Chapter 10: The Constitutional Significance of the Protocols

General

10-1 Until the time of the Treaty on European Union, it was a fundamental characteristic of the law governing the European Communities that laws made at the European level applied equally to all the Member States. To this concept there were two exceptions: one major, but temporary; the other minor, but lasting. The major exception comprised the concessions included in Treaties of Accession, to allow new Member States time in which to adjust their laws, administrative practices and economic policies, in line with Community practice. The minor exception comprised a small number of provisions applying special rules to limited areas of Community territory. For example, state aids granted to the economy of certain areas of the Federal German Republic affected by the division of Germany were, on certain conditions, deemed to be compatible with the common market[1]; and parts of the United Kingdom - the Channel Islands and the Isle of Man - are covered only partially by the Treaties.[2] But the very nature of these minor exceptions emphasises the validity of the general principle, that the Member States were governed by the same constitutional and other rules of law.

10-2 During the ten years or so before the Treaty on European Union, this principle, which had so far underpinned the constitution of the European Communities, was challenged politically by proponents of "fast-track" or "core membership" policies. These policies contemplated the development of the European Communities in such a way that some Member States could move faster towards economic integration than others; or, and this is not necessarily the same thing, that certain Member States should be at the core of the European Communities with more commitment to integration and more power and influence to advance it. To some extent, the Treaty on European Union reflects the legal acceptance of these policies. The constitutional importance of laws, many of which are to be found in the Protocols to the Treaty, directly or indirectly applying different rules to different Member States, can hardly be too strongly stated.

Categories and scope of Protocols

10-3 For formal purposes, there are three categories of Protocols:
- the Protocol annexed only to the Treaty of European Union[3];
- the Protocols annexed to the Treaty on European Union and to the Treaty establishing the European Community[4]; and
- the Protocols annexed to the Treaty on European Union and to the Treaties establishing the three European Communities.[5]

Many of the Protocols introduced by the Treaty on European Union, and particularly those concerned with economic and monetary union, are now annexed only to the Treaty establishing the European Community.[6] One Protocol is annexed to each of the Treaties establishing the respective European Communities, but not to the Treaty on European Union: it is concerned with the privileges and immunities of the European Communities and, inasmuch as it applies mainly to the staff of the Communities' institutions, is outside the direct jurisdiction of the European Union as such.[7] All the Protocols, with the exception of the Protocol annexed only to the Treaty on European Union, are

justiciable; the reason for the exception is the exclusion from the Court's jurisdiction of matters relating to the common foreign and security policy.[8]

10-4 Nine Protocols are annexed, exclusively or jointly, to the Treaty on European Union, covering the following matters:

- the duty of the European Council to draw up, together with the Western European Union, and by 30 April 2000, arrangements for enhanced cooperation between them[9];
- the integration of the "Schengen acquis" into the framework of the European Union[10];
- the right of the United Kingdom to exercise frontier controls[11];
- the exclusion of the United Kingdom and Ireland from the provisions of the Treaty establishing the European Community relating to immigration and other matters[12];
- the exclusion of Denmark from the provisions of the Treaty establishing the European Community relating to immigration and other matters[13];
- the exemption of Ireland from any provisions of the Treaties affecting Ireland's abortion laws[14];
- the reduction of membership of the Commission following the next accession to the European Union[15];
- determination of the location of the institutions and other bodies[16]; and
- the role of national parliaments in the European Union.[17]

Most of the foregoing matters are related to provisions of the Treaty establishing the European Community and are therefore discussed in more detail in the respective Chapters of this book. However, some broad constitutional points arise from consideration of the Protocols in the context of the Treaty on European Union.

10-5 Little needs to be said about the Protocol on Western European Union, beyond the observation that the modest requirement of the Protocol reflects a certain weakness in the main text of the Treaty on the possible role of the Western European Union in the common foreign and security policy.[18]

10-6 Rather more needs to be said about the Protocol on the "Schengen *acquis*". The Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic concerned the gradual abolition of checks at their common borders. The Convention, signed in Schengen on 19 June 1990, between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, was designed to implement the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, with related Final Act and common declarations. The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) and Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations. Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making

powers.[19]

10-7 Under the Protocol, the Schengen *acquis* becomes an integral part of the European Union; and the Council is substituted for the Executive Committee referred to above.[20] However, two Member States of the European Union - the United Kingdom and Ireland - are not part of the Schengen *acquis*; special provision apply to a third Member State, Denmark[21]; and two states which are not Member States of the European Union - Norway and Iceland - are "associated" with the implementation and further development of the Schengen *acquis*.[22] The uniformity of European Union constitutional law is somewhat undermined by these arrangements.

