

January 2013

Britain's 2014 justice opt-out

Why it bodes ill for
Cameron's
EU strategy

By Hugo Brady

Britain's 2014 justice opt-out:

Why it bodes ill for Cameron's EU strategy

By Hugo Brady

- ★ Britain has informed the rest of the EU that it is likely to pull out of most European crime and policing co-operation by 2014. This 'block opt-out' from EU criminal justice policy is allowed for under the Lisbon treaty.
- ★ UK policy-makers want to remain part of specific elements of EU police and justice co-operation that are important for Britain's security while disregarding the rest. However, the European Commission and other member-states may not co-operate in this 'cherry-picking' exercise.
- ★ Eurosceptics argue that the price for Britain of opting out from most EU criminal justice policy would be negligible. But they have made critical errors of analysis. These cast into doubt not only the move itself but the overall Conservative strategy to repatriate powers from Brussels to Westminster.

Britain's Home Secretary, Theresa May, dismayed her EU counterparts in October 2012 when she announced that the UK is "minded" to leave most forms of European police and justice co-operation. The Lisbon treaty states that in 2014 the UK must accept the authority of the European Court of Justice (ECJ) over 130 existing agreements covering EU police and judicial co-operation – or opt out of all of them. Although the British government will take the final decision, members of parliament will also get a say on the matter in 2013 as it has important implications for the country's wider relationship with the EU.

Partly because of the parliamentary vote, most political observers in the UK see the 'block opt-out' as inevitable. Prime Minister David Cameron needs to appease a thoroughly eurosceptic Conservative party.¹ And his government's European policy is focused on limiting the UK's 'exposure' to EU integration and on repatriating powers from Brussels. Cameron has since reiterated this stance publicly, including in a major speech on Britain's relationship with the rest of Europe in January 2013.²

Whitehall officials are also in the early stages of a 'balance of competences' review, a government audit of Britain's EU membership, which is set to report in stages to the

Conservative-Liberal Democrat coalition government, concluding in the autumn of 2014. The review is seen as an important step in the Conservative strategy to identify other policy areas – for example, social policy – that could serve as the basis for a future renegotiation of Britain's membership of the EU.

The debate over the block opt-out and the conduct of the competence review are separate from each other. But if the government uses the opt-out, this would be the first ever transfer of sovereignty back to Britain from the EU. Hence it is a test case for any future attempt at repatriating powers from Brussels.

1: See Hugo Brady, 'Cameron's European 'own goal': Leaving EU police and justice co-operation', CER policy brief, October 2012.

2: David Cameron, 'EU speech at Bloomberg', January 23rd 2013.

An overview of the block opt-out decision

Britain's option for a block opt-out from most EU crime and policing policy was negotiated as part of the Lisbon treaty in 2007. EU co-operation in these areas is based on approximately 130 'justice and home affairs' (JHA) agreements. Most of these are currently inter-governmental 'framework decisions' and cover how police, prosecutors and courts across the EU should co-operate to investigate crime, organise extraditions, share criminal records and exchange evidence. However, the Lisbon treaty allows the ECJ to treat such decisions in the same manner as single market regulation from December 2014 onwards. This means that, for the first time, the European Commission will be able to take to court those countries which fail to implement police and justice decisions made collectively by EU interior and justice ministries. And judges in the ECJ can ensure that these decisions are evenly applied throughout the EU by fining those countries which do not comply and handing down legal advice to national courts.

Alone among the larger EU members, Britain uses 'common law' to hear criminal cases, a type of legal system where the defence and prosecution argue out criminal cases before a neutral judge and jury. EU countries have previously accepted that common law jurisdictions – principally those in Britain and Ireland – are distinct in nature from the legal systems in the rest of Europe. Hence the Lisbon treaty allows these two countries to opt in to any new EU law governing cross-border police or judicial co-operation on a case-by-case basis.

This concession still leaves open the question as to what impact the large body of framework decisions, already in place before the Lisbon treaty, will have on the UK and Ireland once they become enforceable by the ECJ after 2014. This is the reason that Britain sought an additional insurance policy for itself during the 2007 treaty negotiation: the option to leave all EU criminal justice measures agreed prior to the Lisbon reforms before they become binding EU legislation. Ireland, Cyprus and Malta – the other EU countries which use common law to a greater or lesser extent – did not press for this option but rather accepted the ECJ's new role without reservation. Now the UK government must inform other member-states what it wishes to do before June 1st 2014, six months before ECJ jurisdiction is formally extended to police and judicial co-operation.

