



An unavoidable choice:
More or less EU control over UK policing
and criminal law



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EXECUTIVE SUMMARY

The UK Government must decide during this Parliament whether to repatriate 130 EU crime and policing laws or whether to transfer full control over these laws to EU judges for the first time. It is a clear choice between more or less EU control over the British justice system – a choice between repatriation or more Europe.

Owing to a constitutional quirk in the Lisbon Treaty, the UK has the option of using a 'block opt-out' to repatriate EU crime and policing laws adopted before the Lisbon Treaty came into force. If the UK does not opt out, it must accept the European Court of Justice's (ECJ) full powers of jurisdiction over these laws from December 2014. This would, for example, give EU judges the final say over the mechanisms for extraditing British citizens to other member states, on the basis of a case brought against the UK by the European Commission.

The list of laws subject to the block opt-out includes major measures such as the European Arrest Warrant, those establishing the EU's judicial and policing agencies Eurojust and Europol, and databases to share criminal records and DNA between member states. The UK's right to opt out does not apply to EU legislation on asylum, immigration or civil law where the ECJ already has control.

Ultimately, the decision over the 2014 block opt-out is a matter of balancing expediency against national control and democracy. However, the risks of accepting the power of the EU institutions over these laws outweigh the downsides of using the block opt-out for several reasons:

- The ECJ has a record of interpreting EU laws in a way in which national governments do not expect or agree with. Accepting ECJ jurisdiction is therefore a gamble that could backfire on the UK's justice system.
- There are various international agreements in place outside the EU's legal framework, mostly Council of Europe conventions, including one on extradition, which the UK could continue to use should it cease to apply EU crime and policing law post-2014. Although they do not cover all areas, and are often more cumbersome than the EU measures, the fact that the UK has a fall-back option means there is no need to 'rush in'.
- Most importantly, if the UK uses the block opt-out, the rules would allow it to opt back in to individual EU laws that it felt were vital on a case-by-case basis after 2014. However, under EU law as it currently stands, the UK could not opt back out again and the ECJ would have full jurisdiction over the law concerned.

Open Europe recommends that the Government should invoke the 2014 block opt-out, which would allow it to consider the following options post-2014:

- Remain outside the EU crime and policing laws it has opted out of.
- Opt back in to selected EU laws of particular importance, which would need the approval of the EU institutions and mean accepting the ECJ's powers over the laws it opts back into.
- Or, seek to negotiate a new arrangement (a variant of Denmark's position) whereby the UK could cooperate with other EU member states on crime and policing, but would do so outside the EU legal framework and therefore without the jurisdiction of the ECJ.

As much as the Government would like to put this crucial decision off until 2014, this is neither politically nor practically tenable. The Government has said it will give Parliament a vote on the 2014 block opt-out. However, the body of law to which the 2014 block opt-out applies is reduced every time the UK opts in to a new EU law which either amends, repeals or replaces an existing pre-Lisbon measure. To date, the Government has chosen to opt in on every occasion it has had to take such a decision and has not required Parliament's approval. This is therefore not a choice for the distant future, but an issue of urgent legal, political and democratic importance.

A thorough and open debate must now begin in order to inject greater democratic accountability into this crucial decision. However, opting out sooner rather than later would give the Government a greater chance of securing the best possible deal for the UK for the future.

1. STATE OF PLAY

Box 1: The evolution of justice and home affairs under the EU Treaties

EU justice and home affairs (JHA) legislation impacts on a wide range of areas including:

- Border controls and the free movement of people
- Immigration, asylum and civil law
- Criminal law and policing

Over the last two decades JHA has been arguably the fastest growing and the most changed EU policy area. Following the establishment of JHA cooperation under the EU's 1992 Maastricht Treaty and ad hoc cooperation outside the EU through the 1985 Schengen Agreement, the 1997 Amsterdam Treaty marked the first major leap forward. It incorporated asylum, immigration and civil law into the main decision-making structures of the EU by introducing qualified majority voting (QMV) as the norm in this area and brought the Schengen Agreement into the EU Treaties. Crime and policing remained governed by unanimity with the UK therefore retaining a veto.

The Lisbon Treaty, which came into force in December 2009, essentially completed the integration of JHA into the EU decision-making structure with far-reaching transfers of power from national governments to the EU including a further shift to QMV from unanimity in the Council of Ministers on the vast majority of crime and policing legislation. The powers of the EU institutions, the European Commission, European Parliament and European Court of Justice (ECJ), were also much increased with regard to proposing and enforcing EU legislation in the JHA field.¹ Under the Lisbon Treaty, the UK and Ireland have opt-outs from (or rather the right to opt in to) future EU JHA legislation in these areas.²

1.1. What does the 2014 JHA choice involve and how will it work in practice?

Due to a constitutional quirk in the Lisbon Treaty, the UK Government must make a hugely significant decision by mid-2014 at the latest on whether to cede full jurisdiction to the ECJ over 130 EU crime and policing laws, decided before the Treaty came into force and which currently fall under the interpretation of British judges. The European Commission would also gain the power to take the UK to the ECJ for failing to implement these laws.

The body of EU law currently covered by the block opt-out includes significant pieces of legislation such as on the EU's judicial body, Eurojust, the EU's police body, Europol, and the European Arrest Warrant. If the Government refuses to accept the ECJ's jurisdiction over this body of law, up to 130 EU crime and policing measures will no longer apply to the UK after December 2014. This "2014 choice" does not leave the option of maintaining the status quo. It is essentially a binary choice between more or less EU control over crime and policing in the UK.

The block opt-out covers EU crime and policing laws *but not*:

- EU immigration, asylum and civil law;
- Any new EU law adopted since the Lisbon Treaty came into force (new laws are automatically subject to ECJ jurisdiction);
- Any new EU measure which amends a law that was adopted before the Lisbon Treaty came into force (the body of law to which the 2014 block opt-out applies is reduced every time the UK opts in to a new EU law which either amends, repeals or replaces an existing pre-Lisbon measure);
- International arrangements involving EU member states (e.g. Council of Europe conventions).

The last point is important as, even if it were to choose to opt out of these EU laws, the UK would still be bound by the international agreements on crime and policing that existed between the UK and other member states prior to the creation of EU laws in these areas.

¹ See *General Secretariat of the Council of the EU*, 'The Lisbon Treaty's impact on the Justice and Home Affairs Council: More co-decision and new working structures', December 2009, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111615.pdf

² Prior to the Lisbon Treaty, the UK and Ireland had opt-outs from the Schengen acquis (which abolished internal border controls and harmonised rules on visa policy, aspects of illegal migration and rules on criminal and police cooperation), EU legislation affecting border controls, and EU immigration, asylum and civil law legislation. Prior to the Lisbon Treaty, EU criminal law and policing legislation was subject to unanimity and therefore a UK veto. See Professor Steve Peers, 'EU Lisbon Treaty analysis no.4: UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law', *Statewatch Analysis*, 26 June 2009, pages 3-5, <http://www.statewatch.org/news/2009/nov/statewatch-analysis-lisbon-opt-outs-nov-2009.pdf>

a) A test for the internal politics of the Coalition

It is widely known that the Conservative Party and the Liberal Democrats do not always see eye to eye on “Europe”, but this is especially the case when it comes to EU cooperation in justice and policing. The Conservatives opposed the European Arrest Warrant when it was first proposed and, before entering the Coalition agreement, pledged to “return powers” from the EU over criminal justice.³ The Liberal Democrats, on the other hand, pledged to:

“Keep Britain part of international crime-fighting measures such as the European Arrest Warrant, European Police Office (Europol), Eurojust, and the European Criminal Records Information System, while ensuring high standards of justice.”⁴

The fragile coalition between the two parties on this issue will therefore be continually tested, not only in making the ‘big decision’ in June 2014, but also as the European Commission proposes new initiatives or tries to amend existing legislation, since any amended measure is automatically brought under the jurisdiction of the ECJ.

b) How does it work?

Under the protocols of the Lisbon Treaty,⁵ the deadline for the UK to make the choice between ‘more or less’ EU control in these areas is 1 June 2014. If it decides not to accept the new powers over these laws, the entire block of laws would no longer apply to the UK after 1 December 2014.⁶ It should be noted that the Government could inform the Council of Ministers of its decision to opt out any time before June 2014, but the opt-out cannot take effect before 1 December 2014.

If the Government were to take the path of opting out, the UK would retain the choice of applying to opt back in to individual police and criminal justice laws at a later date. However, UK participation would be subject to approval by the EU institutions, would entail full ECJ jurisdiction over the laws concerned and the decision to opt in would be irreversible. Alternatively, it could decide not to opt back in to any of them.

Crucially, there is no ‘middle way’, the UK must either accept full ECJ jurisdiction in this area or opt out of the crime and policing laws concerned.

c) New powers for EU judges and the European Commission over crime and policing...

Prior to the Lisbon Treaty, the jurisdiction of the ECJ was governed by a distinct set of rules for immigration, asylum and civil law, on the one hand, and criminal law and policing on the other.⁷ Both of these sets of rules differed from the ECJ’s normal jurisdiction over all other areas of EU policy. The powers of the European Commission to enforce the implementation of EU JHA legislation were also limited.

However, with the Lisbon Treaty, the ECJ gained full jurisdiction over all JHA areas, except for a restriction on ruling on national police operations.⁸ This means that, since December 2009, the full powers of the ECJ apply to all new EU JHA laws to which the UK has chosen to opt in to and, just as importantly, so does the right of the European Commission to take member states to the ECJ for violation of EU law.

The major change is to EU **criminal law and policing** legislation.⁹ Under Lisbon, the Commission is for the first time able to refer member states to the ECJ when it believes they have failed to fully implement a new EU police or criminal justice law.¹⁰ The ECJ also has the power to set down binding judgements when

³ See the Conservative Party Manifesto, 2010, page 114, http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf

⁴ See the Liberal Democrat Manifesto, 2010, page 66, http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf

⁵ See Article 10 of Protocol No 36 ‘On Transitional Provisions’, annexed to the EU Treaties

⁶ Other EU governments would decide, by QMV, the transitional arrangements for the UK’s exit and could also adopt a decision determining that the UK “bear the direct financial consequences” of seceding from these laws. The UK would not have a vote

⁷ Prior to Lisbon, immigration, asylum and civil law fell under the so-called ‘First Pillar’ of EU law, while crime and policing remained under the ‘Third Pillar’ of EU law. Since Lisbon’s entry into force in December 2009 this distinction no longer applies

⁸ Professor Steve Peers, ‘EU Lisbon Treaty analysis no.4: UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law’, page 12

⁹ For **immigration, asylum, and civil law**, ECJ judges had the power, prior to Lisbon, to rule on the meaning of EU laws following references from the member states’ highest courts (e.g. the Supreme Court in the UK). Now, under Lisbon, the ECJ can decide upon such references from any national court and this extended jurisdiction applies to both *new* laws and those adopted *before* the Lisbon Treaty came into force. The Commission was also already able to take member states to court if it felt EU laws in these areas were not being implemented properly

¹⁰ The ECJ does currently have the power to rule on cases brought against the UK by other member states but no cases have ever been brought and this power is therefore extremely limited

national courts pass cases on to it on matters of EU police and criminal justice law. All in all, the ECJ gains essentially the same power over this area as it enjoys over areas such as the single market.¹¹

However, unlike immigration, asylum and civil law, where the ECJ and Commission’s new powers automatically apply to future legislation and retroactively to pre-Lisbon Treaty legislation, in the area of criminal law and policing, the new powers only apply automatically to post-Lisbon laws and there are transitional arrangements for EU laws adopted before Lisbon came into force (see the table below).