10-8 It is also contrary both to the uniformity of European Union law and indeed to the general objectives of the Treaties that there should be an exception from the principle that internal barriers to free movement of persons should be removed. (This is not a judgment on the political merits or drawbacks of the United Kingdom's immigration policy.) The Protocol in question gives the United Kingdom the right, entitled, notwithstanding the provisions of the Treaty establishing the European Community on the establishment of the internal market[23], any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Community or by the Community and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose of verifying the persons' right to enter, or of determining whether or not to grant permission to enter, the United Kingdom.[24] A constitutional consequence of this provision is that the United Kingdom and Ireland do not take part in the adoption by the Council of measures proposed under the provisions dealing with immigration and related policies.[25]

10-9 Contingent legislation, which is constitutionally unusual but not necessarily objectionable, is a feature of the arrangements by which the number of members of the Commission is reduced (from two for each of the larger Member State and one for the rest) to one for each Member State. Two contingent events, the incidence of which is cumulative, govern this process. The first is the next accession of a new Member State. The second is a modification of the weighting of votes in the Council, whether by reweighting of the votes or by dual majority, in a manner acceptable to all Member States, taking into account all relevant elements, notably compensating those Member States which give up the possibility of nominating a second member of the Commission.[26] It is a nice question whether further legislation will be needed in this event. There is no provision under the Protocol for amending the relevant provisions of the Treaties[27]; yet, if further legislation is indeed required, this element of the Protocol has little more value than a political declaration. With rather more legal force than a mere declaration, the other provision of this Protocol requires an inter-governmental conference to be convened, at least one year before the membership of the European Union exceeds twenty, to carry out a comprehensive review of the composition and functioning of the institutions.[28]

10-10 A long-standing cause of friction has been reduced, though not completely removed, by the Protocol, having effect from 1 May, 1999, determining the location of the seats or headquarters and meeting-places of the Institutions.[29] Under the Treaty establishing the European Community, any

decision on the location of the Institutions has always been a matter of common accord of the Governments of the Member States.[30] This provision stands: it is not incompatible with the terms of the Protocol.

10-11 There is not a great deal of constitutional importance, at any rate at this stage, in the Protocol on the role of national parliaments in the European Union. Essentially, there are two matters set out in the Protocol. One concerns the provision of information to national parliaments about legislative proposals at European Union level, together with a time-table designed to give national parliaments an opportunity to study them. The other concerns the encouragement of the Conference of European Affairs Committees, a forum set up in Paris in 1989 for members of national parliaments, to make "any contribution it deems appropriate for the attention of the institutions of the European Union".[31]

1. Article 87(2)(c) (formerly 92(2)(c)), EC Treaty.

2. Article 299(5)(c) (formerly 227(5)(c)), EC Treaty. There are other similar exceptions in the Treaties.

3. Protocol 1; but see the cautionary note in the Annex to Chapter 3 of this book, about the numbering of the Protocols.

4. Protocols 2 to 5.

5. Protocols 6 to 9.

6. Protocols 10 to 33. See Chapter 11.

7. Protocol 34.

8. Article 46 (formerly L), EU Treaty. See note 9 below.

9. Protocol 1 on Article 17 of the Treaty on European Union. The arrangements with the Western European Union form part of the common foreign and security policy. See Chaper 7.

10. Protocol 2 integrating the Schengen acquis into the framework of the European Union. For a discussion of the constitutional implications of this Protocol, see paragraph 10-6 below.

11. Protocol 3 on the application certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

12. Protocol 4 on the position of the United Kingdom and Ireland.

13. Protocol 5 on the position of Denmark. There are some differences between this Protocol and Protocol 4, deriving from the different circumstances in which Denmark originally sought exclusion. Under Council Regulation EC/44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, "Member states shall mean all the Member States excluding Denmark".

14. Protocol 6. This Protocol has no title, but simply provides that nothing in the Treaties "shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland".

15. Protocol 7 on the institutions with the prospect of enlargement of the European Union.

16. Protocol 8 on the location of the seats of the institutions and of certain bodies and departments of the European Communities and of Europol.

17. Protocol 9 on the role of national parliaments in the European Union.

18. See paragraph 17-16.

19. This description of the Schengen acquis is a paraphrase of the Annex to Protocol 2.

20. Article 2(1), Protocol 2.

21. Article 3, Protocol 2. However, see Council Decision EC/365/2000 concerning the request of the United Kingdom to take part in some of the provisions of the Schengen *acquis*.

22. Article 6, Protocol 2.

23. Article 14 (formerly 7a), EC Treaty.

24. Article 1, Protocol 3.

25. Articles 1 to 3, Protocol 4. (Compare Denmark's special position under Protocol 5.)

26. Article 1, Protocol 7.

27. Particularly, Article 205(2) (formerly 148(2)), EC Treaty. Under Article 213(1) (formerly 157(1), EC Treaty, the number of members of the Commission may be altered by the Council, acting unanimously.

28. Article 2, Protocol 7.

29. See note 16 above and Table II.

30. Article 289 (formerly 216), EC Treaty.

31. Protocol 9. (The Protocol has an eccentric system of numbering of its provisions, but is mercifully short.)