The block opt-out only covers those EU police and criminal justice agreements concluded before 2010. Britain will remain party to JHA legislation agreed since then and can continue to opt in to new measures on a case by case basis. For example, in July 2010, the UK opted in to the European investigation order (EIO), a highly ambitious piece of EU legislation aimed at changing how cross-border police investigations are conducted. This will not be affected by the 2014 decision.

The reaction to the block opt-out

Theresa May's October announcement has caused widespread frustration in Brussels and in national capitals. This matters because, although Britain has the legal right to use the block opt-out, it needs the goodwill of other EU countries and the European Commission if it is to be allowed to opt back into certain elements of police and judicial co-operation afterwards. Although the Commission and other EU countries can decide otherwise, there is no guarantee that the UK will have any further access to – amongst other things – the European arrest warrant (EAW), if the opt-out is exercised. The latter has greatly simplified the transfer of criminal suspects between EU member-states since 2003 and is the single most important piece of European legislation in the JHA policy field.³

Many national and European officials are hostile to the idea that, after triggering the block opt-out, Britain would

re-join a few forms of co-operation like the arrest warrant and the exchange of criminal records across borders between national justice systems. Police in the UK say that they need access to both of these in order to do their jobs effectively, given that citizens of other member-states have the right to reside in Britain under EU single market rules. They also cite 11 other forms of EU law enforcement co-operation that must be maintained after the block opt-out. These include UK membership of Europol, the EU's police office, and Eurojust, its unit of national prosecutors, as well as legislation allowing EU countries to set up 'joint investigation teams'. The latter greatly reduces the amount of red tape involved in fighting crime across borders.⁴

The trouble for Britain is that the political context has completely changed since 2007. Its use of the opt-out is now seen by other member-states as a precursor to

3: The arrest warrant technically abolished international extradition between EU countries altogether, replacing it with a new system where member-states are expected to 'surrender' suspects to each other.

4: Evidence given by the Association of Chief Police Officers, 'UK's 2014 opt-out decision ('Protocol 36') written evidence', UK House of Lords, December 13th 2012.

a broader attempt to re-negotiate its EU membership, rather than an act of understandable prudence in a highly sensitive area. Senior officials say that the opt-out is “the elephant in the room” at JHA Council meetings of EU interior and justice ministers. British officials are already finding it harder to influence new policing and crime legislation under discussion.

The 2014 opt-out is likely to be remembered as an act of diplomatic self-harm by the UK. Britain’s fellow member-states are united in disbelief that a large and important

member-state would choose to leave a policy field where it has long been an important player. Officials in Brussels and other national capitals are only beginning to puzzle out the practical consequences of such a move, although most regard it as reckless and foolish. The block opt-out should be studied carefully by both Cameron’s Europe advisers and the UK Cabinet Office, which is leading the competence review. It clearly illuminates some of the problems inherent in the government’s policy of ‘repatriation’ and suggests five key lessons for British politicians and policy-makers in dealing with EU matters:

1. Make your case clearly, early and in positive terms

British ministers have failed to give their EU counterparts good reasons why the UK needs to use the block opt-out. They have not yet been able to articulate the precise risks posed by the extension of ECJ jurisdiction in 2014 for the English system of jury trial, habeas corpus, the right of silence and the presumption of innocence. Variations of these exist in the criminal justice system of every EU member-state. Lectures on the history of British liberty, or talk of Magna Carta, are likely to prompt irritation on the part of other EU interior and justice ministries, which all have stories to tell about the uniqueness of their own legal systems.

Many EU and national officials have unsurprisingly interpreted May’s recent announcement that the UK government is seriously considering to use the opt-out to mean that it will happen. Authorities in Spain, for example, were crestfallen by May’s statement. Its judges have worked closely with Britain over the last decade on the extradition of a plethora of British ‘super-criminals’ from its territory. Spanish officials now worry that the Conservatives wish a return to the bad old days – prior to the creation of the EAW – when, for example, Britain’s judiciary refused to extradite the former Chilean dictator Augusto Pinochet despite repeated requests from Madrid.

The reality is that the UK has not yet formally decided to use the block opt-out and there is still time for the government to reverse its intention to do so. There must first be a debate within both chambers of the UK parliament in 2013, where the practicality of leaving key forms of European police co-operation will be closely examined and argued over. For example, the House of Lords has already gathered a large amount of expert evidence from the UK’s regional governments, police, and the legal profession, among others, for its own inquiry into the matter. Taken together, the evidence points to an emphatic rejection of the opt-out.