Table 1: The ECJ’s powers over EU JHA law under the Lisbon Treaty

	Legislation agreed before Lisbon came into force (pre-December 2009)	Legislation agreed after Lisbon entered into force (December 2009 onwards)
Asylum, immigration, borders and civil justice	The ECJ automatically gains jurisdiction over laws applying to the UK that were agreed before the Lisbon Treaty.	Agreeing to any new proposal or amending an existing law means that it falls under the ECJ’s full jurisdiction. The UK has the option not to opt in to new proposals or amendments.
Policing and criminal justice	The Government must decide by June 2014 whether to accept full ECJ jurisdiction over these laws or the UK must opt out of them en bloc.	Any new proposal the UK agrees to falls under the ECJ’s full jurisdiction immediately. If the UK opts in to an amendment to a law agreed prior to Lisbon, the ECJ will immediately gain full jurisdiction over the whole measure and the UK will no longer be able to opt out of it as part of the block opt-out in 2014. The UK has the option not to opt in to new proposals or amendments.

d) ...Or the repatriation of up to 130 EU crime and policing laws

The most significant consequence of using the 2014 opt-out would be that 130 EU crime and policing laws would cease to apply to the UK from 1 December 2014. The block opt-out is likely to apply to some of the most important EU crime and policing measures on the statute books (see Section 2) such as the European Arrest Warrant and various data sharing systems such as the Schengen Information System (SIS), which allows police forces to issue alerts relating to people and property. However, of these information sharing systems, the SIS is not currently operational in the UK¹² and the UK only has limited access to the EU’s Visa Information System.¹³

See Annexes 1 and 2 for the list of crime and policing measures that currently fall under the 2014 block opt-out and Home Secretary Theresa May’s explanation of the list.

1.2 A moving target

The 2014 choice does not apply to a static body of law. If the UK opts in to any measure that amends a crime and policing law that was adopted before the Lisbon Treaty came into force, that law is no longer covered by the 2014 opt-out – it is discounted from the current list of 130 laws and the new powers of the Commission and the ECJ also kick in. The UK has opted in to negotiations over proposals that would strike off six pre-Lisbon laws from the 2014 block opt-out (see below).¹⁴ This would leave the UK able to opt-out of 124 laws in 2014 if all of these proposals are agreed and come into force before 2014 (which is not for certain as negotiations are still ongoing).

When the transitional provisions were being put in place, the then Foreign Secretary David Miliband told

11 Prior to Lisbon, member states did have the option of allowing their national courts to refer cases falling under EU crime and policing law to the ECJ. Twelve of the EU-15 did so (with the exception of the UK, Ireland and Denmark), while five of the accession states also accepted jurisdiction (the Czech Republic, Hungary, Slovenia, Latvia and Lithuania). The ECJ could not, however, rule on infringement cases brought up by the European Commission. The transitional arrangements apply to all member states that have yet to accept the ECJ’s jurisdiction in this area. However, the right to opt out in 2014 applies solely to the UK

12 See the then Parliamentary Under-Secretary of State (Security and Counter-terrorism) Lord West of Spithead’s answer to a Parliamentary Question, *Hansard*, 2 Apr 2009: Column WA286, <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90402w0005.htm#0904024600691>

13 Professor Steve Peers, ‘The mother of all opt-outs? The UK’s possible opt-out from prior third pillar measures in June 2014’, *Statewatch*, January 2012, page 8, <http://www.statewatch.org/analyses/no-168-eu-uk-opt-out.pdf>

14 These are: the European Investigation Order; a draft Directive on minimum standards on the rights, support and protection of victims of crime; and a draft Directive on attacks against information systems

the House of Commons' European Scrutiny Committee¹⁵ that the UK had secured a commitment that the EU would seek to "amend or replace" as much of the pre-Lisbon legislation as possible before the end of the transition period in 2014 and therefore bring it under the new powers of the EU institutions.¹⁶ The so-called Stockholm Programme,¹⁷ the latest in a series of five-year JHA programmes, incorporates a review of many existing measures with a view to the Commission proposing new instruments to amend or replace them where necessary. Some notable measures due for amendment before 2014 include the EU crime and justice agencies, Europol, Eurojust and the European Police College (CEPOL).

a) The Government has so far opted in to every amendment striking laws from the 2014 opt-out

Since the Lisbon Treaty came into force, the UK has opted in to every new proposal or law (six in total) that has amended, repealed or replaced measures covered by the 2014 opt-out.¹⁸ These include the proposal for a European Investigation Order, as well as the EU Directive on human trafficking.

The European Investigation Order

The Government decided to opt in to negotiations on the European Investigation Order in July 2010. Once agreed, it will give police forces in other EU member states the right to request that UK police officers seek out and share evidence on criminal suspects in cross-border investigations.¹⁹ For our purposes here, the most important aspect of the UK decision to opt in to the European Investigation Order is that, should it come into force, it would strike off up to four pre-Lisbon laws from the list covered by the 2014 block opt-out. In October 2010, in response to a Parliamentary question, Home Office Minister James Brokenshire explained that the European Investigation Order would "replace the European Evidence Warrant, the majority of the 2000 Convention on Mutual Assistance in criminal matters and its Protocol and the Framework Decision 2003/577/JHA insofar as it relates to the freezing of evidence."²⁰

The UK Parliament was not given the chance to scrutinise the proposal before the Government's decision to opt in – either in the European Scrutiny Committee or in the House²¹ – let alone vote on the decision.

A new EU Directive on human trafficking

Unlike with the European Investigation Order, the Government decided not to opt in to revised EU rules on human trafficking until the final text of the Directive was adopted.²² The new Directive,²³ which replaces a pre-Lisbon law from 2002,²⁴ establishes that offences related to human trafficking must be "punishable by a maximum penalty of at least five years of imprisonment", and raises from eight to ten years of imprisonment the maximum penalty for offences against "vulnerable" victims, such as minors. In addition, it allows national authorities not to prosecute victims of human trafficking if they have been forced to commit a crime.

The Government's initial decision not to opt in while the Directive was still being negotiated was justified by concerns that the UK could in the end be bound by rules which were against its interests. Crucially, when the Government announced its intention to opt in to the Directive, Immigration Minister Damian Green said,

"The new text still does not contain any measures that would significantly change the way the UK fights trafficking. However, the UK has always been a world leader in fighting trafficking and has a strong international reputation in this field. Applying to opt in to the directive would continue to send a powerful message to traffickers that the UK is not a soft touch, and that we are supportive of international efforts to tackle this crime."²⁵

15 House of Commons, European Scrutiny Committee, 'European Union Intergovernmental Conference: Follow-up report, Third Report of Session 2007-2008, 27 November 2007, page 18, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

16 The 'Declaration concerning Article 10 of the Protocol on transitional Provisions' invites "the European Parliament, the Council and the Commission, within their respective powers, to seek to adopt" new legal acts "amending or replacing" pre-Lisbon measures

17 European Commission, 'Action plan implementing the Stockholm Programme', 20 April 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>

18 Professor Steve Peers, 'The mother of all opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014', page 7

19 The EU Council of Ministers agreed on a general approach in December 2011, see <http://register.consilium.europa.eu/pdf/en/11/st18/st18918.en11.pdf>

20 Hansard, 12 October 2010: Column 280W, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101012/text/101012w0002.htm#10101262000185>

21 Hansard, 26 Jan 2011: Column 391, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110126/debtext/110126-0003.htm>

22 See Home Office Minister Damian Green's statement, 9 May 2011, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110509/debtext/110509-0003.htm#11050939000053>

23 Directive 2011/36/EU, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

24 Council Framework Decision 2002/629/JHA, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:203:0001:0004:EN:PDF>

25 See Home Office Minister Damian Green's statement, 22 March 2011, <http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/>

Conservative MP Dominic Raab pointed out,

“If you look at the flaws in UK human trafficking policy – that Britain inherited from the last Government – you see they consist of lax border controls, ad hoc police operations and abysmal conviction rates. These are failures of law enforcement, not law-making. European countries know what they have to do, under the European Convention on Human Trafficking. The point is: if the Directive adds nothing, Britain should not legislate either at the UK or EU level, just for the sake of it.”²⁶

The Government’s statement would indeed suggest that the UK agreed to the transfer of power from the UK to the ECJ for little or no practical need.

b) The UK faces legal and financial pressures to opt in

Where amending laws are agreed and the UK chooses not to opt in, the other member states and Commission can determine that the system is “inoperable” without the UK adopting the amendment. If this is the case, the UK can be forced to opt out of the old measure altogether. Although the term “inoperable” sets a relatively high threshold for ejecting the UK from an existing crime and policing measure, it might apply to things such as shared databases or perhaps agencies such as the European Police College (CEPOL), which is currently based in the UK. Another condition stipulated in the Treaty protocols is that the UK “shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.”²⁷

In contrast to the UK, Denmark secured an amendment to its EU Treaty protocol which allows it to continue to indefinitely apply existing EU crime and policing laws “unchanged”. Denmark’s protocol allows it to keep the pre-Lisbon laws without ceding control to ECJ jurisdiction even if these laws are later amended or replaced²⁸ (Denmark’s protocol is discussed in greater detail in Section 3).

At the time the Lisbon Treaty was being negotiated, the House of Commons European Scrutiny Committee was critical of the Government’s strategy with regard to the transitional arrangements on crime and policing, an area considered a UK ‘red line’ in the negotiations:

“We do not understand why the UK did not interpret the red line on protection of the UK’s position in a firmer form by insisting on a provision which would have preserved the effect of existing EU measures in relation to the UK, in circumstances where the UK decides not to opt in to an amending or repealing measure. This would have ensured that the UK would keep what it now holds and would more effectively have protected the UK’s interests. It would have been open to the UK to keep its existing EU measures in their present form indefinitely as an alternative to opting in to a measure which would be subject to the enforcement powers of the Commission and the jurisdiction of the ECJ...”²⁹

The Committee noted that Mr Miliband “did not explain whether the UK had pressed for the *status quo* to be preserved so that the UK could continue to have the benefit of existing measures, even if it decided not to opt in to any amending measure.”³⁰

The combination of the threat of being ejected from an existing measure, and the potential for financial consequences, is likely to put pressure on the UK to opt in to proposals for amendments.

In addition, since the Lisbon Treaty came into force, the Government has also opted in to some new crime and policing proposals that do *not* replace pre Lisbon laws. Even if the UK decides to use the block opt-out, the ECJ would continue to have jurisdiction over these laws in the UK.

²⁶ Speaking at an Open Europe event, ‘How much power should the EU have over Justice and Home Affairs’, London, 14 September 2011, <http://www.openeurope.org.uk/Article/Page/en/LIVE?id=1657>

²⁷ Article 4a(2) of Protocol No 21 ‘On the position of the UK and Ireland in respect of the area of freedom, security and justice’, annexed to the EU Treaties, states that if the other member states, based on a proposal from the Commission, determine that the UK’s non-participation in the amended version of an existing measure makes the application of that measure “inoperable”, the UK may be forced out of the measure. A vote can be taken by QMV but the UK cannot vote. Article 4a(3) of the Protocol states that the UK “shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure”

²⁸ See Article 2 of Protocol No 22 ‘On the position of Denmark’, annexed to the EU Treaties

²⁹ House of Commons, European Scrutiny Committee, ‘European Union Intergovernmental Conference: Follow-up report’, pages 18-19

³⁰ House of Commons, European Scrutiny Committee, ‘European Union Intergovernmental Conference: Follow-up report’, page 16

c) Democratic accountability to Parliament is inconsistent

Given the significance of opting in to ECJ jurisdiction and European Commission powers on crime and policing measures, democratic accountability to Parliament when the Government decides to do so is clearly an important issue. However, the role of the UK Parliament in these decisions differs depending on whether the UK decides to opt in to ECJ jurisdiction on a case-by-case basis or via the block decision in 2014.

In January 2011, the Coalition Government committed to putting the 2014 block opt-out to a vote in both Houses of Parliament. Minister for Europe David Lidington said,

“Parliament should have the right to give its view on a decision of such importance. The Government therefore commit to a vote in both Houses of Parliament before they make a formal decision on whether they wish to opt-out. The Government will conduct further consultations on the arrangements for this vote, in particular with the European Scrutiny Committees, and the Commons and Lords Home Affairs and Justice Select Committees and a further announcement will be made in due course.”³¹

However, although Parliament is to be granted a vote on the 2014 block opt-out, there is currently no mechanism for Parliament to prevent the Government from taking a decision to opt in to an amendment to individual laws covered by the opt-out ahead of 2014.³² In an extreme and purely theoretical case, the Government could opt in to amendments to every single one of the laws covered by the 2014 block opt-out without gaining Parliamentary approval in each case.

1.3. Invoking the block opt-out would not be the end of European police cooperation

It is important to note that if the UK decided to use the block opt-out in 2014 this would not spell the end of European cooperation on crime and policing entirely. There are various international agreements in place outside the EU’s legal framework, mostly Council of Europe conventions, that would kick in should the UK cease to apply EU crime and policing law post-2014.

