

# We should opt out of the EU police and criminal justice measures

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## Executive Summary

- ◆ The government ought to opt out of all 135 police and criminal justice measures in question, then immediately rejoin only those suited to the UK's justice principles and common law tradition.
- ◆ This position would help the UK to avoid the growth of European Union power and judicial activism.
- ◆ Numerous measures are inconsequential, potentially damaging or outright dangerous.
- ◆ From the outside, the UK would be best placed to help reform problematic measures without risking injustice against its citizens.
- ◆ Short-term concerns such as cost and practicality have been overstated by supporters of the opt-in.
- ◆ Such concerns would be mitigated by prompt government action.
- ◆ Opting out would help protect parliamentary sovereignty and set a precedent for powers to flow back from Brussels to member states.

## Introduction

The government must decide by 31 May 2014 whether to 'opt out' of all 135 pre-Lisbon EU police and criminal justice measures, or opt in, allowing them to come into full force on 1 December 2014. Opting in would bring the relevant 'competences' under the full jurisdiction of the European Commission and Court of Justice of the European Union (CJEU, which includes the European Court of Justice – ECJ) rather than Parliament. Such a block opt-in would be irreversible within EU law, as currently applies to post-Lisbon police and criminal justice (PCJ) moves to which the UK subscribes.

Home Secretary Theresa May intends to opt out – which legally must be done en masse – before negotiating re-entry to specific measures which fit Britain's needs.<sup>1</sup> May promised to bring the

issue to Parliament. The right to negotiate re-entry is enshrined in the Lisbon Treaty, although the government has yet to indicate which measures it would rejoin. EU bodies would have full jurisdiction over measures in which the government participates. Measures include the controversial European Arrest Warrant (EAW),<sup>2</sup> DNA & fingerprint databases, fraud and illegal migration mechanisms and the legal basis of Europol and Eurojust.

The government provides a detailed breakdown of all 135 measures.<sup>3</sup>

## The government's argument

Theresa May's position is broadly supported by over 100 Conservative MPs,<sup>4</sup> Labour MPs including Keith Vaz, and thinktanks like Open Europe. Dominic

Raab MP goes so far as suggesting that effective cooperation can be achieved without formally opting back in, instead negotiating ad hoc (non-EU) agreements to avoid supranational oversight.

May explained, 'The Government are clear that we do not need to remain bound by all the pre-Lisbon measures. Operational experience shows that some of the pre-Lisbon measures are useful, that some are less so and that some are now, in fact, entirely defunct.'

### Summary of the measures

In Dominic Raab's analysis of all 135 measures for Open Europe he assigns each measure to one of eight categories: practically valuable to the UK (60 measures), attempting to harmonise law across the EU (11), little or no use to UK (11), duplications of UK law (11), unknown impact (16), not yet implemented in the UK (7), redundant (9), and not relevant to UK (10).<sup>5</sup> These distinctions are subjective – several measures labelled useless or unknown are at least theoretically welcome, such as transferring driving bans across member state borders, executing another state's asset-freeze on criminals, monitoring EU official corruption and transmitting illegal drug samples for testing. Whilst such measures are seldom used, or are supported by little hard data, many would argue that they were justifiable. Nevertheless, Raab's analysis is robust and detailed.

There are two measures that receive little attention but deserve more.

Measure #86, the Council Framework Decision 2008/913/JHA,<sup>6</sup> aims to combat racism and xenophobia. No action was taken when it first passed because domestic legislation already proscribes any incitement to hatred or violence on racial or religious grounds. A 2012 Cambridge University paper argues that 'this does not require the UK to take legislative action.'<sup>7</sup>

However, articles 1 (1) (c) and (d) include a requirement to outlaw 'publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes'. If this measure

became an EU competence, the EU could force Parliament to legislate such a provision. This would be highly controversial and contrary to British free speech traditions – which are already under threat from Section 5 of the Public Order Act (1986)

according to Telegraph editor Philip Johnston, writing for Civitas.<sup>8</sup>

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The problems would not merely be confined to historical discourse and school debating chambers, but may actually result in serious diplomatic incidents. The UK government, for example, refuses to label the early 20th century 'Medz Yeghern' Ottoman attacks on Armenians, Pontic Greeks and Assyrians as

a 'genocide'. This is largely a Foreign Office policy intending not to offend modern Turkey. Presumably if the Framework Decision was in place, government officials would either be at risk of alienating a prospective EU member state or of incriminating themselves by denying genocide.

