) on Transitional Provisions attached to the Treaty of Lisbon sets out a temporal menu of considerable complexity which is designed to govern the period of time between the entry into force of the Treaty of Lisbon and the end of its extended introductory period, the duration of which is

108. Fletcher, *op. cit. supra* note 8, at 97.

109. One of the most striking features of the Treaty of Lisbon must surely be the plethora of Protocols and Declarations attached thereto. The sheer number of Declarations annexed to the Final Act of the Treaty of Lisbon, at 65, adopted by either the Member States or the Inter-Governmental Conference, is quite significant and not since the Treaty on the European Union have so many detailed legal descriptors been attached to the Treaties. Clearly, Declarations often reflect matters of great national but not necessarily European interest and frequently dwell on veritably parochial causes that do not garner wider support. The value that the Court of Justice places on such instruments is less than predictable, as the decision discussed in Section 5 suggests.

governed by these provisions. While the provisions concerning the Area of Freedom, Security and Justice in the main affect the UK, Ireland is also affected in a significant fashion. Most notable are the provisions pertaining to the present discussion, namely to Titles V and VI TEU prior to the entry into force of the Treaty of Lisbon. Articles 10(1) and (3) of the Protocol provide for a five-year transitional period during which the Court of Justice does not enjoy jurisdiction over the newly “communitarized” Area of Freedom, Security and Justice nor does the Commission enjoy its powers to institute infringement proceedings against States during this period. Article 10(4) arguably contains the most striking and indulgent of all of the opt-outs conceded to the UK, whereby the UK is permitted six months prior to the expiry of the Transitional Period, to declare that it does not accept the end of the Transitional Period in respect of non-amended measures that have not been converted from Third Pillar to First Pillar status by then, an unqualified right.¹¹⁰ Financial penalties also attach pursuant to Article 10(4) for the direct financial consequences of cessation of its participation. The UK thus has an unprecedented right to leave en bloc all Third Pillar (police cooperation and judicial cooperation in criminal matters) *acquis* not meanwhile amended or replaced, which may obviously entail a cost to the Union given that UK withdrawal would require the measure to be amended. These provisions have elicited forceful reactions: “... they are to be deplored, for their complexity, for their potential torpedoing of ambitious legislative initiatives, and ... for the symbolic message of the precedent: for the first time, an EU treaty allows a Member State to withdraw from existing *acquis*.”¹¹¹

Fletcher rightly contends that Article 10 presents a much greater danger to the coherence of the Area of Freedom, Security and Justice than does the Protocol on the position of the UK and Ireland as to the Area of Freedom, Security and Justice and it is difficult to disagree.¹¹² The rationale for the provisions arguably related to the desire of the British Government to avoid holding a referendum on the Treaty of Lisbon, through emphasis on the differences between the Constitutional Treaty and the Treaty of Lisbon.¹¹³ The provisions are thus

110. Art. 10(5) permits the UK to participate in acts which ceased to apply to it pursuant to Art. 10(4). See the recommendation by the House of Lords in its report on the Treaty of Lisbon: House of Lords Select Committee on European Union, cited *supra* note 40, para 6.339: “...we expect that the Government will be fully engaged with the Commission and other Member States to ensure that measures which might prompt them to use the block opt-out are amended before the expiry of the transitional period.”

111. Ladenburger, “Police and Criminal law in the Treaty of Lisbon: A new dimension for the Community method”, 4 *EuConst* (2008), 20.

112. See Fletcher, *op. cit. supra* note 8.

113. See Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts”, 45 *CML Rev.* (2008), 617, at 683–684.

overtly political and stretch the limits of constitutional differentiation. Importantly, the Irish State did not avail of such mechanisms and the period after the transition time frame could bring legal complexities of Byzantine proportions for Ireland. How will Ireland be affected by the “UK exclusion zone,” in the event that the UK does not accept “communitarization” at the end or near-end of the transitional period? For example, what system would be established to replace the European arrest warrant as between Ireland and the UK, where the need for a common system between the two countries has generated a vast corpus of law as to extradition and now in respect of surrender under the new system? The jurisprudence as to the European arrest warrant would become mired in complexity if the UK Supreme Court (which has taken over the role of the House of Lords), the supreme court of a common law country from which Ireland has traditionally drawn much of its inspiration for criminal law legislation as well as the inspiration of the legislation incorporating the ECHR, were to deliver judgments ordinarily persuasive but suddenly of no relevance? It would appear that the complexity of the provisions is detrimental both to the coherence of the Area of Freedom, Security and Justice in the future and potentially to the interests of Ireland.