For example, the EU’s European Arrest Warrant replaced a Council of Europe convention on extradition. If the UK decided no longer to apply the European Arrest Warrant post-2014, UK extradition requests to the other EU member states (and those in the opposite direction) would revert to the old system. It is fair to say however that many of the Council of Europe conventions are far less developed than the EU measures adopted in their place.

Professor Steve Peers, an EU JHA expert at the University of Essex Law School, notes that, just as a Council of Europe convention would apply for extradition, “The same is true of issues such as the transfer of prisoners, money laundering and mutual assistance, and certain substantive criminal law issues such as drug trafficking.” However, not all EU crime and policing law has a corresponding Council of Europe fall-back option and, even in the cases where there is a Council of Europe convention in place, it has not necessarily been ratified by the UK and/or every other EU member state.³³

A full list of the international arrangements that would remain in place (and the member states they apply to) should the UK decide to use the 2014 block opt-out is provided in Annex 3.

31 Written Ministerial Statement, *Hansard*, 20 January 2011: Column 51WS, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110120/wmstext/110120m0001.htm>

32 The Government is currently in the process of reviewing Parliamentary scrutiny of JHA opt-in decisions

33 Professor Steve Peers, ‘The mother of all opt-outs? The UK’s possible opt-out from prior third pillar measures in June 2014’, pages 4-5

2. LAWS FALLING UNDER THE BLOCK OPT-OUT AND THE CASE FOR AND AGAINST ECJ JURISDICTION

2.1. The existing body of pre-Lisbon EU crime and policing law

Of the 130 pre-Lisbon EU crime and policing measures currently covered by the block opt-out, the European Arrest Warrant is the most well-known but there are a number of other measures in force at the EU level which have the potential to have a major impact on individuals' lives. The underlying logic of EU cooperation in the area of crime and policing is "mutual recognition" which is predicated on an underlying assumption of equivalent standards of justice across the member states.

However, so far member states have made limited use of some of these measures and it is therefore difficult to fully assess their impact to date. The practical impact of the Commission gaining the power to ensure they are implemented and enforced across the EU and the ECJ gaining the power to interpret them is therefore also uncertain.³⁴ As mentioned above, the block opt-out also applies to a number of EU agencies, such as Eurojust and Europol.

Below we assess the benefits and potential drawbacks of some of the key measures that fall under the 2014 opt-out and examine the case for and against the ECJ gaining jurisdiction over this body of law.

a) European Arrest Warrant (2002/584/JHA)

The European Arrest Warrant is the most conspicuous example of EU crime and policing legislation. It is the only legal instrument in force that has been fully adopted and frequently used by all member states. Over 15,000 extradition requests were made under European Arrest Warrants between member states in 2010.³⁵ Since the introduction of the European Arrest Warrant in 2004, 193 British nationals have been surrendered by UK authorities to another EU member state, with the number steadily increasing.³⁶

Year	UK nationals surrendered to another EU member state
2004	5
2005	11
2006	26
2007	27
1 January 2008 to 30 September 2008	32
1 October 2008 to 31 March 2009	3
2009-10	41
2010-11	48
Total	193

Clearly, the benefits of swift extraditions need to be balanced against the potential infringement of UK nationals' civil liberties. Law enforcement professionals and prosecutors have been very positive about the European Arrest Warrant, highlighting the impact it has had on speeding up and simplifying the process of extraditing suspects.

Commander Allan Gibson, of the Association of Chief Police Officers (ACPO) noted in March 2011, "When you need to have someone arrested abroad, it is a simpler, faster and more certain process of getting a person before your courts. The police service benefits from that. It is much easier than what went before."³⁷ The Director of Public Prosecutions agreed that the advantage of the Warrant was that it was

³⁴ So far, the cases referred to the ECJ have "almost exclusively" concerned the following three pre-Lisbon laws: the EU Framework Decision on the standing of victims; the European Arrest Warrant; and the Schengen rules on double jeopardy. To date, only one case has been referred regarding another EU crime and policing law (the Framework Decision on mutual recognition of financial penalties). See Professor Steve Peers, 'The mother of all opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014', page 3

³⁵ Jodie Blackstock, 'EU criminal procedure: A general practitioner's guide', *Justice*, 2011, page 21 <http://www.justice.org.uk/data/files/resources/296/EU-Criminal-Procedure.pdf>

³⁶ Written answer from Immigration Minister Damian Green, *Hansard*, 1 December 2011: Column 1064W, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111201/text/111201w0002.htm#11120168000866>

³⁷ *House of Lords and House of Commons, Joint Committee on Human Rights*, 'The Human Rights Implications of UK extradition policy', 8 March 2011, page 37, http://www.parliament.uk/documents/joint-committees/human-rights/Fifteenth_Report_Extradition_Oral_Evidence.pdf

much quicker than the previous system and that it also dealt with previous problems of countries blocking the extradition of their own citizens.³⁸

For example, the European Commission's 2011 annual report on the European Arrest Warrant noted that surrender times have fallen considerably since its introduction,

*"Available statistics compiled for the years between 2005 and 2009 [...] record 54,689 EAWs issued and 11,630 EAWs executed. During that period between 51% and 62% of requested persons consented to their surrender, on average within 14 to 17 days. The average surrender time for those who did not consent was 48 days. This contrasts very favourably with the pre-EAW position of a one-year average for the extradition of requested persons."*³⁹

In 2010-11, 134 individuals of all nationalities were surrendered to the UK under the European Arrest Warrant.⁴⁰

There have however been a number of well-documented problems with the European Arrest Warrant, and individual cases that have raised civil liberties concerns, such as:

- People being arrested in the UK after being tried in their absence and without their knowledge in another EU state;⁴¹
- People being arrested for crimes that are not crimes in the UK;
- People being arrested for crimes for which deportation and imprisonment awaiting trial would be disproportionate.⁴²

The functioning of the European Arrest Warrant has also raised practical procedural issues, especially in the UK, diverting valuable policing resources away from investigating more serious crimes. For example, almost 60% of the European Arrest Warrant extradition requests the UK receives come from Poland, where the legal system obliges the authorities to prosecute even very minor crimes.⁴³ A document from the EU's Council of Ministers identified the following cases that have resulted in Warrants being issued:

- Theft of two car tyres;
- Driving a car under the influence of alcohol, where the limit was not significantly exceeded (0.81 mg/l);
- Theft of a piglet.⁴⁴

As currently drafted, the European Arrest Warrant does not allow the requested member state to contest the extradition of an individual on the basis of the case against the individual being weak or disproportionate. The only grounds for refusal set out in the Framework decision are procedural. The lack of safeguards was something that was cited by MPs at the time it was being discussed.⁴⁵ The Crown Prosecution Service sets out the limited grounds for refusing a European Arrest Warrant in their guide saying:

*"At the Extradition Hearing the district judge must decide a number of issues including: is the offence an extraditable offence? Are there any bars to the extradition? Is the extradition compatible with the person's rights under the European Convention on Human Rights? If there are no statutory grounds to refuse the request, an order is made for the person's surrender."*⁴⁶

38 Ibidem

39 *European Commission*, Report to the European Parliament and the Council 'On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States', 11 April 2011, http://ec.europa.eu/justice/policies/criminal/extradition/docs/com_2011_175_en.pdf

40 Written answer from Immigration Minister Damian Green, *Hansard*, 24 November 2011: Column 480W, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111124/text/111124w0001.htm#11112465000694>

41 See, for instance, the case of Deborah Dark, http://www.fairtrials.net/cases/article/deborah_dark

42 The case of Patrick Connor (not his real name) has been highlighted as an example of disproportionate use of the EAW, see *Fair Trials International*, 'The European Arrest Warrant seven years on – The case for reform', May 2011, p15

43 In 2009/2010, the UK received 4,100 extradition requests under the EAW – 2,403 of which came from Poland. See Immigration Minister Damian Green's letter to the UK Parliament's Joint Committee on Human Rights, May 2011, page 218, http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf

44 See the Portuguese EU Presidency's letter to the 'Working Party on Cooperation in Criminal Matters', 9 July 2007, <http://register.consilium.europa.eu/pdf/en/07/st10/st10975.en07.pdf>

45 *Hansard*, 25 March 2003: Column 195, http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030325/debtext/30325-14.htm#30325-14_spnw5

46 See the *Crown Prosecution Service's* website, http://www.cps.gov.uk/news/fact_sheets/extradition/; and the *Home Office website*, <http://www.homeoffice.gov.uk/publications/police/operational-policing/european-arrest-warrant1>

ECJ jurisdiction over the European Arrest Warrant would give it the final say over issues such as the grounds for refusing to deport someone to another member state. Any ruling it made, on a case referring to any member state, would be binding across the entire EU and in the UK.

b) Mutual recognition of rulings ordering fines to be paid

Framework Decision 2005/214/JHA allows member states to issue the UK with certificates ordering it to impose fines on people in the UK (and vice versa). If a request has been made to a UK court to impose such a fine, the court can only refuse on procedural grounds set out in the EU law and cannot look at the case against the person being fined. In addition, the person being fined might have no knowledge of the fine until it is brought before the UK court.

Disputing such a case would be extremely difficult, as a challenge “must be made to the issuing court in the other EU member state. This will need to be undertaken by the affected person or a lawyer instructed for them in that country.”⁴⁷

c) Taking account of previous convictions in a trial (2008/675/JHA)

Foreign convictions are used on a case-by-case basis in trials in England and Wales where either the defendant has accepted them, or where they can be proved to the satisfaction of the court. However, the EU’s Framework Decision 2008/675/JHA obliges domestic courts to take into consideration prior convictions of defendants from other EU member states whenever they consider criminal proceedings such as pre-trial (when deciding on bail and mode of trial), during trial (decisions on bad character) and post-conviction (decisions on sentencing).⁴⁸ Previous convictions handed down against someone in another member state are taken into account in the same way as national convictions.

Potential problems can arise, once again, because this is a measure based on ‘mutual recognition’ and UK courts are therefore “likely to be reluctant to question the veracity” of previous convictions in another member state “in a similar way as the extradition courts have been reluctant to question the purposes of request to surrender under the European Arrest Warrant.”⁴⁹ Defence lawyers wishing to raise objections to the use of the foreign convictions are therefore likely to need the assistance of a lawyer in the country where it was issued – potentially a difficult barrier to proving that the previous conviction being used is either flawed or incorrect.

d) ECRIS (European Criminal Record Information System) (2009/316/JHA)

ECRIS is the data sharing system that allows member states to notify each other of an individual’s previous convictions or criminal records, and is therefore closely linked to the law described above.

This can clearly be of benefit to the UK as it means a criminal’s previous convictions in another EU state can be taken into account in UK criminal proceedings. In the UK, cooperation is dealt with via the United Kingdom Central Authority for the Exchange of Criminal Records, run by the Association of Chief Police Officers (ACPO). ACPO states that in 2009 it received 5,750 notifications of convictions for UK nationals in other EU states and in return sent 32,833 notifications regarding foreign nationals who have been convicted while in the UK.⁵⁰ The perceived importance of such data was demonstrated in 2007, when the Home Office was criticised by MPs and the media for failing to make the best of use of information on foreign criminals, and failing to pass it on to the UK’s Criminal Records Bureau.⁵¹

e) The ‘Prüm Decision’ on police cooperation (2008/615/JHA and 2008/616/JHA)

The Prüm Decision provides for the automatic exchange of DNA, fingerprints and vehicle registration data. Access to DNA profiles and fingerprints held in national databases is granted on a “hit/no-hit” basis, which means that DNA profiles or fingerprints found at a crime scene in one EU state can be compared with profiles held in the databases of other EU states.⁵² This can of course help solve crimes.

