The “Third Pillar acquis” after the Treaty of Lisbon enters into force

Professor Steve Peers, University of Essex
3 November 2009

Introduction
The entry into force of the Treaty of Lisbon, likely on 1 December 2009, will end the 16-year life of the EU’s ‘third pillar’, which concerned almost all Justice and Home Affairs matters from 1993-99, and policing and criminal law matters since then.

During these periods a large number of legal acts were adopted, and most of them are still in force. Also, the Treaty of Amsterdam integrated the ‘Schengen acquis’ into the EU legal order, and much of this acquis (some of which concerns immigration law) is still in force.

In fact, it is still possible (and indeed likely) that a few more third pillar measures will be adopted before the new Treaty enters into force (the next JHA Council will meet on 30 November 2009). This analysis will be updated at that point.

From 1 December on, EU measures concerning policing and criminal law will take the form of Regulations and Directives, subject to the normal effect of EU law (direct effect and supremacy) and the normal jurisdiction of the EU Court of Justice (in particular, references on the validity and interpretation of EU measures in this area from all courts and tribunals in all Member States, and the power of the Commission to sue Member States for infringement of the laws in this area). It is assumed that any third pillar proposals not yet adopted at that point will have to be proposed again from scratch.

But what will happen to the third pillar measures adopted prior to the entry into force of the Treaty of Lisbon? The ‘transitional protocol’ to that Treaty tells us two things. First, there will be a five-year transitional period relating to the Court of Justice jurisdiction (ending 1 November 2014), in which the ‘old’ rules on that jurisdiction apply - meaning no infringement actions, and references only from the national courts of 17 Member States.
(all of the first 15 Member States except the UK, Ireland and Denmark, plus Latvia, Lithuania, Slovenia, Hungary and the Czech Republic).

Secondly, the old rules on the legal effect of third pillar measures (meaning no direct effect, and arguably no supremacy or damages liability - although the Court of Justice has not ruled on those issues) apply indefinitely. However, the old rules on jurisdiction and legal effect cease to apply once a ‘legacy’ third pillar act is amended.

The annex to this analysis lists all of the ‘legacy’ third pillar acts which have been adopted to date, and all of the proposals for third pillar acts under discussion. Those proposals which are under active discussion are indicated by an asterisk.

Those third pillar measures which are no longer in force, because they have lapsed, or become obsolete, or have been repealed or annulled, are not generally listed. Some measures which will be repealed effective in the near future are mentioned, except for the Europol Convention and its protocols and implementing measures, since they will be repealed already as from 1 January 2010.

The annex also indicates which measures have been adopted but are not applicable yet - although the delay in their applicability does not alter the application of the transitional protocol (ie what matters is when the measures were adopted, not when they will start to apply).

It should be noted that a declaration to the Lisbon Treaty calls upon the EU institutions to transform the prior third pillar acts to new EU acts after the entry into force of the new Treaty, and the draft Stockholm programme also calls upon the Commission to submit a timetable to this effect.

Any proposals made after the new Treaty is in force, even simply to convert old third pillar acts without amendment, will be subject to the new Treaty’s revised and extended rules on JHA opt-outs for the UK, Ireland and Denmark, as well as on decision-making on JHA matters (ie the Council will generally vote by qualified majority, the EP will generally have co-decision rights).

In some cases, the conversion of a Convention or Protocol into a new EU measure would mean that those measures would now apply to some Member States that had signed but not yet ratified the third pillar acts. In those cases, the effect of transforming the third pillar measure would go beyond changing the rules on ECJ jurisdiction and the legal effect of the measure.

The Annex also lists third pillar treaties which have come into force, or which have been signed or are under negotiation. Treaties already in force are presumably in the same position as legislation adopted before the entry into force of the Treaty of Lisbon, whereas treaties not yet concluded or still under negotiation should arguably be treated the same way as pending legislative proposals when the new Treaty enters into force.
Annex

A) Binding third pillar acts adopted to date - and still in force

1) Schengen acquis (integrated into EU legal order 1.5.1999) - [2000] OJ L 239

a) Schengen Convention:

Articles 39-45, 47-49, 51, 54-58, 71-72, 75-76, 82, 91-119, 126-30; also some provisions of Schengen accession treaties