The above analysis completes the sectional analysis of the Irish-related Protocols and Declarations as contained in the Treaty of Lisbon. Subsequent to the signing of the Treaty of Lisbon, a referendum resulted in further Irish-specific legal provisions being required to be passed so as to ratify the Treaty of Lisbon and these events and provisions are considered here next.

7. After the signing of the Treaty of Lisbon in 2007: What happened next

Thus in 2008, in the first Treaty referendum, the Irish electorate rejected the Treaty of Lisbon for reasons adverted to earlier, shortly after a new *Taoiseach* (Prime Minister) came to power.¹¹⁴ A period of reflection ensued, which coincided with a global economic recession, a severe downturn in the Irish economy as well as unprecedented unpopularity of the Irish Government. Extensive Government research was commissioned so as to explain the negative vote.¹¹⁵ A Sub-Committee of the Houses of the Oireachtas (Parliament) was established on *Ireland's Future in the European Union*, which then heard extensive evidence from a range of experts and bodies and, it is suggested here, made a

114. Mr Brian Cowen T.D., formerly Tánaiste, replaced Mr Bertie Ahern T.D. as *Taoiseach* in 2008.

115. See Introduction *supra*.

number of limited and generalized recommendations.¹¹⁶ By the time the second Treaty of Lisbon referendum took place, a party founded principally to oppose the Treaty of Lisbon, Libertas, disintegrated following an abysmal performance in the MEP elections in 2009.¹¹⁷ For the second referendum, the State's broadcasting rules were amended so as to facilitate the reality of the politics governing the referendum campaign, where all the major political parties supported the Government in their desire to procure a successful referendum result.¹¹⁸ Previously, broadcasters had been obliged to provide equal airtime to those campaigning for and against the Treaty referendum result, despite the weight of elected representatives and campaigners in favour of the Treaty. This change was most significant in facilitating a positive referendum result.

8. The Lisbon II guarantees provided to Ireland in 2009

As a measure to assist the Irish Government with the prospect of a second referendum on the Treaty of Lisbon, the concerns of the Irish people voting in Lisbon I were taken cognizance of in the form of Irish-specific legal guarantees or more formally, a Decision of the Heads of State or Government of the 27 Member States in 2009 meeting within the European Council.¹¹⁹ This formula was adopted so as to ensure as a matter of law and for domestic political purposes that the decision was a legally binding one, but also that it did not require the Treaty of Lisbon to be renegotiated. In this regard, the pressures brought to bear by the British Government were significant.¹²⁰ Three specific guarantees were provided in total to the Irish State – a Decision, a Declaration of the European Council and a Declaration by the Irish State. The formula employed a Solemn Declaration on Workers Rights, as the British Government would

116. Sub-Committee on Ireland's Future in the European Union, *Ireland's future in the European Union: Challenges, Issues and Options* (Houses of the Oireachtas, Nov. 2008).

117. Founded by a millionaire Irish businessman Mr Declan Ganley. The party attracted considerable controversy in respect of its funding.

118. See Broadcasting Commission of Ireland, *Guidelines in respect of coverage of the referendum on the Treaty of Lisbon and related Constitutional Amendments 2009* (2009), see www.bci.ie.

119. See Presidency Conclusions of the Brussels European Council, (18–19 June 2009) (11225/2/09, Rev. 2, 10 July 2009), which expresses that the Decision in Annex I is a legal guarantee that is fully compatible with the Treaty of Lisbon and is legally binding: (a) Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon (Annex 1); (b) Solemn Declaration on Workers' Rights, Social Policy and other issues (Annex 2). Cf. Editorial comment, "Protocology", 46 CML Rev. 1785 et seq.