Measure #68, the Council Framework Decision 2006/783/JHA, concerns mutual judicial confiscation orders. The UK has not yet implemented it, and according to the House of Commons EU Scrutiny Committee, it would require 'changes to the current UK restraint and confiscation regime and changes to primary legislation.'<sup>9</sup>

All the same dangers that the European Arrest Warrant poses to human liberty (below) are here applied to property. Initially Britain used the Proceeds of Crime Act 2002 rather than the Framework Decision, and has since used the 2005 'request model' exclusively. The Centre for European Legal Studies concedes that opting out means 'we may not (in principle) be able to get other member states to enforce our confiscation orders' but that 'in practice...the loss of this particular instrument would make little or no difference'.

On the other hand, opting in to the measure would replace the current 'request model' with a 'command model'. Currently, if Country A asks Britain to freeze someone's assets, our judicial system can evaluate the case. The new regime would allow 'quasi-automatic enforcement', meaning that British citizens' assets could be seized for crimes supported by flimsy evidence, or for actions not illegal in the UK.

The decision that faces the government is certainly a difficult one – because May must decide *en masse*, flexibility and nuance are impossible. She must either outrage elements in Brussels who would see any opt-out as an affront (regardless of its legality) or antagonise members of her own party concerned with freedom of property, freedom of speech and judicial oversight. Consider an extreme scenario regarding the two measures above: even if the government decides it is in favour of 133 out of 135 measures and does not wish to renegotiate those 133, it would still be imperative to opt out then opt back in. The remaining measures could be immediately rejoined, and the two troublesome ones forgotten. To argue that we must subscribe to all 135 displays a certain head-in-the-sand mentality.

In reality of course, there are at least 30 measures we do not need to rejoin and would thereby avoid EU institutional control.

### ■ The argument to opt in

Large sections of the media and ‘Europhile’ politicians oppose the government’s plans. Like Mike Kennedy, former President of Eurojust, they argue that opting out would be costly, drawn out, weaken justice and security operations in the UK, and would achieve very little through the diplomatic complexity of reform.<sup>10</sup> The House of Lords European Select Committee dismisses the concerns raised by those proposing an opt-out:

‘The concerns of proponents of opting out... were not supported by the evidence...and did not provide a convincing reason for exercising the opt-out. We have failed to identify any significant, objective, justification for avoiding the jurisdiction of the CJEU...The CJEU has an important role to play.

‘Alternative arrangements... would raise legal complications, and result in more cumbersome, expensive and less effective procedures, thus weakening the hand of the UK’s police and law enforcement authorities. The negotiation of any new arrangements would also be a time-consuming and uncertain process.’

This conclusion is flawed in its logic, methodology and ideology. The full report is available on the Parliament website.<sup>11</sup> Proponents of the opt-in such as Kennedy and the committee repeat that the

desirability of the *intended effects* of specific measures is sufficient justification for keeping such measures unreformed, the weight of such cases proving the need for a block opt-in. They see no difference between the legal framework enabling ‘x measure’ and the day-to-day operation of that measure. This logic simply does not follow – even if most measures are unambiguously desirable for their effects, there would still be a case for opting out, reforming and re-entering the relevant measures, given their superstructure. The government is already *in* various post-Lisbon PCJ measures such as the European Investigation Order (EIO) and is fully aware of the importance of cross-border cooperation. This is not, then, an effective counter-argument to the opt-out.

The Lords’ argument rests on quibbles and speculation – they inflate the difficulty, cost and time-frame of a renegotiation to paint it as the worst option. The opt-in case represents preference for the ‘Path of Least Resistance’. Rather than accept that several of the measures are flawed and work to reform them, the Lords Committee recommend the government accepts this risky system for the sake of short-term stability and pleasant member state relations.

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Hugo Brady of the Centre for European Reform, a pro-EU thinktank, published *Britain’s 2014 justice opt-out*.<sup>12</sup> His criticism of the government position focuses largely

on the EAW. He argues that both Viviane Reding, Commissioner for Crime and Justice, and many member states see the EAW as a ‘red-line issue’ on which they will not budge, its creation having taken a decade of painful negotiations and the impetus of the Twin Towers attacks. As discussed below, it is not unreasonable to attempt to improve the EAW – indeed, parts of the EU are already trying. In any case, a stalemate over the EAW is not compelling enough to support the need for a block opt-in to all 135 measures.