Notes: Arts 92-119 have been amended by Decisions concerning the SIS in 2005 and 2008 (see below); they are repealed with effect from when the decision setting up SIS II (adopted in 2007, see below) becomes operational

Arts 39(1), (2) and (3) were repealed by the Framework decision on exchange of data between law enforcement services (OJ 2006 L 386/89), Art. 12(1); Art. 47(4) was repealed by a 2003 Decision (OJ 2003 L 67/27); Art. 40(1) and (7) were amended by a 2003 Decision (OJ 2003 L 260/47)

Arts 49(a), 52, 53 and 73 were repealed by the 2000 EU mutual assistance Convention, Art. 2(2); Art. 50 was repealed by Art. 8(3) of the 2001 protocol to that Convention; but note that a few Member States have not ratified the Convention or the Protocol (see below)

Arts 59-60, 62-66 (extradition) were repealed by the Framework Decision on the European Arrest Warrant (OJ 2002 L 190/1), Art. 31(1)(e), but might still apply in a few cases where the effect of the EAW is restricted

Arts 67-69 were repealed by the Framework Decision on transfer of prisoners (OJ 2008 L 327/27), Art. 26(1), but this is not applicable yet (see below)

a) Schengen Executive Committee Decisions/Declarations/Central Group acts:

i) repealed with effect from when SIS II Decision is operational:

SCH/Com-ex (97) 18 - 7.10.1997 - Contributions from Norway and Iceland to the C.SIS operating costs
SCH/Com-ex (97) 24 - 7.10.1997 - Future of the SIS
SCH/Com-ex (97) 35 - 15.12.1997 - Amendment to the C.SIS Financial Regulations
SCH/Com-ex (98) 11 - 21.4.1998 - C.SIS with 15/18 connections
SCH/Com-ex (99) 4 - 28.4.1999 - C.SIS installation costs
ii) other (within scope of third pillar)

SCH/Com-ex (93) 14 - 14.12.1993 - Improving practical cooperation between the judicial authorities to combat drug trafficking
SCH/Com-ex (97) 2 Rev 2 - 25.4.1997 - Awarding the tender for the SIS II preliminary study
SCH/Com-ex (97) 6 Rev 2 - 24.6.1997 - Schengen Manual on police cooperation in the field of public order and security
SCH/Com-ex (97) 29 Rev 2 - 7.10.1997 - Bringing into force the Convention implementing the Schengen Agreement in Greece [obviously obsolete]
SCH/Com-ex (98) 26 def - 16.9.1998 - Setting up of the Schengen implementing Convention Standing Committee [note - proposed amendment under discussion]
SCH/Com-ex (98) 29 Rev - 23.6.1998 - Catch-all clause to cover the whole technical Schengen acquis
SCH/Com-ex (98) 37 def 2 - 16.9.1998 - Action plan to combat illegal immigration [partly first pillar]
SCH/Com-ex (98) 49 Rev 3 - 16.12.1998 - Bringing the Convention implementing the Schengen Agreement into force in Greece [nb - obsolete]
SCH/Com-ex (99) 6 - 28.4.1999 - Telecomms situation
SCH/Com-ex (99) 7 Rev 2 - 28.4.1999 - Liaison officers
SCH/Com-ex (99) 8 Rev 2 - 28.4.1999 - Payments to informers
SCH/Com-ex (99) 11 Rev 2 - 28.4.1999 - Agreement on cooperation in proceedings for road traffic offences
SCH/Com-ex (96) Decl 6 - Rev 2 - 26.6.1996 - Declaration on extradition
SCH/Com-ex (97) Decl 13 - Rev 2 - 21.4.1998 - Abduction of minors
SCH/C (98) 117 - 27.10.1998 - Action plan to combat illegal immigration [partly first pillar]
SCH/C (99) 25 - 22.3.1999 - General principles for the remuneration of informants and infiltrators