47 Jodie Blackstock, ‘EU criminal procedure: A general practitioner’s guide’, page 27

48 Jodie Blackstock, ‘EU criminal procedure: A general practitioner’s guide’, page 28

49 Jodie Blackstock, ‘EU criminal procedure: A general practitioner’s guide’, pages 31-33

50 See ACPO, *Criminal Records Office, Annual report 2009/2010*, www.acro.police.uk/uploadedFiles/annual%20report.pdf

51 *Telegraph*, ‘No record kept of criminals convicted abroad’, 10 January 2007, <http://www.telegraph.co.uk/news/uknews/1539030/No-record-kept-of-criminals-convicted-abroad.html>

52 See the *European Commission’s* website, http://ec.europa.eu/home-affairs/policies/police/police_prum_en.htm

However, this arrangement has also been described by the European Data Protection Supervisor as “a laboratory for cross border exchange of information, in particular DNA and fingerprints.”⁵³ The House of Lords’ EU Committee noted that the exchange of DNA data among the 27 member states is problematic because of the differing standards of data collection and retention in the member states. In the UK, since January 2006, it has been possible for persons arrested to have their DNA and fingerprints taken compulsorily even if they are not charged.⁵⁴ The UK is also disproportionately exposed to DNA sharing as around 5.2% of the UK population’s DNA data is held on record, while the EU average is just 1.1% (2006 figures).⁵⁵ Given how often data is susceptible to leaks in today’s world, the bigger the database, the bigger the chance of the information being compromised.

f) Eurojust

Eurojust is the EU’s judicial cooperation body which oversees the exchange of judicial information and personal data. In 2010, member states requested Eurojust’s assistance in 1,424 new cases.⁵⁶ Eurojust oversees a range of other agreements including agreements on data sharing and freezing orders and European Arrest Warrants. The UK is a major participant in Eurojust, with the highest number of cases (205) referred in 2009-2010.⁵⁷ Furthermore, Eurojust is currently chaired by a Briton, Aled Williams.⁵⁸

Giving the ECJ jurisdiction in this area would see the UK more locked in to Eurojust cooperation. Should the UK disagree with its decisions or practices in future, the power of the ECJ to overrule the UK might become a factor, although at this stage it is difficult to speculate. Crucially, the European Commission is due to put forward its plans for reform of Eurojust’s structure in 2012, including giving it the power to initiate criminal investigations.⁵⁹ If the UK decides to opt in to the proposal, Eurojust will no longer be covered by the 2014 opt-out.

g) Europol

Europol is the EU’s police agency and has 700 staff at its headquarters in the Netherlands and is also currently run by a Briton, Rob Wainwright.⁶⁰ It manages approximately 12,000 cross-border investigations each year and helps organise Joint Investigation Teams of mixed nationality to investigate cross-border crime. Europol claims successes in providing analysis support that has helped tackle major cases of human trafficking, smuggling and tax fraud. Europol has working relationships with a number of other international agencies and states.⁶¹ The UK’s participation in Europol is substantial. With ten officers, the UK Liaison Bureau is the largest of any country represented at Europol headquarters in The Hague.⁶²

The European Commission is planning to publish a proposal on Europol in 2012.⁶³ Similarly to Eurojust, should the UK choose to opt in to any amending measure, Europol would automatically be struck off of the list of EU crime and police laws covered by the 2014 block opt-out.

2.2. What is the case for and against the ECJ gaining jurisdiction over EU crime and policing law?

It is possible to argue that the effects of giving EU judges the power to interpret EU crime and police law would come with benefits as well as costs. However, these potential benefits must also be weighed against the loss of national sovereignty and control and the ECJ’s record in other areas of EU policy, which has seen it take EU laws in directions unforeseen by the governments that agreed to them.

53 *House of Lords, European Union Committee*, ‘Prüm: An effective weapon against terrorism and crime?’, Eighteenth Report of Session 2006-2007, 9 May 2007, page 32, <http://www.publications.parliament.uk/pa/ld200607/ldselect/lddeucom/90/90.pdf>

54 *House of Lords, European Union Select Committee*, ‘Prüm: An effective weapon against terrorism and crime?’, page 17

55 *Home Office*, ‘DNA Expansion Programme 2000–2005: Reporting Achievement’, October 2005, page 5

56 See Eurojust, ‘Annual report 2010’, http://www.eurojust.europa.eu/press_releases/annual_reports/2010/Annual_Report_2010_EN.pdf

57 *Eurojust*, ‘Annual report 2010’, page 80

58 See *Eurojust’s website*, <http://www.eurojust.europa.eu/college.htm>

59 *European Commission*, ‘Commission Work Programme 2012’, 15 November 2011, page 19, http://ec.europa.eu/atwork/programmes/docs/cwp2012_annex_en.pdf; see also *European Commission*, ‘Action Plan implementing the Stockholm Programme’, 20 April 2010, page 18, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>

60 See *Europol’s website*, <https://www.europol.europa.eu/content/page/introduction-143>

61 <https://www.europol.europa.eu/content/page/about-europol-17>

62 See *Europol’s website*, <https://www.europol.europa.eu/content/memberpage/united-kingdom-817>

63 *European Commission*, ‘Commission Work Programme 2012’, page 13

2.2.1. The case for ECJ jurisdiction

a) Ensuring the consistent enforcement of EU laws in all 27 member states

ECJ jurisdiction, and therefore the power to decide on the interpretation of EU laws, would potentially lead to a more consistent application of EU crime and policing law across the 27 member states and increase legal certainty.⁶⁴

The Law Society of Scotland⁶⁵ described the ECJ's extended jurisdiction under the Lisbon Treaty as, "A natural concomitant of the move to qualified majority voting and the bringing of this area of legislative power within the mainstream of EU legislative process."⁶⁶ Others have argued that, if the UK were to choose not to accept the ECJ's jurisdiction, "the outcome would be more than an inconvenience. It would entail a spectrum of legal uncertainty relating to European law produced over a period of 16 years from 1993."⁶⁷ Summing up what some see as a problem with the status quo, Mike Kennedy, Chief Operating Officer, CPS and former President of Eurojust told a Commons Committee, "Although the concept of mutual trust is 'relatively simple' to grasp, it is difficult to achieve in practice."⁶⁸

This argument essentially rests on the view that for European citizens, including UK citizens, to fully enjoy freedom of movement across the EU, they need to have confidence in and access to justice systems across Europe. This is, of course, a noble aim but depends on the ECJ's ability to deliver it and must be weighed against the loss of national control that ceding jurisdiction to the ECJ involves.

b) An 'independent' arbiter of EU law and guardian of citizens' rights?

Another argument in favour of accepting ECJ jurisdiction is that the UK Government cannot be held to account for failure to implement EU legislation. The House of Commons Justice Committee noted in its 2010 report 'Justice issues in Europe' that,

"While this limits judicial control over the UK (as it cannot be sued by the Commission) it potentially has considerable implications for UK citizens."⁶⁹

Victim Support, a national charity for people affected by crime, noted that the UK has failed to transpose certain articles in the EU law on the standing of victims, such as Paragraph 3 of Article 4, which states that "member states shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary". Victim Support claims that, "This article is not fully transposed as victims in England & Wales are only entitled to information on the offender's release in relation to certain offences, and if the sentence is at least 12 months."⁷⁰ If the ECJ had jurisdiction over this law then the UK could be taken to the Court, which would rule if the UK was applying the law 'correctly'. Alternatively, there is no reason why the UK Parliament could not legislate to close this loophole should it feel the need to do so.

c) A vehicle to promote UK best-practice and uphold standards across the EU

The AIRE Centre, a charity which provides advice on individual rights in Europe, has argued that the UK's refusal to accept the ECJ's jurisdiction will prevent UK lawyers from using their expertise and experience in making cases to the Court. The House of Commons Justice Committee noted that,

64 As the House of Lords' European Union Committee concluded in 2008, "The increase in the jurisdiction of the ECJ is a significant development. It replaces the complex existing regime of jurisdiction with a clear and uniform rule and is likely to increase consistency and legal certainty in the application of EU law." *House of Lords, European Union Committee, 'The Treaty of Lisbon: An impact assessment', Tenth Report of Session 2007-2008*, <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom62/6210.htm>

65 *House of Lords, European Union Committee, 'The Treaty of Lisbon: An impact assessment', Volume II, E100*, <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom62/62ii.pdf>; see also Carrera, Eggenschwiler and Guild (editors), 'The Area of Freedom, Security and Justice ten years on. Successes and future challenges under the Stockholm Programme', CEPS, 2010, pages 3-4, <http://www.ceps.eu/book/area-freedom-security-and-justice-ten-years-successes-and-future-challenges-under-stockholm-pro>

66 *Law Society of Scotland, 'The impact of the Lisbon Treaty in Scotland'*, written evidence to the Scottish Parliament's European and External Relations Committee, January 2010, http://www.lawsocot.org.uk/media/29901/3941_eu-sp_inquiry_lisbon_treaty.pdf

67 Andrew Blick, 'Neither in nor out: Coalition policy in the EU Area of Freedom, Security and Justice', *Federal Trust for Education and Research*, January 2012, page 39

68 See *House of Commons, Justice Committee, 'Justice issues in Europe', Seventh Report of Session 2009-10*, 23 March 2010, <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/162/162i.pdf>

69 *House of Commons, Justice Committee, 'Justice issues in Europe'*, page 17

70 Evidence to the House of Commons' Justice Committee's report, 'Justice issues in Europe', E113, January 2010, <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/162/162ii.pdf>

“For instance, if the UK courts were able to refer complex questions to the European Court of Justice regarding the operation of the European arrest warrant, they could receive greater clarification on issues around proportionality.”⁷¹

As ECJ rulings are binding across the entire EU, such a ruling could improve the functioning of European Arrest Warrants across Europe and result in greater protection for civil liberties for UK citizens abroad by introducing greater proportionality that has been lacking so far. However, the case could, of course, go the other way.

2.2.2. The case against ECJ jurisdiction

a) Loss of national control

As noted in Section 1, the effect of accepting the jurisdiction of the ECJ over EU crime and policing measures covered by the 2014 opt-out would give the Court a hugely important role in interpreting legislation and judicial cooperation agreements. The Commission would be able to bring infringement proceedings to the ECJ against a member state where it considers the state to have failed to comply with EU law and domestic courts could make preliminary references to the ECJ for interpretation of a law to assist in a domestic case.

This would see the ECJ given the final say over how these laws are applied in the UK and therefore the power to overrule Parliament and the UK's Supreme Court. If the ECJ interprets EU law in a way in which the UK does not agree with, the UK is bound by it. However, the ECJ is not directly accountable to Parliament or UK voters.

This means that, if a situation evolves that imposes obligations on the UK that it had not foreseen it would have to gain approval from other EU states to overrule the ECJ case. As we have seen in other cases such as the Working Time Directive, gaining approval of other states is time consuming, requires a great deal of political capital and still has no certainty of success. This would be particularly problematic if the ECJ through a ruling imposed a financial cost or unsupportable administrative burden that diverted resources away from UK justice and policing priorities.

b) A potential clash with the UK's common law system

The UK differs from most EU states (and the ECJ) in using a common law system of precedents rather than a civil law system based on the Napoleonic code. It is unclear how ECJ jurisdiction in this area would impact on the UK's continued use of this practice but other areas that may be difficult to reconcile are differing standards of legal aid in EU states, (given the ECJ's ability to take on human rights concepts) and the treatment of witnesses and evidence. Beyond this, the UK has agreed to a Framework Decision on combating racism and xenophobia and a separate agreement on combating corruption in the private sector (2008/913/JHA and 2003/568/JHA). These are of course already obligations in the UK. However giving the ECJ jurisdiction over them could open the door to new interpretations of the definition of a crime with significant potential implications for UK criminal law. This is particularly so given the imprecise wording of these obligations, for instance the obligation that the UK “shall take the necessary measures to ensure that active and passive corruption in the private sector is punishable by effective, proportionate and dissuasive criminal penalties”⁷² could potentially leave the door open to ECJ interpretation.

c) The ECJ's future interpretation of EU crime and justice law is unknown and uncertain

Given that there have been relatively few crime and policing cases brought to the ECJ to date (from the member states that have already accepted its jurisdiction), it is difficult to predict how the ECJ might behave and interpret this area of EU law in future. However, the Court has a history of ruling in favour of “ever closer union”. Given this uncertainty and the Court's natural tendencies, politicians would be taking a gamble should they choose to cede national sovereignty to the ECJ.

⁷¹ House of Commons, Justice Committee, 'Justice issues in Europe', pages 16-17, <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/162/162i.pdf>

⁷² See Article 4(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:192:0054:0054:EN:PDF>

d) The ECJ would have EU human rights legislation at its disposal

Another factor to consider is the EU's Charter of Fundamental Rights, the EU's catalogue of rights that is based largely on the Council of Europe's European Convention on Human Rights. There has been some political confusion in the UK as to whether the UK has an opt-out from the Charter, particularly in regards to social and economic rights. The Labour Government was said to have secured an opt-out from the Charter, or at least a "clarification" that it would not create any new "rights" in the UK.

