



**COUNCIL OF  
THE EUROPEAN UNION**

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**CATS 16**

**NOTE**

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from:	Presidency
to:	CATS
Subject:	Preparation of the upcoming end of the five year transitional period provided for in Article 10(1) to (3) of Protocol 36 on transitional provisions - Introductory note

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**Preparation of the upcoming end of the five year transitional period provided for in  
Article 10(1) to (3) of Protocol 36 on transitional provisions  
Introductory note**

1. During the Lisbon Treaty Intergovernmental Conference, it was agreed to insert in Protocol (No 36) on transitional provisions (Protocol 36) a five year transitional period from 1 December 2009 to 1 December 2014 (Article 10(1) to (3) of Protocol 36) which reads as follows:

- "1. *As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.*
2. *The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.*
3. *In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon."*

2. During this period, the judicial powers of the Court of Justice and infringement powers of the Commission with regard to the *acquis* adopted under the "ex-third pillar" of the Treaty on European Union (TEU), i.e. Union acts in the field of judicial cooperation in criminal matters and police cooperation pursuant to Title VI of the former TEU (pre-Lisbon *acquis*), would continue to be limited in the same way as before the entry into force of the Lisbon Treaty<sup>1</sup>.

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<sup>1</sup> Under Article 35 of the former TEU, only actions for annulment, preliminary rulings and dispute settlement could be brought to the Court concerning that *acquis*, with a number of limitations: actions for annulment could be brought only by the Commission or a Member State (neither by the European Parliament, nor by individuals) and preliminary rulings could be requested only by courts or tribunals from those Member States having accepted the jurisdiction of the Court (to date 18 Member States have made such a declaration and nine Member States have not: Bulgaria, Denmark, Estonia, Ireland, Cyprus, Malta, Poland, Slovakia and the United Kingdom). Other types of actions (infringement proceedings, actions for failure to act, actions for damages and pleas of illegality) were not allowed in the "ex-third pillar".

3. However, during that transitional period, in case an act belonging to this pre-Lisbon *acquis* would be amended (or replaced), the above limitations would end and the full powers of the Court and of the Commission would apply to that amended act. This was the case for instance as regards Council Framework Decision 2002/629/JHA on combating trafficking in human beings of 19 July 2002 which was replaced by Directive 2011/36/EU of 5 April 2011.<sup>1</sup>
4. As from 1 December 2014, these limitations will end and the pre-Lisbon *acquis* concerned will be submitted to the full powers of the Court of Justice and of the Commission.

It should however be noted that, pursuant to Article 9 of Protocol 36, the legal effects of such acts will in any event "*be preserved until those acts are repealed, annulled or amended*" in accordance with the post-Lisbon Treaties. This means that the legal effects of pre-Lisbon "common positions", "framework decisions" and "decisions" as defined in Article 34 of the former TEU will continue to apply until they are amended or replaced (or, indeed, repealed or annulled). Such legal effect should however be read together with the relevant case law of the Court, notably the *Pupino* Case which limited the consequences of the absence of direct effects of framework decisions.<sup>2</sup>

5. The Presidency believes that it would be useful for delegations to exchange views on the ending of the transitional period as provided for in Protocol 36 in order to:
  - a) identify the list of pre-Lisbon *acquis* which will be affected by the end of the five year transitional period (and regularly update it);
  - b) possibly identify acts on this list which might be considered as obsolete or which may have lost relevance and have a preliminary discussion in regard to such acts;
  - c) as appropriate, have a preliminary discussion on any implementation problems which may be encountered in advance of the end of the transitional period.

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<sup>1</sup> See OJ L 101, 15.4.2011, p. 1. The same applies to Directive 2011/92/EU of 13 December 2011 on combating sexual exploitation of children (OJ L 335, 17.12.2011, p. 1). A similar file will be the draft Directive on attacks against information systems (doc. 11399/12) which is politically agreed since June 2012 with the European Parliament, has been blocked by the Parliament as part of the Schengen dispute.

<sup>2</sup> See judgment of 16 June 2005, Case C-105/03, *Pupino*, [2005] ECR p. I-5285, points 33, 34 and 38.