2) Maastricht era (1 Nov. 2003 to 1 May 1999)

a) Joint Actions

1. Council Joint Action 94/795/JHA on crossing internal borders by organised school groups (OJ 1994 L 327/1)
3. Joint Action 96/277/JHA on exchange of liaison magistrates (OJ 1996 L 105/1)
4. Joint Action 96/443/JHA on racism and xenophobia (OJ 1996 L 185/5)
   Note: replaced by Framework Decision on subject (see below), as from 2010
5. Joint Action 96/750/JHA on drug trafficking (OJ 1996 L 342/6)
   Note: Framework Decision of 2001 amends and supplements this Joint Action in part (see below)
   Note: repealed by Framework Decision on this issue as from 2010 (see below)
10. Joint Action 96/698/JHA on customs and business cooperation in drug trafficking (OJ 1996 L 322/3)
11. Joint Action 96/699/JHA on exchange of information on chemical profiling of drugs (OJ 1996 L 322/5)
12. Joint Action 96/747/JHA on directory of expertise on international organised crime (OJ 1996 L 342/2)
14. Joint Action 97/372/JHA on targeting criteria for police (OJ 1997 L 159/1)
15. Joint Action 97/827/JHA on evaluation (OJ 1997 L 344/7)

b) Conventions
1. Convention on simplified extradition (OJ 1995 C 78/1)
   - Note: not in force; 14 of the first 15 Member States have ratified; Italy has yet to ratify; Cyprus, Poland, Estonia, Lithuania, Slovenia and Latvia have ratified; thirteen Member States apply early (the exceptions are Netherlands, Cyprus, Estonia, Greece, Ireland, Slovenia and Portugal); largely replaced by Framework Decision on European Arrest Warrant, from 31 Dec. 2003 (see below)
2a. First Protocol to Convention on fraud against EC budget (OJ 1996 C 313/1)
2b. ECJ Protocol to Convention on fraud against EC budget (OJ 1997 C 151/1)
- Note: all entered into force 17 October 2002; three Member States have not ratified (Czech Republic, Hungary and Malta); also Estonia has not ratified ECJ Protocol

2c. Second Protocol to Convention on fraud against EC budget (OJ 1997 C 221/12)
- Note: entered into force 19 May 2009; three Member States have not ratified (Czech Republic, Hungary and Malta)

- Note: not in force; 14 of the first 15 Member States have ratified; Italy has yet to ratify; Cyprus, Poland, Estonia, Lithuania, Slovenia and Latvia have ratified; thirteen Member States apply early (the exceptions are Cyprus, Latvia, Estonia, Greece, Slovenia and Ireland); largely replaced by Framework Decision on European Arrest Warrant, adopted 13 June 2002, on 31 Dec. 2003 (see below)

- Note: entered into force 28 Sept. 2005; now in force in all Member States except Czech Republic and Malta

5. Driving Disqualification Convention (OJ 1998 C 216/1)
- Note: not in force; needs all of the first 15 Member States ratify; can be applied early among the first Member States to ratify; only Spain, UK and Ireland have ratified among first 15 Member States; Romania, Bulgaria, Cyprus and Slovakia have also ratified


6a. ECJ Protocol to CIS Convention (OJ 1997 C 151/15)
- Note: both measures entered into force 25 Dec. 2005; in force in all Member States; possibly to be replaced by proposed Decision (see below); Malta has not ratified ECJ Protocol

6b. Protocol to CIS Convention (OJ 1999 C 91/1)
- Note: entered into force 14 April 2008; in force in all Member States except Malta; also possibly to be replaced by Decision (see below)

7. Naples II Convention (OJ 1998 C 24/1)
- Note: entered into force 25 June 2009; in force in all Member States

3) Title VI EU Police and Criminal Law

a) Common Positions

1. Combatting terrorism (OJ 2001 L 344/90)
   - Note: also a CFSP measure

2. Application of specific measures to combat terrorism (OJ 2001 L 344/93)
   - Note: many subsequent amendments to update list of ‘terrorists’