However, a recent ruling by the ECJ in December 2011 stated unambiguously that the Charter applied to Britain when applying EU law on asylum (the Court steered clear of the thorny issue of whether this applies to social and economic rights, where the UK's protocol on the Charter is less legally certain). The ECJ ruled that the UK could not deport an Afghan asylum seeker to the EU member state designated as responsible for the asylum application under EU law (Greece),⁷³ because there were "substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union."⁷⁴ It should be noted that such references to the Charter can only apply when the UK implements EU law.

This ruling would seem to pave the way for the ECJ to interpret other EU JHA laws, including crime and policing laws, with reference to the Charter. This could have many unforeseen consequences and see it take on a role similar to the European Court of Human Rights. As the Lord Chief of Justice Lord Judge noted, "The development of the European Union, and the extended jurisdiction of the European court in criminal matters, will have a significant impact domestically. Twenty years down the line, where will we be?"⁷⁵

e) EU judges have a record of making unpredictable judgements in other areas of EU law

One of the main risks stemming from the ECJ's extended jurisdiction over EU crime and police laws is the fact that, on a number of occasions, ECJ rulings have radically changed the meaning and scope of EU rules – in various EU policy areas. For example, the SiMAP and Jaeger rulings on working time spent resident on call and compensatory rest have made the EU's Working Time Directive hugely more burdensome for the NHS.⁷⁶ Similarly, the ECJ ruled last year to scrap the insurance industry's derogation from the EU's Gender Directive, which had the effect of preventing the insurance industry from offering different premiums based on gender, even if it can be statistically proven that men and women present different degrees of risk.⁷⁷

2.3. Conclusions

The examples in Section 2.1 highlight that there are clearly pros and cons to the existing body of EU crime and policing law that falls under the block opt-out. From a prosecution and law enforcement perspective, a lot of the EU measures have increased the speed at which people can be brought to justice and the UK often leads in the cooperation within Eurojust and Europol.

Ultimately, however, these considerations must be balanced against the loss of national and democratic control over these laws to the EU institutions, the considerable uncertainty surrounding ECJ case law, and whether similar arrangements to fight crime cannot be achieved outside the EU Treaties. Given the uncertainty involved and that, as EU law currently stands, the decision to accept ECJ jurisdiction is irreversible, this would be a huge leap of faith.

⁷³ The EU's Dublin II Regulation allocates responsibility for processing each asylum-seeker's application to a single member state based on which member state's border the asylum-seeker illegally crossed first, in this case Greece

⁷⁴ See case C-411/10; <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-12/cp110140en.pdf>

⁷⁵ The Judicial Studies Board Lecture 2010, Inner Temple, 17 March 2010

⁷⁶ The British Medical Association has estimated that the effect of the Jaeger ruling alone was tantamount to losing between 4,300 and 9,900 junior doctors by 2009, when the full 48-hour limit for junior doctors came into effect, see *Open Europe*, 'Repatriating EU social policy: The best choice for jobs and growth?', November 2011, page 12, <http://www.openeurope.org.uk/Content/Documents/Pdfs/2011EUsocialpolicy.pdf>

⁷⁷ *Open Europe* press release, 'EU court ruling could cost young women drivers an extra £4,300 and require the UK insurance industry to raise nearly £1 billion more in capital', 28 February 2011, <http://www.openeurope.org.uk/Article/Page/en/LIVE?id=1517>

3. WHAT ARE THE OPTIONS FOR THE UK?

As we set out in Section 1, the initial choice facing the UK is essentially a binary one: opt in to ECJ jurisdiction and Commission enforcement powers over the bulk of EU crime and policing law or opt out of this body of EU law altogether. However, as we set out below, the UK can also seek to get the 'best of both worlds'. At the moment, far more is known about the potential consequences of opting in than is known about what options the UK would have should it decide to opt out. Given the unlikelihood of the UK wanting to cease all cross-border crime and police cooperation with its European partners, it is important to understand the possible options the Government could pursue following a decision to opt out.

The options below are divided into those that are already legislated for under the Lisbon Treaty and those that would require Treaty change and negotiations with other member states.

OPTIONS UNDER THE EXISTING EU TREATIES

3.1. Opt in to ECJ jurisdiction

As we note in Section 1, the body of law to which the 2014 block opt-out applies is reduced every time the UK opts in to a new EU law which either amends, repeals or replaces an existing pre-Lisbon measure. The UK must therefore continually choose whether or not to opt in and accept the enhanced powers of the EU institutions over crime and policing on both a case-by-case basis as well as 'en bloc' in 2014.

3.1.1. Opt in to new legislation that amends, repeals or replaces on a case-by-case basis

The first option would be to opt in to amendments of pre-Lisbon crime and policing laws with the aim of improving them. For example, the Government could choose to opt in to a revised version of the European Arrest Warrant, which included greater safeguards for UK citizens before they could be extradited.

Box 2: Parliamentary scrutiny and oversight should be improved immediately

Under the current arrangements, and despite the newly passed EU Act, which was designed to implement democratic checks on future transfers of powers from the UK to the EU, the Government can opt in to any new JHA law without seeking the approval of Parliament – even if opting in would have the effect of striking one or more laws from the list of measures covered by the 2014 choice.

Open Europe has therefore argued elsewhere that Government decisions to opt in to new JHA legislation should be subject to far greater Parliamentary scrutiny and preferably a Parliamentary vote.⁷⁸ Introducing such safeguards would be a matter entirely for Parliament in Westminster and would not require approval from the EU.

As noted in Section 1, the likelihood is that the Commission will propose new legislation to amend or replace many of the laws that currently fall under the 2014 opt-out before the June 2014 cut-off date. This was the understanding of the Government negotiators who agreed the Lisbon Treaty and the 2014 transitional arrangements. So, the UK will face these case-by-case decisions up to 2014.

The UK's protocol states that if the Government decides not to opt in to an amendment, the existing pre-Lisbon law will continue to apply to the UK until 2014, when it must make the block opt-out decision.⁷⁹

Drawbacks: However, there are two problems with this case-by-case approach. First, once the UK opts in to a new proposal it has no power to block the resulting amendments if it does not agree with the outcome of the negotiations, i.e. the UK could find itself locked into a newly amended European Arrest Warrant that it considers worse than the existing legislation. Alternatively, the UK could request to opt in to an amended European Arrest Warrant once it had already been agreed and adopted by the other member states. However, under this scenario, it would have no formal role in the negotiations on the amendments made to the law.

⁷⁸ The EU Act does provide for a referendum or vote in Parliament for some of the most controversial potential transfers of power, for example, the creation of a European Public Prosecutor. See *Open Europe*, 'The Government's EU referendum lock: Plugging the Justice and Home Affairs leak', December 2010, pages 6-8, <http://www.openeurope.org.uk/Content/documents/Pdfs/referendumlockjha.pdf>

⁷⁹ The other member states can decide that the UK's non-participation makes the law "inoperable", see Section 1

Second, while opting in to an amended European Arrest Warrant could potentially improve the existing problems with the law, it would automatically bring the legislation under the remit of the ECJ and the European Commission, resulting in uncertainty regarding how the law might develop in the future (see Section 2.2.). If the prospect of bringing the European Arrest Warrant under the jurisdiction of the ECJ is a major concern of principle, then opting in to an amended European Arrest Warrant would make little sense. The additional condition is that the decision to opt in would, as EU law currently stands, be irreversible and mean that the newly amended European Arrest Warrant would no longer be covered by the 2014 block opt-out.

Nevertheless, as we saw in Section 1, the UK has already chosen to opt in to measures amending pre-Lisbon crime and policing laws on at least six occasions, with the effect of bringing them under the ECJ's jurisdiction.

3.1.2. Opt in en bloc in June 2014

The Government could decide that it wishes to accept the ECJ's full jurisdiction over all the remaining unamended crime and policing laws. This is the default option as defined under the existing Treaty arrangements.

If the UK fails to notify the other EU member states by 1 June 2014 that it does not wish to accept the powers of the EU institutions over crime and policing, then these powers will apply automatically from 1 December 2014.

Drawbacks: As things currently stand, accepting the jurisdiction of the ECJ and the Commission's enforcement powers would mean losing national control over 130 laws (there are proposals currently subject to negotiation that would reduce this number to 124). The ECJ has a record of interpreting EU law in unexpected ways and, once it has done so, reversing these decisions is hugely difficult and requires the support of a majority of other EU member states. Given that, as EU law currently stands, the decision to accept ECJ jurisdiction is irreversible, giving away control over these laws would be a one-off gamble that has the potential to backfire on the UK's police and criminal justice system.

Opting in en bloc in 2014 would mean accepting the unamended laws as they stand. For example, if the European Arrest Warrant remains untouched prior to the 2014 opt-out, and the UK opts in en bloc, it will have to accept its current flaws regarding the protection of civil liberties. The opt-in would be irreversible, so if the European Arrest Warrant's flaws are left unresolved the UK will be forced to accept them indefinitely, having passed on its option to opt out.

So, while a decision to opt out in 2014 offers flexibility and is reversible (because the UK can opt back in later), a decision to opt in en bloc is not. The risks of opting in are therefore far higher. If it opts out, there are other instruments in place for the UK to fall back on (e.g. Council of Europe conventions), providing it some flexibility and time to assess how it might cooperate with EU member states in future. In this sense, there is no need to 'rush in'.

The options below highlight that the current Treaty rules offer the UK the flexibility of opting back in to individual EU laws where it feels they are essential to fighting crime and ensuring the UK's justice system remains effective. Alternatively, the UK could seek to renegotiate the current Treaty arrangements.

3.2. Invoke the block opt-out

The alternative option under the EU Treaties is to invoke the block opt-out. If the UK chooses to opt out, the other EU member state governments would decide, by QMV, the transitional arrangements for the UK's exit and could also adopt a decision determining that the UK "bear the direct financial consequences" of seceding from these laws. The UK would not have a vote in either decision.⁸⁰

As we note in Section 1, the UK would not be entering completely uncharted territory should it decide to opt out. Existing Council of Europe conventions remain in force and would kick in absent the EU measures that currently apply to the UK. The UK could decide to stay out of all the EU crime and policing

⁸⁰ See Article 10(4) of Protocol No 36 'On Transitional Provisions', annexed to the EU Treaties

laws it has opted out of or it could seek to opt back in to all or certain measures under the options described below.

Drawbacks: While there are many Council of Europe conventions in place to deal with crime and policing cooperation, outside the EU legal framework, not all of these have been ratified by either the UK or all of the other member states (Council of Europe conventions on extradition, transfer of prisoners, mutual assistance, suppression of terrorism and the proceeds of crime have been ratified by all the member states, including the UK. See Annex 3 for a full list of international conventions that exist and who is party to them).⁸¹ For areas where there are no Council of Europe conventions to fall back on, the UK might want to sign the conventions it has yet to agree to and encourage other member states to ratify them.⁸²

In addition, the UK would cease to apply certain pieces of EU crime and policing law that UK law enforcement practitioners consider valuable to fighting crime and bringing people to justice. For example, the police have expressed strongly that the European Arrest Warrant is a “simpler, faster and more certain process of getting a person before your courts” than the Council of Europe convention on extradition that was previously relied on. As Professor Peers notes:

“...the main practical impact of the block opt out would be to end the UK’s access to policing databases and other forms of exchange of police information, and to terminate the UK’s involvement in some aspects of criminal law judicial cooperation, in particular the European Arrest Warrant and the transfer of prisoners. In most, but not all, of the areas addressed by EU criminal law (but not police cooperation), there is in any event another international law framework in place. However, in all cases, that framework is less detailed than the EU rules, and in many cases the UK and/or some other Member States do not participate in the relevant rules.”⁸³

As we set out below, should the UK decide that the fall back option of the Council of Europe conventions is insufficient to effectively combat cross-border crime, it would retain at least three further options it could pursue. One is already legislated for in the EU Treaties, while the two other options we set out below would require an EU Treaty change and negotiations with other EU member states.

Box 3: When should the UK announce its decision on whether to opt out?

Were the UK to decide to use the block opt-out, there are a number of reasons why it would be beneficial to announce it sooner rather than later:

- It would give UK diplomats the maximum amount of time to secure the best possible new deal. The history of current negotiations demonstrates that demands tabled at the last minute are less likely to gain a sympathetic hearing from other EU states. Announcing it early would allow time to explain the UK’s reasoning and more chance of gaining allies willing to accept the UK’s cooperation without the ECJ;⁸⁴
- There will be European Parliament elections in June 2014, with the risk of turning the issue into a political football;
- Announcing it early would mean that all amendments to current measures can be negotiated with the understanding that the UK will not be accepting ECJ jurisdiction. There is also likely to be a last minute rush to legislate before the European elections in June 2014.