120. See the account of Miller, "The Treaty of Lisbon after the Second Irish Referendum" (House of Commons Research Paper 09/75, 8 Oct. 2009), Ch. 6.

not allow the Government to obtain a Protocol referencing workers rights, for fear that they would be interpreted as obtaining a less effective deal for their electorate.¹²¹ The concerns addressed by the guarantees include the right to life, family, education, taxation, security and defence and the subjects (in all except education) reflect the findings of the Government commissioned researched in to the negative first Treaty of Lisbon vote in 2008.¹²² The formula set out in the guarantees, as to the various subjects and their expressed compatibility as a matter of Irish constitutional law with the provisions of the Treaty of Lisbon, retains a solidly domestic flavour to it, reflecting the genesis of the Treaty of Lisbon I campaign, where serious fears were publicly raised by influential members of society as to the likelihood of the detention of three-year-olds pursuant to the provisions of the Charter of Fundamental Rights, despite the groundlessness of these claims.¹²³

The Decision taken in 2009 by the Heads of State or Government expresses itself to be legally binding in a particularly explicitly fashion.¹²⁴ The formula is also expressed to be subject to a promise or expectation, as a matter of law, that the decision will become a Protocol to the Treaties at the next Accession Treaty. The necessity of a dual reference to it being a legally binding decision and a prospective Protocol has been openly questioned by the British Government.¹²⁵ Peers has suggested that there is no conflict between the Decision and the Treaties, and most commentators assert a similar position or in fact that the guarantees substantially ameliorate existing domestic constitutional protections.¹²⁶ So as to stall the successful ratification of the Treaty of Lisbon, a suggestion was made that the Czech Republic could be denied a Commissioner in the next Commission on account of the legal position currently subsisting as to the composition of the Commission.¹²⁷ Otherwise, the guarantees although

121. *Ibid.*

122. Post-Lisbon Treaty Research Findings (Dublin, Millward Brown IMS, Sept. 2008), www.imsl.ie/ (last visited 27 Nov. 2009).

123. Hogan, *op. cit. supra* note 2.

124. See the Editorial comments, 46 *CML Rev.* (2009), 1383, at 1385–1387.

125. Miller, *op. cit. supra* note 119, at 26.

126. Peers, *Statewatch Lisbon Treaty Guarantees for Ireland 2009* (19 June 2009), see www.statewatch.org; Hogan, “Irish protocol will copper-fasten right to life of the unborn”, *Irish Times*, 18 Sept. 2009.

127. Topolánek, a former Czech Prime Minister, warned that the Czech Republic would lose its European commissioner if it was responsible for delaying the entry into force of the Treaty of Lisbon. Speaking after a meeting with Commission President Barroso, Topolánek said that the European Parliament would reject a Czech candidate for commissioner even if the government vetoed an attempt in the European Council to deny the Czechs a place in the Commission: (Renewed Czech threat to Lisbon Treaty ratification *European Voice* (1 Oct. 2009) www.europeanvoice.com/article/imported/renewed-czech-threat-to-lisbon-treaty-ratification/65987.aspx).

influenced to a degree by Irish-British relations, do not appear to have been significantly affected by these relations. Clearly, the guarantees had to relate to Irish-specific interests. Notably, the research did not suggest broader concerns or issues relating to the Common Travel Area, the Schengen Area Protocol or the Area of Freedom, Security and Justice.

In light of the above analysis as a matter of European Union law as to Irish specific instruments used to ratify the Treaty of Lisbon, an account of the domestic constitutional provisions of relevance to ratification follows for completeness' sake.

9. Domestic constitutional provisions passed so as to ratify the Treaty of Lisbon

The Twenty-Eighth Amendment to the Constitution (Treaty of Lisbon) Act, 2009 was enacted to amend domestic constitutional provisions relating to European Union affairs and thus ratify the Treaty of Lisbon.¹²⁸ The key amendments are made to the existing provisions of Article 29 of the Constitution dealing with European Union affairs and the subject of amendment with each Treaty, to paragraph 4 thereof. A fuller analysis of these provisions is outside the scope of this work, and one provision is selected here for examination.