3. Common Position on transfer of data to Interpol (OJ 2005 L 27/61)

b) Decisions

1. Exchange of information on counterfeit travel documents (OJ 2000 L 81/1)
2. Combatting child pornography on the Internet (OJ 2000 L 138/1)
3. Decision 2000/586/JHA: Procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of Schengen Convention (OJ 2000 L 248/1)
6. Decision 2001/419/JHA on the transmission of samples of controlled substances (OJ 2001 L 150/1)
   Note: there is a proposal to repeal this Decision - see below
8. Decision 2001/887/JHA on protection of the euro against counterfeiting (OJ 2001 L 329/1)
9. Decision establishing Eurojust (OJ 2002 L 63/1)
10. Decision 2002/348/JHA concerning security in connection with football matches with an international dimension (OJ 2002 L 121/1)
11. Decision 2002/494 on exchange of information and contact points concerning genocide, crimes against humanity and war crimes (OJ 2002 L 167/1)
12. Decision on network for protection of public figures (OJ 2002 L 333/1)
13. Decision on evaluating Member States’ implementation of international commitments regarding terrorism (OJ 2002 L 349/1)
16. Decision 2003/335 on investigation and prosecution of genocide, crimes against humanity and war crimes (OJ 2003 L 118/12)
17. Decision extending Convention on corruption to Gibraltar (OJ 2003 L 226/27)
   Note: this was not a legislative act, but a sui generis decision
18. Decision amending Eurojust decision (OJ 2003 L 245/44)
   Note: this will be repealed when once SIS II Decision applies
22. Decision on future functionalities for SIS (OJ 2005 L 68/44)
   Note: this will be repealed when once SIS II Decision applies
23. Decision on synthetic drugs (OJ 2005 L 127/32)
24. Decision designating Europol as the central office for counterfeiting the euro (OJ 2005 L 185/35)
25. Decision on exchange of information on terrorism (OJ 2005 L 253/22)
27. Decision on criminal record information exchange (OJ 2005 L 322/33)
   - Note: this is repealed by 2009 Framework Decision on criminal records exchange (see below), Art. 12(4) - as from 2012
31. Decision establishing SIS II (Criminal law/policing aspects) (OJ 2007 L 205/63)
   - Note: this Decision is not yet applied
32. Decision amending Decision on football hooligans (OJ 2007 L 155/76)
33. Decision establishing an asset recovery network (OJ 2007 L 332/103)
34. Decision on cross-border intervention teams (OJ 2008 L 210/73)
35. Decision on cross-border police cooperation (Prum Treaty Decision) (OJ 2008 L 210/1)
   - Note: Application date is 26 Aug. 2011 (for Chapter 2)
36. Decision on cross-border police cooperation (Prum Treaty Decision) (OJ 2008 L 210/12)
   - Note: application date is the same as Prum treaty decision
37. Decision on law enforcement access to VIS (OJ 2008 L 218/129)
   - Note: application date to be set by Council; legality challenged by UK (Case C-482/08 UK v Council, pending)
38. Decision establishing an anti-corruption network (OJ 2008 L 301/38)
39. Decision on migration from SIS to SIS II (OJ 2008 L 299/43)
   - Note: there is a proposal to amend this Decision (see below)
40. Decision amending Decision establishing Eurojust (OJ 2009 L 138/14)
   - Application date: 4 June 2011
42. Decision implementing the Framework Decision on the exchange of criminal records (OJ 2009 L 93/33)
   - Application date: 7 April 2012
43. Decision establishing Europol (OJ 2009 L 121/37)
   - Application date: 1 Jan. 2010
44. Decision amending the Decision establishing a network for the protection of public figures (OJ 2009 L 283/62)

c) Framework Decisions

1. Criminal sanctions for counterfeiting the euro (OJ 2000 L 140/1)
3. Framework Decision 2001/413/JHA on payment card fraud and counterfeiting (OJ 2001 L 149/1)
4. Framework Decision 2001/500 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ 2001 L 182/1)
5. Framework Decision 2001/888/JHA on criminal records for counterfeiting the euro
6. Framework Decision on terrorism (OJ 2002 L 164/3)
7. Framework Decision on European arrest warrant (OJ 2002 L 190/1)
8. Framework Decision on joint investigation teams (OJ 2002 L 162/1)
   - Note: there is a proposal to repeal this measure (see below)
10. Framework Decision on the penal framework to prevent the facilitation of illegal entry and residence (OJ 2002 L 328/1)
   Note: annulled by Court of Justice - Case C-176/03 Commission v Council, judgment of 13 Sept. 2005


   - Note: there is a proposal to repeal this measure (see below)

   - Note: annulled by the Court of Justice (judgment of 23 Oct. 2007 in Case C-440/05, Commission v Council)