A Cambridge University law fellow, Alicia Hinarejos, criticised the opt-out extensively on the LSE’s website and a Centre for European Legal Studies essay.<sup>13</sup> Whilst informative, the study assumes the government would want to permanently leave most measures, thus constructing a straw-man with which to argue that pragmatism would force

a number of ‘opt-back ins’. Hinarejos suggests that by failing to announce which measures the government would rejoin, Theresa May’s negotiating position is weakened and thus the end result gets worse. She does, however, concede that a number of measures could be left without negative consequences.

## ■ **Reasons to opt out and selectively opt back in**

### ***i) Legitimate sovereignty concerns***

There is a serious possibility that permanently surrendering all 135 measures to Commission and ECJ auspices could constitute a sovereignty loss. Even the Lords’ report reads:

‘The CJEU [ECJ] has jurisdiction notably to hear:

(i) infringement actions against Member states by the Commission or other Member states for non-compliance with EU law; (ii) preliminary references—providing interpretative judgments at the request of national courts and tribunals in order to help them decide a case with an EU law dimension; (iii) reviewing the legality of acts by the EU institutions, including actions for annulment of EU legislation or to require an institution to act, brought by a Member state or by one of the EU institutions.’

The measures in question expand the number of EU laws that apply to the UK, thereby expanding EU institutions’ control. Item (ii) gives the ECJ power to ‘redefine’ any EU act in which the UK participates.

Many dismiss the opt-out argument that the ECJ is a less accountable court by pointing out that both British and EU courts are not ‘democratically accountable’ in the sense that there is a separation of powers between judiciary and legislature. This begs the accountability question by implying that EU law and British law are equally valid, a contention with which Civitas’ director Dr David Green disagrees.<sup>14</sup> EU laws are decided with very little input from the UK public. Lord Chancellor Chris Grayling explained that the ECJ often made

interpretations which surprised ministers. In the UK, if a court interprets a new law in a manner unintended by the legislature, the legislature can clarify the law. This is not a freedom Grayling has in the EU – laws can be foisted on the UK by qualified majority voting in the Council of Ministers, and even laws which the UK initially supports cannot be remedied, if interpreted radically differently by the ECJ.

Dominic Raab MP, who has European and human rights law experience, is prominent in expressing his sovereignty fears. These are echoed by Martin Howe QC’s expert testimony to the Lords. The Fresh Start Project (of which Raab is part) fear that the measures are ‘stepping stones towards a pan-European criminal code, decided by qualified majority voting, overseen by the Commission and enforced by the ECJ and a European Public Prosecutor’. They see a clash between the British ‘Common Law’ system and civil/continental systems, especially when the ECJ is influenced by the ‘ever closer union’ objective of the treaties which underpin its existence. Fears include a pan-European criminal code, closer judicial

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harmonisation, and in Howe’s words, ‘the creation of a super-state with an integrated criminal law.’ However, the Lords argue ‘the United Kingdom would not be compelled to participate in such a venture thanks to its right under Protocol 21 to the Treaties not to opt in to proposals in this area.’

Evidence from EU employees such as Klaus-Heiner Lehne MEP and Mike Kennedy, a former President of Eurojust and former Chief Operating Officer at the Crown Prosecution Service (CPS), decided that no such extreme proposals had been

discussed at the Commission, and that the European Parliament would block such a move. Assuming the witnesses’ reliability, this demonstrates a lack of *current* will for further PCJ integration, but fails to support the Lords’ conclusion, which concerns principle.

### ***ii) Creeping integration***

Those in favour of opting in dismiss fears of pan-European legal standardisation as hyperbole, as an illegitimate use of the ‘slippery slope’ argument. This may simply be because the end point is not clearly in sight. Whereas an individual Commission

measure to grant the EU full criminal and justice competence would be blocked abruptly by the UK, numerous small integrations over several decades might achieve the same end-point. Across multiple parliaments, no-one would ever realise they were passing a 'point of no return'.

Whether any measures in question constitute 'building blocks' for further integration when taken individually is not the only issue – the principle of committing their sum to EU jurisdiction is. An opt-in would surrender competences and establish precedent in which supranational EU institutions have police and criminal justice control in areas previously run on an intergovernmental basis. If, in a decade's time, a more radical Commission or set of judges explicitly *do* wish to radically standardise the continent's legal character, they would find it much easier.

The pioneering sociologist Max Weber wrote that a bureaucracy expands with an 'inevitable fate' since those operating within it are necessarily convinced of bureaucracy's superior efficiency compared to other systems.<sup>15</sup> Weber feared that this continual growth of control and complexity would create an 'Iron Cage' of conformity, in which only one rules regime can flourish. Whatever the opinions of current Commissioners, the driving logic behind PCJ laws sees standardisation and convergence as the ideal goal. In the long term it is implicitly hostile to the 'disharmony' represented by the atypical British legal system.