9.1. *Parliamentary approval and opt-ing in*

Of the recent constitutional changes, the revised Article 29.4.7° permits the State, with only the approval of Parliament needed and not a referendum, to engage in enhanced cooperation and to take part in the Schengen Area and the Area of Freedom, Security and Justice. This permission – considered below – is the constitutional background to the Protocol on the Area of Freedom, Security and Justice (No. 21). Article 29.4.7° provides that:

“7° The State may exercise the options or discretions —
 i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,
 ii under Protocol No. 19 on the Schengen *acquis* integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and
 iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed,

128. As to the relevant existing provisions, see Hogan and Whyte, *op. cit. supra* note 9, para 5.4.35 et seq.

including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.”

Mere parliamentary *approval* is then needed to opt in pursuant to Article 8 of the Protocol, as a matter of domestic law.¹²⁹ This falls short of a possibly more rigorous and systematic approach, such as that being contemplated in the UK at the time of writing.¹³⁰ The European Union Act 2009, which amends Irish statutory law to incorporate the enhanced role for national parliaments as to the new Protocol on subsidiarity as contained in the Treaty of Lisbon, is equally devoid of any system to deal with the implications of Article 4a noted above (financial implications of non-participation) or the remainder of the Protocol.¹³¹ This type of “advance parliamentary approval” has its origins in Ireland in the constitutional amendments passed to deal with the variable geometry provisions of the Treaty of Amsterdam, in Article 29 of the Constitution also.¹³² This represented, domestically at least, an important development and a more effective (and cost effective) means of dealing with the complexities of European Law developments, arguably more so than a referendum.

It could be contended that the constitutional amendments made recently authorizing the State, by way of parliamentary authority only, to elect to opt into the Area of Freedom, Security and Justice, pursuant to the terms of the relevant Protocol or to join the Schengen Area, are unduly straightforward or simplistic. The difficulty with the simplicity of the constitutional provision drafted is that it fails to enumerate other related issues arising in the event of the State exercising such choices. For example, the three-year review set out in Declaration (No. 56), considered above, would take place ahead of the five-year transition period to accept the jurisdiction of the Court of Justice and the five-year lead-in period for the UK to accept communitarized Third Pillar acts. The Irish Government could of course, for political reasons, in three years time elect to have a referendum for Ireland to opt-in or not to the Area of Freedom, Security and Justice or the Schengen *acquis*, but arguably it would not have to hold such a referendum as the strict wording of the constitutional amendment

129. Twenty-Eighth Amendment to the Constitution (Treaty of Lisbon) Act 2009: see www.oireachtas.ie.

130. See House of Lords European Union Committee, *Enhanced scrutiny of EU legislation with a United Kingdom opt-in* (2nd Report, Session 2008-09, HL Paper 25).

131. Practice suggests that Irish MEPs do not vote in the plenary where Ireland has not opted into a measure: see generally House of Lords Select Committee on European Union, cited *supra* note 40. This, arguably, is a worrisome development in the long term, particularly if Ireland reviews its opt-out in the future, as per the terms of Declaration (No. 56) considered above.

132. See formerly Arts. 29.4.6 and 29.4.8, the Eighteenth and Twenty-Sixth Amendments to the Constitution respectively.

passed does not provide for this; on the contrary, simple parliamentary approval is required. The timing thereof appears temporally ill-judged in light of the ramifications for Ireland of the UK exercising opt-out rights after the five-year period.

9.2. *Opting-in: Constitutional difficulties?*

It is submitted here that the Common Travel Area would need to be reviewed in the event of Ireland electing to opt-in to the Schengen Agreement pursuant to the terms of Article 29.4.7° and Protocol No. 21. Ostensibly, of course, no domestic constitutional law issue arises, as the Common Travel Area has its basis originally in administrative measures and not in the Constitution.¹³³ Only in 1997 did the Common Travel Area receive mention as a matter of European Union law, pursuant to the Amsterdam Protocols on Schengen and Article 14 EC. It could be asserted that the removal of the Common Travel Area would result in a loss of national sovereignty warranting a referendum within the meaning of existing Supreme Court jurisprudence governing European Union law affairs,¹³⁴ on account of the provisions of the Constitution modified after the Good Friday Agreement according citizenship to those born on the Island of Ireland and the assertions of unity of the people North and South of the Island.¹³⁵ The Common Travel Area is a privilege, but its removal could adversely impact on the free movement rights of citizens of Northern Ireland electing to obtain Irish citizenship. Arguably, a more concrete legal basis would need to be ring-fenced as to British-Irish relations given the terms of the Irish Constitution if the Common Travel Area were amended.