FD 21. Framework decision on exchange of data between law enforcement services (OJ 2006 L 386/89)
FD 22. Framework decision on taking account of prior convictions in another Member State (OJ 2008 L 220/32)
   - Deadline to apply: 15 Aug. 2010
   - Deadline to apply: 11 May 2010 (Art. 10)
   - Deadline to apply: 5 Dec. 2011 (Art. 29(1))
FD 25. Framework Decision on data protection in the sphere of criminal law and policing (OJ 2008 L 350/60)
   - Deadline to apply: 27 Nov. 2010 (Art. 29(1))
   - Deadline to apply: 6 Dec. 2011 (Art. 25(1))
FD 27. Framework Decision on racism and xenophobia (OJ 2008 L 328/55)
   - Deadline to apply: 28 Nov. 2010 (Art. 10(1))
   - Deadline to apply: 9 Dec. 2010 (Art. 3(1))
   - Deadline to apply: 19 Jan. 2011 (Art. 23(1))
FD 30. Framework decision on criminal record exchange (OJ 2009 L 93/23)
   - Deadline to apply: 27 April 2012 (Art. 13(1))
- **Deadline to apply:** 28 Mar. 2011 (Art. 8(1)); can be extended to 1 Jan. 2014 (Art. 8(3)).

**FD 32. Framework decision on mutual recognition of pre-trial supervision orders (not yet published)**
- **Deadline to apply:** not yet known

**Conventions**

1. Mutual assistance on criminal matters (OJ 2000 C 197/1)
   - **Note:** entered into force 23 August 2005; in force in 23 Member States (all except Italy, Ireland, Luxembourg, Greece)

   - **Note:** entered into force on 5 Oct. 2005; in force in 22 Member States (not Estonia, Italy, Ireland, Luxembourg, Greece)

3. Protocol to Customs Information System Convention, regarding customs files (OJ 2003 C 139/1)
   - **Note:** entered into force on 15 Oct. 2007; in force in 23 Member States (all except Belgium, Greece, Italy, and Ireland); would be replaced by proposed Decision (see below)

4) **Proposed Measures**

a) **Decisions**

1. French initiative for Decision establishing a judicial training network (OJ 2001 C 18/9)
4. Spanish initiative to establish European institute of police studies (OJ 2002 C 42/6)
5. Danish initiative on exchange of information on disqualifications (OJ 2002 C 223/17)
6. Belgian initiative on contact points for restorative justice programmes (OJ 2002 C 242/20)
7. Initiative from the Netherlands on cross-border police cooperation (OJ 2005 C 101/36)
*13. Initiative of eleven Member States (Sweden, Belgium, Czech Republic, Germany, Spain, France, Hungary, Netherlands, Slovakia, Finland and UK) for Decision on crime prevention network (OJ 2009 C 222/2)

b) Framework Decisions

1. German initiative on breaches of EC public procurement law (OJ 2000 C 253/3)
2. Greek proposal concerning trafficking in human organs (OJ 2003 C 100/27)
3. Greek proposal concerning 'double jeopardy' principle (OJ 2003 C 100/24)
5. Initiative of Belgium for framework decision on mutual recognition as regards prohibitions following convictions for sexual offences against children (OJ 2007 C 295/18)
8. Initiative for framework decision on prevention and settlement of conflicts of jurisdiction in criminal matters (OJ 2009 C 39/2)
11. Initiative of Sweden and Spain for framework decision on accreditation of forensic laboratory activities (OJ 2009 C 174/7)
12. Initiative of sixteen Member States (Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Greece, Spain, France, Lithuania, Latvia, Hungary, Netherlands, Romania, Slovenia, Slovakia and Sweden) for framework decision on the transfer of criminal proceedings (OJ 2009 C 219/7)

5) International treaties

in force:

1. Schengen association agreement with Norway and Iceland (OJ 1999 L 176)
2. Schengen association agreement with Switzerland (OJ 2008 L 53)
signed, not yet concluded:

1. Treaty with Norway and Iceland on mutual assistance (OJ 2004 C 26/1)
2. Treaty with Norway and Iceland for treaty on extradition (OJ 2006 L 292)
3. Treaty with USA on passenger name data (OJ 2006 L 298) - provisionally in force
5. Treaty with Australia on passenger name data (OJ 2008 L 218) - provisionally in force

under negotiation:

Treaty with Japan on mutual assistance

© Statewatch ISSN 1756-851X. Personal usage as private individuals/"fair dealing" is allowed. We also welcome links to material on our site. Usage by those working for organisations is allowed only if the organisation holds an appropriate licence from the relevant reprographic rights organisation (eg: Copyright Licensing Agency in the UK) with such usage being subject to the terms and conditions of that licence and to local copyright law.