A relevant analogy here is the formation of a Eurozone banking union. On 20th April the Dutch Finance Minister and chair of the financial wing of the Council, Jeroen Dijsselbloem, told the IMF that 'at least 80 to 90 percent' of the necessary action to create the banking union could be achieved without a treaty change.<sup>16</sup> No banking union was imagined during the creation of the Lisbon Treaty – powers with different intentions are now being used to change the Eurozone in a way in which the original signatories had not imagined. Surrendering PCJ competences could result in a similar situation.

### **iii) The 'big picture'**

Opponents of the opt-out, including the Lords committee, deny any relation between the PCJ

question and the UK's general relationship with Europe. We must understand the PCJ question in its wider context: the Eurozone in crisis, the EU in flux with David Cameron's intention to renegotiate Britain's EU membership and submit the result (which may be a new treaty) to referendum. Euroscepticism is popular and growing both in the UK and across the continent, and Cameron has invoked the Laeken Declaration, which allows powers to flow from the Union towards member states.<sup>17</sup>

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The 'big picture' prompts us to consider the theoretical hierarchy of UK and EU bodies and to consider the merits of intergovernmental versus supranational action. It is impossible to separate the running of police and justice, and their part in the wider matrix of treaties, laws and alternatives. If EU membership comes to a referendum then the legal situation will be an important consideration for every voter, and unsatisfactory PCJ measures could add to the economic and political arguments for 'Brexit'.<sup>18</sup>

### **iv) Path of least resistance**

Those supporting the opt-in have chosen the 'path of least resistance' rather than recognising that certain measures, while based on desirable motives, are dangerous in their current form. This is best illustrated by the European Arrest Warrant and measures supporting the 'Prüm Decision' (below).

### **European Arrest Warrant (EAW)**

The EAW was designed in the aftermath of the 9/11 World Trade Centre attacks to allow 'fast track' ('no questions asked') extradition between EU countries for extreme crimes. Courts in the country expected to extradite a suspect have no power to scrutinise the case, even if the crime in question is not illegal in that country. Since the EAW came into force in 2004 several flaws emerged. These are detailed by Fair Trials International, a justice and rights non-governmental organisation. Briefly:

i) Proportionality: Extraditions are often requested for minor crimes such as stealing a wheelbarrow

or making a credit card payment late. These disproportionately involve Poland, whose constitution forces the government to prosecute all cases. Extraditions cost over £20,000 each.<sup>19</sup>

ii) Judicial scrutiny: UK judges extraditing Britons cannot check the evidence, meaning that Britons have been extradited for crimes they cannot possibly have committed, or on the basis of contaminated evidence extracted through police brutality. (See Fair Trials International reports on Edmond Arapi, Andrew Symeou.<sup>20</sup>)

iii) Rights and conditions: Other member states' legal systems allow long pre-trial detention without charge in squalid conditions, trials and appeals *in absentia*, and often fail to provide adequate translation and legal aid.

iv) Fishing: Member states have been accused of 'fishing expeditions', arresting people like Michael Turner long before they are ready to prosecute, holding them without trial then freeing them.<sup>21</sup>

Lord Justice Thomas' comments sum up the issue: 'A lot of European criminal justice legislation has emerged [that] presupposes a kind of mutual confidence and common standards that actually don't exist'.

The Lords said of the EAW:

'The operation of the EAW has resulted in serious injustices, but these arose from *the consequences of extradition*, including long periods of pre-trial detention in poor prison conditions, which could occur under any alternative system of extradition. Relying upon alternative extradition arrangements is highly unlikely to address the criticisms directed at the EAW and would inevitably render the extradition process more protracted and cumbersome, potentially undermining public safety.

'The best way to achieve improvements in the operation of the EAW is through negotiations with the other Member states, the use of existing provisions in national law, informal judicial cooperation, the development of EU jurisprudence and the immediate implementation of flanking EU

measures such as the European Supervision Order.'

The Lords' defeatist analysis, which denies fault in the EAW and instead blames the conditions in individual member states, defies not only

Euroscptics like Raab and Open Europe, but also analysis by the pro-integration Centre for European Reform and by the Parliamentary Joint Committee on Human Rights.<sup>22</sup>

Europhile solutions are either impossible – 'informal judicial cooperation' is exactly what the EAW disables – or *more* integration: the European Supervision Order (ESO). The ESO is not implemented in the

UK, and would allow those suspected of foreign crimes to be 'supervised' on bail within the UK rather than kept in member state jails pre-trial. In other words, the Lords' solution to an awkward, centralising law is to introduce a further awkward, centralising law.