133. See *supra*, section 3.

134. The Supreme Court decision in *Crotty v. An Taoiseach*, [1987] I.R. 713 has entailed that a referendum on European Treaty ratification has been held consistently since that decision, which decided that a Treaty had to be submitted by referendum to the people where a proposed Treaty altered the scope and objectives of the Union such that the initial popular consent to European Union membership had been exceeded.

135. See Arts. 2, 3 and 9 of the Irish Constitution. Art. 9 now provides that:

“1. 1° On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.

2° The future *acquisition* and loss of Irish nationality and citizenship shall be determined in accordance with law...

2. 1° Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.

2° This section shall not apply to persons born before the date of the enactment of this section...”

In sum, the amendments made to the Irish Constitution are in the main minimalist. However, the opt-in provisions raise several issues of immense complexity and the efforts made to simplify the position of the State may not be so easily realized, given the range of variables surrounding those choices to be exercised by other actors.

10. Conclusion

Ireland is politically not at the heart of European affairs, although the Irish State does not attract the same “Euro-sceptic” labels as its closest neighbour. There remains a complex interaction between the Irish and British States in matters of law and politics. The Common Travel Area is historically the legal and political basis for Irish-European policy positions as to the Schengen Area and the Area of Freedom, Security and Justice. However, the Common Travel Area reflects the deep-seated complexities of the entity that is the “Irish-British-European” relationship. Water borders are only a minimal element of the factual matrix of these relations and yet in many accounts they appear as the most critical one. The extent to which the Court of Justice in its two decisions in 2007 upset the purpose of the Schengen Protocol special arrangements is most remarkable, but ultimately did not deter Ireland and the UK from extending further the limits of constitutional differentiation in the Treaty of Lisbon. The Schengen Protocol “special arrangements” for the UK and Ireland have not been well received by commentators or the Court of Justice, serving often to show their futility. The breadth of the recent opt-outs obtained by Ireland seems difficult to understand given the separateness that they encourage and is explicable only to the extent that they support a commonality of “Irish-British-European” relations. It has been argued here that increased constitutional flexibility accorded to Ireland and the UK in the Treaty of Lisbon appears legally disproportionate to its effectiveness as a matter of EU law. Major complexities surround the operation of Declaration (No. 56) and the Protocols and the simplicity of the relevant domestic constitutional law provisions remains problematic, as does the absence of mention of the Common Travel Area in Irish constitutional law. Notably the research conducted to investigate the negative Lisbon referendum result in Ireland did not uncover any sentiments as to “Irish-British-European” relations.

It might take an especially brave Court of Justice to overlook or defy the peculiarities of the Protocols and Declarations negotiated by Ireland (and the UK) in the Treaty of Lisbon. Far from the claims of Wiener over a decade ago that differentiated State behaviour and opt-outs gave rise to an effective principle of constitutional differentiation, the reality instead is a bleak mismatch

of incoherence. Curtin's "Europe of bits and pieces"¹³⁶ perhaps has been remedied to a degree, Treaty by Treaty and with patchily significant interventions on the part of the Court of Justice. However, the "bits and pieces" of the Irish-specific opt-outs have increased in scale and in direction. The matrix comprising European Union law, national law, the Protocols and Declarations and the complex beast of "Irish-British-European" relations, conjointly has yet to receive any consideration by the Court of Justice. Its incoherence and complexity may not be fully "ECJ proofed" but equally nor is it ever likely to be so.

136. Curtin, "The constitutional structure of the Union: A Europe of bits and pieces", 30 CML Rev. (1993), 17.