3.2.1. Opt back in to selected EU measures

Failing a comprehensive renegotiation of the UK’s cooperation on EU crime and policing, the current rules do already allow the UK to apply to opt back in to individual measures on a case-by-case basis following a block opt-out in 2014. This means that even if the UK chooses to opt out, it could still continue to apply the laws it felt were in its interests. However, such a case-by-case approach to opting back in would be subject to the approval of the EU institutions.⁸⁵

⁸¹ Professor Steve Peers, ‘The mother of all opt-outs? The UK’s possible opt-out from prior third pillar measures in June 2014’, see pages 4-5 and Annex 1

⁸² This could affect the UK’s relations with countries outside the EU that may be party to the relevant conventions

⁸³ Professor Steve Peers, ‘The mother of all opt-outs? The UK’s possible opt-out from prior third pillar measures in June 2014’, page 9

⁸⁴ *Open Europe*, ‘Cameron’s EU veto: Ten lessons that need to be learnt’, December 2011, <http://www.openeurope.org.uk/Content/Documents/Pdfs/10lessons.pdf>

⁸⁵ See the letter from Home Secretary Theresa May in Annex 1, where she notes, “In respect of measures forming part of the Schengen acquis, this would be governed by the Schengen Protocol. The UK would need to make an application under Article 4 of that Protocol and the Council would decide on the request ‘with the unanimity of its members’ and the representative of the UK.” For non-Schengen measures, to the vast majority of the laws concerned, “Article 4 of the Title V Protocol would apply, which is the process for opting in to a measure post adoption and allows for conditions to be set by the Commission”

The UK could announce its intention to opt back in to certain crime and policing measures at the same time that it makes the formal block opt-out decision. The effect, essentially, would be to only opt out of some of them.⁸⁶ This could be a politically convenient approach for the Coalition to take, due to the differences of opinion between the Government parties. A further option would be for the UK to isolate one or a limited number of measures it fundamentally objected to (or where it objected to the ECJ's jurisdiction over them). This could be used to isolate and end the application of just the European Arrest Warrant, for example.⁸⁷

Drawbacks: As above, this approach, whether opting back in to one or more EU crime and policing laws, would entail accepting the full powers of the ECJ and the Commission. In addition, the decision to opt in would be irreversible under current EU law.

UK applications to opt back in are also subject to the approval of the EU institutions, meaning that the UK could, in theory, be refused 're-entry' once it has opted out en bloc. This could happen if, for example, individual opt-ins became entangled in negotiations over other, unrelated areas of EU policy and the UK needed to horse-trade over an opt-in. James Brokenshire, Home Office Minister for Crime and Security, has noted, "We believe that the Commission would attach conditions, for instance they might only allow us to join groups of related measures, some of which we might like and others we might not."⁸⁸

However, on the other hand, the protocol on the block opt-out states that, "the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence."⁸⁹

OPTIONS REQUIRING EU TREATY CHANGE

3.2.2. Negotiate a Danish-style opt-out on crime and policing circumventing the ECJ

Unlike the UK, which is faced with an all or nothing, in or out choice when it comes to much of EU crime and policing law (if it wants to avoid the jurisdiction of the ECJ), Denmark secured a rather different opt-out that might serve as a model for the UK, following a 2014 block opt-out.

Denmark has an opt-out from EU JHA matters dating back to 1993. The opt-out was designed as an exemption to 'supranational' cooperation, leaving Denmark free to cooperate on an 'intergovernmental' basis (i.e. where it retained a veto). The underlying premise was that Denmark did not want to cede sovereignty to the EU institutions over such politically sensitive issues but was happy to coordinate in so far as national control was retained.⁹⁰ However, Denmark did sign the Schengen Agreement that abolished border controls and established police and crime cooperation among the signatory countries.

The Lisbon Treaty, which had the effect of making all EU JHA legislation 'supranational' by bringing it under the power of the ECJ and the European Commission, poses a particular challenge to Denmark's future EU JHA cooperation because it is now prevented from opting in to any new EU JHA measures or any measures which would amend a pre-Lisbon law (doing so would take Denmark into the realms of supranational cooperation).⁹¹ In this sense, Denmark's current opt-out is less flexible than the UK's because it is unable to opt in to new EU JHA legislation, even if the Danish government of the day wanted to.⁹²

However, in order to keep the intergovernmental EU laws it already applies, Denmark secured changes in negotiations on the Lisbon Treaty to its protocol on JHA ensuring that it could keep existing pre-Lisbon

⁸⁶ Legally, the UK would have to take a two step approach (opting out of all of the measures first, and then opting back in to the ones it wishes to re-join)

⁸⁷ Professor Steve Peers, 'The mother of all opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014', pages 5-6

⁸⁸ Speaking at Open Europe's event, "How much power should the EU have over Justice and Home Affairs?", 14 September 2011, London

⁸⁹ Opting back in to Schengen measures as opposed to the old 'third pillar' measures could prove more difficult as this requires unanimous approval from national governments

⁹⁰ Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen, 'Straitjacket or sovereignty shield? The Danish opt-out on Justice and Home Affairs and prospects after the Treaty of Lisbon', *Danish Foreign Policy Yearbook 2010*, page 139, http://www.diis.dk/graphics/Publications/Books2010/YB2010/YB2010-Straitjacket-or-sovereignty-shield_WEB.pdf

⁹¹ Denmark could choose to abolish its opt-out but it is constrained by a domestic requirement to have the support of a referendum to do so

⁹² In practice, Denmark has come to arrangements with the European Commission and the other member states to cooperate in some supranational EU laws. For example, in EU asylum law, which became supranational under the Amsterdam Treaty, Denmark has negotiated so-called 'Intergovernmental Parallel Agreements' allowing it to take part in the EU's Dublin Regulation, which allows member states to deport asylum seekers to the member state where they first entered the EU. For further details, see Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen, 'Straitjacket or Sovereignty Shield? The Danish Opt-Out on Justice and Home Affairs and Prospects after the Treaty of Lisbon', pages 142-5

EU crime and policing measures “unchanged” and outside the jurisprudence of the ECJ or the powers of the Commission, irrespective of any later subsequent amendments to legislation (see Article 2 of the ‘Protocol on the position of Denmark’ attached to this report as Annex 4).

When it comes to Schengen though, Denmark continues to cooperate and opt in to new laws (as a signatory of the Schengen Agreement, Denmark and the other Schengen signatories have an interest in allowing it to continue to cooperate in new measures). Article 4 of the Danish protocol allows it to take part in new EU laws that build on the Schengen Agreement, but in the form of an international agreement between Denmark and the other member states of the EU. The key phrase is “this measure will create an obligation under international law” (See Article 4(1) of the ‘Protocol on the position of Denmark’ attached to this report as Annex 4).

This, in combination with the article that exempts it from ECJ jurisdiction, allows Denmark to continue to apply EU law building on the Schengen Agreement but, crucially, outside the remit of the new powers of the EU institutions.

Adapting this Danish arrangement could provide an attractive option for future UK-EU cooperation on crime and policing, outside the jurisdiction of the ECJ. The UK would also want to extend the Danish protocol arrangement beyond Schengen to all EU crime and policing law (this option could, of course, serve as a model for cooperation in all EU JHA law, including asylum, immigration and civil law).

A new UK protocol would require two things: a new article could be added to the UK’s JHA protocol exempting it from ECJ jurisdiction in police and criminal law. This would have to be combined with an article allowing the UK to apply crime and policing measures in its national law and create an international obligation with the other EU member states.

Creating an international obligation would allow the UK not only to apply EU measures in its domestic law but would also allow it to enter into reciprocal arrangements with the other member states. This is the basis for the more sophisticated EU crime and policing measures, such as the European Arrest Warrant or various shared databases. But the UK would be able to do so outside the normal EU framework and therefore the enforcement powers of the EU institutions.

Such an arrangement would require EU Treaty change and therefore the agreement of the other member states. However, the existence of a precedent (although a variant) in the Treaties could strengthen the UK’s case for a similar arrangement.

Drawbacks: This arrangement would mean that the UK would have no formal role in negotiating new proposals or amendments to existing proposals. It could express its views informally and indicate whether it was more or less likely to implement an EU law if certain conditions are met (the UK already does this in cases where it opts in to EU JHA laws once they have already been agreed rather than during negotiations). However, where the content of the particular legislation is the problem (e.g. the European Arrest Warrant) the UK might find that its influence is limited on amending the law to make it more acceptable.

As noted in Section 1, the UK has already opted in to several EU crime and policing laws and, as a result, they now fall under the jurisdiction of the ECJ (e.g. European Investigation Order if/when it comes into force). The UK would either have to continue to accept ECJ jurisdiction over these laws or negotiate a way of opting out of them and applying them in the manner described above.

3.2.3. A reversible opt-in

The most radical option the UK could pursue would be to negotiate a completely reversible opt-in. Opting in would continue to work as it does under the current system – and the UK would be bound by the jurisdiction of the ECJ and the powers of the Commission both over pre-Lisbon laws after December 2014 and under any new crime and policing laws agreed going forward. Unlike the option above, the UK would be able to opt in to negotiations on new proposals and therefore vote on the final outcome of legislation.

However, if the UK felt that a crime and policing law was developing in a way in which it did not agree with, for example as a result of ECJ case law, the UK would have the option of reversing its decision to opt in and therefore exit the law in question. This would be the ultimate guarantee that the UK could retain national control over its cooperation in EU crime and policing (as with the option above, this could be applied to all JHA cooperation, including asylum, immigration and civil law).

Drawbacks: This arrangement would allow the UK unprecedented freedom to pick and choose its level of cooperation with the EU on crime and policing. It would give the UK the option of voting on new proposals as they are being negotiated but also give it the option to opt out of a law it did not subsequently agree with. Although this might be the 'ideal' situation, the political opposition to it among other member states is likely to be substantial and therefore their agreement to it unlikely. In contrast to the above option, which would also depend on the political agreement of the other member states, there is no precedent for such an arrangement in the EU and unpicking the Treaties in such a way would face substantial obstacles.

ANNEX I: LETTER FROM THERESA MAY, HOME SECRETARY, TO THE CHAIR OF THE HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE⁹³

The operation of Article 10(4) of the Protocol on Transitional Provisions Protocol 36 of the Treaty of Lisbon

I am pleased to provide at Annex A the list of measures that the Government considers to be subject to this notification. The Transitional Protocol to the Lisbon Treaty allows the UK to “opt out” by 1 June 2014 of “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 Lisbon”. This means that all “acts” with a legal base in the former Title VI of the Treaty of the European Union (police and judicial cooperation in criminal matters) are caught by this transitional provision. This includes straightforward Third Pillar’ measures as well as ‘Third Pillar’ measures classified as ‘Schengen building’.

The list at annex A is split between old ‘Third Pillar’ measures and ‘Schengen’ measures due to the slightly different procedures that would apply to any application to rejoin measures should the decision be taken to reject European Court of Justice jurisdiction resulting in the UK opting out of all measures within the scope of the decision. In respect of measures forming part of the Schengen acquis, this would be governed by the Schengen Protocol. The UK would need to make an application under Article 4 of that Protocol and the Council would decide on the request “with the unanimity of its members” and the representative of the UK. For non-Schengen measures, Article 4 of the Title V Protocol would apply, which is the process for opting in to a measure post adoption and allows for conditions to be set by the Commission.

Also included as part of the annex is a list of measures which the UK has opted in to which repeal and replace, or amend, measures which would otherwise have been within the scope of the notification.

The lists are subject to change as measures are repealed and replaced or amended and we will keep you updated with any changes that are made. In particular I am aware that the Commission is planning proposals for next year involving revisions to Europol, Ceu (EU police college), Eurojust, the framework for cooperation on confiscation of assets and on criminal measures to tackle counterfeiting the Euro, all of which fall on the current list. Those proposals will of course trigger separate opt-in decisions. We will continue to engage with the Council Secretariat to ensure that the list is comprehensive.

I am committed to ensuring that Parliament is able to properly scrutinise the decision that flows from Article 10(4) of Protocol 36 of the Treaty of Lisbon as part of our undertaking to hold a debate and vote in both Houses on this decision. We look forward to engaging with Parliament fully in this matter.