### The Prüm Decision

The Prüm Decision provided the initial framework for the sharing of DNA, fingerprints and car registration data. The UK does not currently participate, but several of the 135 measures would necessitate inclusion. The UK holds more personal information than most states since it collects samples from anyone charged with a prison-worthy offence, rather than only the most serious offenders. Over 8% of the UK population is on the database according to Big Brother Watch, the civil liberties pressure group, including over a million innocents.<sup>23</sup>

Given the information's high sensitivity, and the cost and difficulty of coordinating a continent-wide computer system, the Prüm measures present a great challenge. The Prüm system for identifying a DNA 'hit' is 40% less accurate than the UK system, opening the large and partially innocent UK database to future injustices.<sup>24</sup> Concerns about the Commission gaining control over this information are valid, as are Open Europe's proposals that a 'bespoke' information-sharing system would be superior to Prüm's scattergun approach. It does not matter that the government intends not to implement Prüm in the near future (despite the fact that an opt-in would necessitate the measure.)

With both the EAW and the Prüm measures we

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must not impose strict conceptual boundaries on our analysis. For the EAW, it is unproductive and reductive to see all problems as the fault of specific member states' penal/legal systems, rather than acknowledging that all injustices were enabled by the overarching framework of the EAW. Expecting 26 nations' penal/legal systems to reform is considerably less likely than reforming the EAW. For the DNA and fingerprint sharing future, we cannot minimise our concerns simply because they are not a short-term issue.

Clearly certain measures are in need of serious reform, reform which has not been achieved 'from within' in the years since Lisbon. It is safer for British justice to attempt to reform them 'from without'.

### v) Other Paths

The Lords committee is pessimistic in its evaluation of the chances of external negotiations' success, even though they concede both that 'in our discussion with the Commission we found no inclination on their part to obstruct or make the process of opting back in difficult,' and that 'it was impossible to say with any certainty whether the UK would be held liable for any costs, but [the Government] considered a 'high threshold' would have to be met before this proved to be the case'. This evidence seems to undermine the opt-in argument which cites high costs as a major reason not to opt out.

In reality, many EU nations recognise problems – Germany and the Netherlands created systems in which their judges ameliorate the EAW's excesses. Even the Lords' report notes, 'Other Member States would have an interest in putting effective mechanisms in place' in case of an opt-out. All member states recognise the importance of PCJ cooperation, and since the frameworks for those measures that already exist are both mutually beneficial and already in place, other member states have every reason to allow the UK to rejoin promptly.

Therefore the *worst* outcome of an external negotiation would be a reassertion of the current situation. The costs and legal difficulties are difficult to estimate until the government have provided a list of measures we would rejoin, but the long term importance of a just international regime outweighs the potential for negligible costs. With measures as dangerous to liberty and justice as the current EAW, it's desirable that the UK reforms it 'from the outside' where its citizens are not at risk.

### Conclusion

Both to allay the fears of the police and the public, and to leave maximum time to work with European states towards a solution, it is important that the government identifies the measures it will attempt to opt into or change as soon as possible. The chance of a legal hiatus is only dangerous if the

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Home Office allows it to be – prudent planning and diplomacy should mean that all arrangements are in place for a smooth transition (of both opt-back-ins and of permanent opt-outs) long before December 2014. Given Theresa May's public opt-out position, the government will be able to negotiate as if it was already out. Such prudence would answer the concerns of legal and political commentators such as the Centre for European Reform and Cambridge University's Alicia Hinarejos.

This would leave only committed ideological Europhiles in opposition to the opt-out. By ignoring the wider sovereignty and EU competences context, dismissing evidence that does not fit their evaluation and elevating the virtues of watertight continuity and cost-saving above justice, supporters of the opt-in make a 'Better The Devil You Know' case. With such weak evidence this could not be compelling. In the present situation, the argument is almost farcical: the devil we do not know can hardly be worse than the one we do, and has great potential to be positively angelic.

## Notes

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- 22 Brady, *Britain's 2014 justice opt out*. The Centre for European Reform oppose the opt-out, believing that proportionality will be imposed on the EAW by the ECJ's advocates general. There has been no progress on this front for years. My italics. The Committee report can be accessed at: <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15603.htm>, accessed 18/06/2013
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