21 December 2011

⁹³ House of Commons, European Scrutiny Committee, Ministerial correspondence, Session 2010-12, <http://www.parliament.uk/documents/commons-committees/european-scrutiny/Ministerial-Correspondence-2010-12.pdf>

ANNEX II: EU CRIME AND POLICING LAWS FALLING UNDER THE 2014 BLOCK OPT-OUT

The first three columns below are a reproduction of “Annex A” referred to in Home Secretary Theresa May’s letter to the House of Commons Scrutiny Committee above. We have struck through those pre-Lisbon measures that are no longer covered by the 2014 block opt-out because they have been amended, repealed or replaced by new post-Lisbon legislation. Further details are provided in the right hand columns.

In the “Notes” column we highlight the amending proposals currently being negotiated and the Commission’s planned proposals to amend laws where a UK decision to opt in would have the effect of removing laws from the list (it is impossible to fully predict the Commission’s plans up to 2014 and there may be more proposals tabled that we are currently unaware of).

In the Government’s table, pre-Lisbon laws amended by subsequent pre-Lisbon laws are counted as separate pieces of legislation (e.g. “Council Framework Decision 2000/383/JHA” and “Council Framework Decision 2001/888/JHA amending Framework Decision 2000/383/JHA” are counted as two separate laws).

‘Third Pillar’ measures

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
1	1995	Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities’ financial interests		
2	1996	Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union		
3	1996	Joint Action 96/610/JHA concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between the Member States of the European Union		
4	1996	Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking		
5	1996	Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combating illicit drug trafficking		
6	1996	Joint Action 96/747/JHA concerning the creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international organized crime, in order to facilitate law enforcement cooperation between the Member States of the European Union		
7	1996	Joint Action 96/750/JHA concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking		
8	1996	Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities’ financial interests		
9	1997	Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union		
10	1997	Joint Action 97/339/JHA of 26 May 1997 with regard to cooperation on law and order and security		
11	1997	Joint Action 97/372/JHA of 9 June 1997 for the refining of targeting criteria, selection methods, etc. and collection of customs and police information		
12	1997	Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities’ financial interests		
13	1997	Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime		

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
14	1997	Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations		
15	1998	Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications		
16	1998	Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters		
17	1998	Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime		
18	1998	Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)		
19	1999	Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees		
20	1999	Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties		
21	1999	Council Decision of 2 December 1999 amending the Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, with regard to the establishment of remuneration, pensions and other financial entitlements in euro		
22	2000	Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents		
23	2000	Council Decision 2000/375/JHA to combat child pornography on the internet		
24	2000	Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro		European Commission could put forward proposals to replace Council Framework Decision 2000/383/JHA in 2012 ⁹⁴
25	2000	Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters	To be amended by the EIO in so far as it deals with obtaining evidence for the use of proceedings in criminal matters. Given that the UK has opted in to the proposal for a EIO, the Council Act of 29 May 2000 will no longer be covered by the 2014 opt-out if the EIO becomes law
26	2000	Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)		
27	2000	Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements between financial intelligence units of the Member States in respect of exchanging information		
28	2001	Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings	Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime ⁹⁵	Council Framework Decision 2001/220/JHA will no longer be covered by the 2014 opt out if it is replaced by the proposed Directive, which the UK has opted in to

94 European Commission, 'Commission Work Programme 2012', 15 November 2011, page 20, http://ec.europa.eu/atwork/programmes/docs/cwp2012_annex_en.pdf

95 The Commission published its proposal in May 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0275:FIN:EN:PDF>

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
29	2001	Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment		
30	2001	Council Decision 2001/419/JHA of 28 May 2001 on the transmission of samples of controlled substances		
31	2001	Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (repealing Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA)		
32	2001	Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters	To be amended in so far as it deals with obtaining evidence for the use of proceedings in criminal matters. Given that the UK has opted in to the proposal for a EIO, the Council Act of 16 October 2001 will no longer be covered by the 2014 opt-out if the EIO becomes law
33	2001	Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting		
34	2001	Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro		European Commission could put forward proposals to replace Council Framework Decision 2000/383/JHA in 2012 ⁹⁶
35	2002	Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime		European Commission proposal for reform of Eurojust's structure planned for 2012 ⁹⁷
36	2002	Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA		
37	2002	Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension		
38	2002	Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams		
39	2002	Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism		
40	2002	Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes		
41	2002	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States		
42	2002	Council Framework Decision 2002/629/JHA on combating trafficking in human beings	Directive 2011/36/EU of the European Parliament and the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA ⁹⁸	
43	2002	Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence		

96 European Commission, 'Commission Work Programme 2012', page 20

97 European Commission, 'Commission Work Programme 2012', page 19

98 The full text of the Directive is available here, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
44	2002	Council Decision 2002/956/JHA of 22 November 2002 setting up a European Network for the Protection of Public Figures		
45	2002	Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism		
46	2003	Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States		
47	2003	Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector		
48	2003	Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters	Council Framework Decision 2003/577/JHA will no longer be covered by the 2014 opt-out if it is replaced by the proposed European Investigation Order, which the UK has opted in to
49	2003	Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union		
50	2003	Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2		
51	2003	Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes		
52	2003	Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography	Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA ⁹⁹	
53	2004	Council Decision 2004/731/EC of 26 July 2004 concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information Agreement between Bosnia and Herzegovina and the European Union on security procedures for the exchange of classified information		
54	2004	Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking		European Commission proposal to replace Council Framework Decision 2004/757/JHA planned for 2012 ¹⁰⁰
55	2004	Council Decision of 2004/843/CFSP 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information		
56	2004	Council Decision 2004/919/EC of 22 December 2004 on tackling vehicle crime with cross-border implications		
57	2005	Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol		

99 The full text of the Directive is available here, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF>

100 European Commission, 'Commission Work Programme 2012', page 18

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
58	2005	Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property		
59	2005	Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties		
60	2005	Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems	Proposal for a Directive of the European Parliament and of the Council on attacks against information systems, repealing Council Framework Decision 2005/222/JHA ¹⁰¹	Council Framework Decision 2005/222/JHA will no longer be covered by the 2014 opt-out if it is repealed by the proposed Directive, which the UK has opted in to
61	2005	Council Decision 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information (Council Decision 2005/296/CFSP/JHA of 24 January 2005)		
62	2005	Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances		European Commission proposal to amend Council Decision 2005/387/JHA planned for 2012 ¹⁰²
63	2005	Council Decision 2005/481/CFSP of 13 June 2005 concerning the conclusion of the Agreement between the European Union and Ukraine on the security procedures for the exchange of classified information		
64	2005	Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro-counterfeiting		
65	2006	Council Decision 2006/560/JHA of 24 July 2006 amending Decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States		
66	2005	Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences		
67	2005	Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA		
68	2006	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders		
69	2006	Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union		
70	2006	Council Decision 2006/317/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the European Union and the Republic of Croatia on security procedures for the exchange of classified information		
71	2006	Council Decision 2006/467/CFSP of 21 November 2005 concerning the conclusion of the Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information		

¹⁰¹ The Commission published its proposal in September 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0517:FIN:EN:PDF>

¹⁰² *European Commission*, 'Commission Work Programme 2012', page 18

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
72	2007	Council Decision 2007/412/JHA of 12 June 2007 amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension		
73	2007	Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime		
74	2007	Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security		
75	2007	Council Decision 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information		
76	2008	Council Decision 2008/206/JHA of 3 March 2008 defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions		
77	2008	Council Decision 2008/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime		European Commission proposal for reform of Eurojust's structure planned for 2012 ¹⁰³
78	2008	Council Decision 2008/568/CFSP of 24 June 2005 concerning the conclusion of the Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information		
79	2008	Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime		
80	2008	Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime		
81	2008	Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations		
82	2008	Council Decision 2008/651/CFSP/JHA of 30 June 2008 on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union sourced passenger name record (PNR) data by air carriers to the Australian Customs Service	Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service	New Agreement signed on 29 September 2011 ¹⁰⁴
83	2008	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings		
84	2008	Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime		
85	2008	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union		
86	2008	Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law		

¹⁰³ European Commission, 'Commission Work Programme 2012', page 19

¹⁰⁴ The Council of Ministers adopted the Decision on the conclusion of the agreement (i.e. ratified it) in December 2011, see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/126932.pdf, page 35

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
87	2008	Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism		
88	2008	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions		
89	2008	Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network		
90	2008	Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters		
91	2008	Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters	Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters	Council Framework Decision 2008/978/JHA will no longer be covered by the 2014 opt-out if it is replaced by the proposed European Investigation Order, which the UK has opted in to
92	2009	Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial		
93	2009	Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States		
94	2009	Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA		
95	2009	Council Decision 2009/371/JHA establishing the European Police Office (Europol)		European Commission proposal for amendment planned for 2012 ¹⁰⁵
96	2009	Council Decision 2009/796/JHA of 4 June 2009 amending Decision 2002/956/JHA setting up a European Network for the Protection of Public Figures		
97	2009	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention		
98	2009	Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA		
99	2009	Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities		
100	2009	Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes		European Commission to put forward proposals to simplify and clarify legislation in 2012 ¹⁰⁶

¹⁰⁵ European Commission, 'Commission Work Programme 2012', page 13

¹⁰⁶ European Commission, 'Commission Work Programme 2012', page 21

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
101	2009	Agreement on mutual legal assistance between the European Union and the United States of America		
102	2009	Agreement on extradition between the European Union and the United States of America		
103	2009	Council Decision 2009/933/CFSP of 30 November 2009 on the extension, on behalf of the European Union, of the territorial scope of the Agreement on extradition between the European Union and the United States of America		
104	2009	Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information		
105	2009	Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements		
106	2009	Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files		
107	2009	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters		
108	2009	Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information		
109	2009	Council Decision 2010/348/EC of 17 November 2009 concerning the conclusion of the Agreement between the Government of the Russian Federation and the European Union on the protection of classified information		

'Schengen' measures

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
110	1985	<p>Convention implementing the Schengen Agreement of 1985</p> <p>Article 27(2) and (3)</p> <p>Article 39 to the extent that that this provision has not been replaced by Council Framework Decision 2006/960/JHA.</p> <p>Article 40</p> <p>Article 42 and 43 (to the extent that they relate to article 40)</p> <p>Article 44</p> <p>Article 46</p> <p>Article 47 (except (2)(c) and (4))</p> <p>Article 48</p> <p>Article 49(b) – (f)</p> <p>Article 51</p> <p>Article 54</p> <p>Article 55</p> <p>Article 56</p> <p>Article 57</p> <p>Article 58</p> <p>Article 71</p> <p>Article 72</p> <p>Article 126</p> <p>Article 127</p> <p>Article 128</p> <p>Article 129</p> <p>Article 130</p> <p>Final Act - Declaration N° 3 (concerning article 71(2))</p>		
111		<p>Accession Protocols: (amended in conformity with article 1 (b) of CD 2000/365/EC and CD 2004/926/EC article 1)</p>		

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
		Italy: Articles 2, 4 + common declaration on articles 2 and 3 to the extent it relates to article 2, Spain: Articles 2, 4 and Final Act, Part III, declaration 2 Portugal: Articles 2, 4, 5 and 6 Greece: Articles 2, 3, 4, 5 and Final Act, Part III, declaration 2 Denmark: Articles 2, , 4 and 6 and Final Act Part III joint declaration 3 Finland: Articles 2, 4 and 5 and Final Act, Part II joint declaration 3 Sweden: Articles 2, 4 and 5 + Final Act, Part II joint declaration 3		
112	1993	SCH/Com-ex (93) 14 on improving practical judicial cooperation for combating drug trafficking		
113	1996	SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition)		
114	1998	SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen		
115	1998	SCH/Com-ex (98)52 on the Handbook on cross-border police cooperation		
116	1999	SCH/Com-ex (99)6 on the Schengen acquis relating to telecommunications		
117	1999	SCH/Com-ex (99)7 rev 2 on liaison officers		
118	1999	SCH/Com-ex (99)8 rev 2 on general principles governing the payment of informers		
119	1999	SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences)		
120	2000	Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65((2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.		
121	2003	Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders		
122	2004	Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen Acquis		
123	2005	Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism		
124	2006	Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism		
125	2006	Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism		
126	2006	Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism		
127	2007	Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar)		

No.	Year of adoption	Title	Amended, repealed or replaced by	Notes
128	2007	Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)		
129	2008	Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation Schengen Information System (SIS II)		
130	2008	Commission Decision 2008/334/JHA of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II)		
131	2008	Council Decision 2008/328/EC of 18 April 2008 amending the Decision of the Executive Committee set up by the 1990 Schengen Convention, amending the Financial Regulation on the costs of installing and operating the technical support function for the Schengen Information System (C.SIS)		
132	2008	Council Decision 2008/149/EC of 28 January 2008 on the conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis		
133	2009	Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)		

ANNEX III: INTERNATIONAL CRIME AND POLICING AGREEMENTS OUTSIDE EU LAW

Below are listed the alternative international legal frameworks that the UK might be able to fall back on should it decide to opt-out of the majority of EU crime and policing law under the block opt-out in 2014.

This annex is a reproduction of Annex 1 in Professor Steve Peers' paper 'The Mother opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014'.¹⁰⁷

Council of Europe

a) 'Fall back' treaties which all Member States (and Croatia) are party to:

ETS 24 Extradition Convention (1957)

ETS 30 Convention on mutual assistance (1959)

ETS 90 Convention on the suppression of terrorism (1977)

ETS 112 Convention on the transfer of sentenced persons (1983)

ETS 141 Convention on the proceeds of crime, et al (1990)

b) 'Fall back' treaties which UK and some Member States are party to:

ETS 98 Second Protocol, Extradition Convention (1978)

Ratified by: 23 Member States: all except France, Greece, Ireland and Luxembourg; also ratified by Croatia

Signed by: 1 Member State: Greece

ETS 99 First Protocol to Convention on mutual assistance (1978)

Ratified by: 26 Member States: all except Malta; also ratified by Croatia

Signed by: Malta

ETS 167 Protocol to the Convention on the transfer of sentenced persons (1997)

Ratified by: 22 Member States: all except Italy, Portugal, Spain, Slovenia and Slovakia; also in force in Croatia

Signed by: 3 Member States: Italy, Slovenia and Portugal

ETS 173 Criminal law Convention on corruption (1999)

Ratified by: 24 Member States: all except Austria, Germany and Italy; also in force in Croatia

Signed by: 3 Member States: Austria, Germany and Italy

ETS 182 Second Protocol to Convention on mutual assistance (2001)

Ratified by: 14 Member States: Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Ireland, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia and UK; Croatia has also ratified

Signed by: 8 Member States: Finland, France, Hungary, Greece, Germany, Malta, Slovenia and Sweden

c) 'Fall back' treaties which UK is not party to, but which some Member States are party to:

ETS 51 Convention on the supervision of conditionally released or conditionally sentenced offenders (1964)

Ratified by: 12 Member States: Austria, Belgium, Czech Republic, Estonia, France, Italy, Luxembourg, Netherlands, Portugal, Slovakia, Slovenia and Sweden; Croatia has also ratified

Signed by: 4 Member States: Denmark, Germany, Greece and Malta

ETS 52 Convention on road traffic offences (1964)

Ratified by: 4 Member States: Cyprus, Denmark, France and Sweden; not ratified by Croatia

Signed by: 8 Member States: Austria, Belgium, Germany, Greece, Italy, Luxembourg, Netherlands and Portugal

¹⁰⁷ Professor Steve Peers, 'The mother of all opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014', see Annex 1

ETS 70 Convention on the international validity of criminal judgments (1970)

Ratified by: 12 Member States: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Latvia, Lithuania, Netherlands, Romania, Spain and Sweden; Croatia has not ratified

Signed by: 6 Member States: Germany, Greece, Italy, Luxembourg, Portugal and Slovenia

ETS 73 Convention on transfer of criminal proceedings (1972)

Ratified by: 13 Member States: Austria, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Latvia, Lithuania, Netherlands, Romania, Slovakia, Spain and Sweden

Signed by: 7 Member States: Belgium, Greece, Hungary, Italy, Luxembourg, Portugal and Slovenia; also signed by Croatia

ETS 86 First Protocol, Extradition Convention (1975)

Ratified by: 19 Member States: all except Austria, Finland, France, Germany, Greece, Ireland, Italy and United Kingdom; also ratified by Croatia

Signed by: 1 Member State: Greece

ETS 189 Protocol to Cyber crime Convention (2003)

Ratified by: 11 Member States: Cyprus, Denmark, Finland, France, Germany, Latvia, Lithuania, Netherlands, Portugal, Romania and Slovenia; Croatia has also ratified

Signed by: 9 Member States: Austria, Belgium, Estonia, Greece, Italy, Luxembourg, Malta, Poland and Sweden

ETS 190 Protocol to Convention on the suppression of terrorism (2003) (not yet in force)

Ratified by: 16 Member States: Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovakia and Slovenia; Croatia has also ratified

Signed by: 11 Member States: all other Member States

CETS 196 Convention on the prevention of terrorism (2005)

Ratified by: 17 Member States: Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Netherlands, Poland, Slovenia, Slovakia, Sweden and Spain; Croatia has also ratified

Signed by: 9 Member States: all others except Czech Republic

CETS 198 Convention on the proceeds of crime, et al (2005)

Ratified by: 12 Member States: Belgium, Cyprus, Hungary, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain; Croatia has also ratified

Signed by: 8 Member States: Austria, Bulgaria, Finland, France, Greece, Italy, Luxembourg and Sweden

ETS 209 Third Protocol, Extradition Convention (2010) (not yet in force)

Ratified by: no Member States

Signed by: 12 Member States: Austria, Bulgaria, Cyprus, Finland, Germany, Latvia, Luxembourg, Netherlands, Poland, Portugal, Slovenia and Sweden; also signed by Croatia

Note: a Fourth Protocol to the Extradition Convention is likely to be opened for signature in 2012

United Nations

Convention on transnational organized crime

Ratified by: 26 Member States: all except Czech Republic; also ratified by Croatia

Signed by: 2 Member States: Czech Republic

Protocol on smuggling, Convention on transnational organized crime

Ratified by: 23 Member States: all except the Czech Republic, Ireland and Luxembourg;

Croatia has also ratified

Signed by: 4 Member States: Czech Republic, Ireland and Luxembourg

Convention on corruption

Ratified by: 25 Member States: all except Czech Republic and Germany; also ratified by Croatia

Signed by: 2 Member States: Czech Republic and Germany

OECD

Anti bribery (corruption) convention (1997)

Ratified by: 26 Member States: all except Romania; not ratified by Croatia

ANNEX IV: DENMARK'S JHA PROTOCOL

PROTOCOL (No 22) ON THE POSITION OF DENMARK

THE HIGH CONTRACTING PARTIES,

RECALLING the Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 12 December 1992, concerning certain problems raised by Denmark on the Treaty on European Union,

HAVING NOTED the position of Denmark with regard to Citizenship, Economic and Monetary Union, Defence Policy and Justice and Home Affairs as laid down in the Edinburgh Decision,

CONSCIOUS of the fact that a continuation under the Treaties of the legal regime originating in the Edinburgh decision will significantly limit Denmark's participation in important areas of cooperation of the Union, and that it would be in the best interest of the Union to ensure the integrity of the *acquis* in the area of freedom, security and justice,

WISHING therefore to establish a legal framework that will provide an option for Denmark to participate in the adoption of measures proposed on the basis of Title V of Part Three of the Treaty on the Functioning of the European Union and welcoming the intention of Denmark to avail itself of this option when possible in accordance with its constitutional requirements,

NOTING that Denmark will not prevent the other Member States from further developing their cooperation with respect to measures not binding on Denmark,

BEARING IN MIND Article 3 of the Protocol on the Schengen *acquis* integrated into the framework of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union:

PART I

Article 1

Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the decisions of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.

Article 2

None of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice of the European Union interpreting any such provision or measure or any measure amended or amendable pursuant to that Title shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of Denmark; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Denmark. In particular, acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark unchanged.

Article 2a

Article 2 of this Protocol shall also apply in respect of those rules laid down on the basis of Article 16 of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of that Treaty.

Article 3

Denmark shall bear no financial consequences of measures referred to in Article 1, other than administrative costs entailed for the institutions.

Article 4

1. Denmark shall decide within a period of six months after the Council has decided on a proposal or initiative to build upon the Schengen acquis covered by this Part, whether it will implement this measure in its national law. If it decides to do so, this measure will create an obligation under international law between Denmark and the other Member States bound by the measure.

2. If Denmark decides not to implement a measure of the Council as referred to in paragraph 1, the Member States bound by that measure and Denmark will consider appropriate measures to be taken.

PART II

Article 5

With regard to measures adopted by the Council pursuant to Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union.

The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.

PART III

Article 6

Articles 1, 2 and 3 shall not apply to measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas.

PART IV

Article 7

At any time Denmark may, in accordance with its constitutional requirements, inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the European Union.

Article 8

1. At any time and without prejudice to Article 7, Denmark may, in accordance with its constitutional requirements, notify the other Member States that, with effect from the first day of the month following the notification, Part I shall consist of the provisions in the Annex. In that case Articles 5 to 8 shall be renumbered in consequence.

2. Six months after the date on which the notification referred to in paragraph 1 takes effect all Schengen acquis and measures adopted to build upon this acquis, which until then have been binding on Denmark as obligations under international law, shall be binding upon Denmark as Union law.

ANNEX

Article

Subject to Article 3, Denmark shall not take part in the adoption by the Council of measures proposed pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 238(3) of the Treaty on the Functioning of the European Union.

Article 2

Pursuant to Article 1 and subject to Articles 3, 4 and 8, none of the provisions in Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreements concluded by the Union pursuant to that Title, no decision of the Court of Justice of the European Union interpreting any such provision or measure shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of Denmark; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Denmark.

Article 3

1. Denmark may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon Denmark shall be entitled to do so.

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with Denmark taking part, the Council may adopt that measure referred to in paragraph 1 in accordance with Article 1 without the participation of Denmark. In that case Article 2 applies.

Article 4

Denmark may at any time after the adoption of a measure pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article 331(1) of that Treaty shall apply *mutatis mutandis*.

Article 5

1. The provisions of this Protocol apply for Denmark also to measures proposed or adopted pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union amending an existing measure by which it is bound.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the nonparticipation of Denmark in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge it to make a notification under Article 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council.

If, at the expiry of that period of two months from the Council's determination, Denmark has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless it has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating or having participated in the adoption of the amending measure. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that Denmark shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.

4. This Article shall be without prejudice to Article 4.

Article 6

1. Notification pursuant to Article 4 shall be submitted no later than six months after the final adoption of a measure if this measure builds upon the Schengen acquis.

If Denmark does not submit a notification in accordance with Articles 3 or 4 regarding a measure building upon the Schengen acquis, the Member States bound by that measure and Denmark will consider appropriate measures to be taken.

2. A notification pursuant to Article 3 with respect to a measure building upon the Schengen acquis shall be deemed irrevocably to be a notification pursuant to Article 3 with respect to any further proposal or initiative aiming to build upon that measure to the extent that such proposal or initiative builds upon the Schengen acquis.

Article 7

Denmark shall not be bound by the rules laid down on the basis of Article 16 of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of that Treaty where Denmark is not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 16.

Article 8

Where, in cases referred to in this Part, Denmark is bound by a measure adopted by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, the relevant provisions of the Treaties shall apply to Denmark in relation to that measure.

Article 9

Where Denmark is not bound by a measure adopted pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, it shall bear no financial consequences of that measure other than administrative costs entailed for the institutions unless the Council, with all its Members acting unanimously after consulting the European Parliament, decides otherwise.

About Open Europe

Open Europe is an independent think tank, with offices in London and Brussels, set up by leading UK business people to contribute positive new thinking to the debate about the future direction of the European Union.

While we are committed to European co-operation, we believe that the EU has reached a critical moment in its development. Globalisation, enlargement, successive No votes in EU referenda and the eurozone crisis have discredited the notion of 'ever closer union' espoused by successive generations of political and bureaucratic elites.

Faced with weak economic growth, rising global competition, insecurity and a looming demographic crisis, there is now an urgent need to find a new model for European cooperation, more in tune with modern economic realities and the preferences of citizens. We believe Europe has the potential to rise to these challenges and thrive as a vibrant economic region in the 21st century. Our vision is of a slimmed-down, outward-looking EU, which:

- facilitates and encourages free trade, internally and globally;
- is democratic, transparent and accountable to citizens;
- doesn't interfere in areas better – or equally well – handled locally or nationally; regulates far less but far better;
- is flexible enough to let powers flow back from the EU to its member states, and to let countries integrate with each other to different degrees.

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