Even the Conservative-Liberal Democrat government itself has yet to take a position on the issue and may not

be able to do so in the final analysis. As the leader of the Liberal Democrats and Deputy Prime Minister, Nick Clegg, told a Chatham House audience in November 2012: “I want to be absolutely clear: a final decision has not been taken, and I will only agree to doing that if I am 100 per cent satisfied we can opt back in to the measures needed to protect British citizens, and if I am convinced we are not creating waste and duplication.”

“The Conservatives committed to limiting the powers of the ECJ over Britain’s courts in their 2009 election manifesto.”

Few expert observers know whether Britain’s concerns over its common law system are real, an imagined legal exceptionalism or a mere negotiating tactic. In 2007, Britain’s partners simply gave the UK the benefit of the doubt in agreeing to the block opt-out as its stock in Brussels was relatively high at the time.⁵ Now, even Cecilia Malmström, the EU’s rather anglophile Home Affairs Commissioner, has warned that Britain cannot leave commonly agreed legislation and afterwards expect automatic access to cherry-picked items of police co-operation.⁶

The Conservatives committed themselves to limiting the powers of the ECJ over Britain’s courts in their 2009 election manifesto. Other EU countries could conceivably have been convinced of the merit of Britain withdrawing from some EU rules governing policing and criminal justice – while remaining in others – had the government taken care to cultivate allies among member-states well-disposed to the country. This might have decoupled the issue from the subsequent deterioration of UK-EU relations in the wake of the eurozone crisis. Britain’s negotiators could have more credibly used the argument that the block opt-out was in fact a necessary concession to convince UK MPs to ratify the Lisbon treaty in 2008. Furthermore, the Home Secretary should have stated early on that, whatever her view of EU

5: During the Lisbon treaty negotiations, a group of countries led by Austria formed a so-called ‘Friends of Schengen’ caucus to oppose the block opt-out, but, in the end, they acquiesced to a special deal for Britain.

6: James Fontanella-Khan and Helen Warrell, ‘Cameron challenged over EU cherry picking’, *Financial Times*, December 9th 2012.

integration generally, Britain would remain engaged in justice and policing co-operation wherever necessary to maintain law and order in the UK.

Even moderate British politicians believe that the opt-out is 'low-hanging fruit'⁷ because it is already in the text of a treaty. But this is wrong-headed and a futile defiance of political realities in Brussels. Worryingly, the block opt-out is just the beginning for some influential British

eurosceptics. Fresh Start, a well-connected parliamentary grouping within the Conservative Party, wants Britain to leave all formal EU police and justice co-operation altogether, whether agreed before the Lisbon treaty or otherwise.⁸ Amongst other things, this would leave the UK outside of Eurojust and Europol, despite Britain's prosecutors making frequent use of the former, and the British police doing the bulk of their police liaison work in Europe through the latter.

2. Interrogate lazy assumptions

Britain's eurosceptics argue that the block opt-out should be used for two main reasons. The first is that eurosceptics consider the expansion of the ECJ's remit to some crime and policing matters as a step on the road to the creation of a federal European criminal justice system. They argue that the block opt-out would protect the common law courts of England and Wales from an ECJ-led harmonisation of the way criminal cases across Europe are conducted. Because Britain would leave a chunk of the relevant legislation, and thus escape the allegedly nefarious attention of EU judges, it would be protected from any such harmonisation.

In addition, British critics of the European arrest warrant argue that it needs to be overhauled because other member-states request the surrender of too many suspects on trivial grounds. They also point to a handful of miscarriages of justice involving British citizens who were surrendered to another EU country as a result of the EAW. In the eurosceptic analysis, Britain should pull out of the warrant altogether, forcing other member-states to engage in wholesale reform. When this process is completed to London's satisfaction, the UK would opt back in.⁹

However, most EU member-states currently consider any major renegotiation of the EAW a 'red line' issue. This was firmly communicated to Theresa May when she sounded out colleagues at an interior ministers' meeting in Brussels in November 2012 and later reiterated by Viviane Reding, the EU's Justice Commissioner. The agreement on the arrest warrant a decade ago was one of the toughest negotiations in the history of European judicial co-operation, even with the impetus provided by the terror attacks of September 11th 2001.

For many, to re-open the legislation now would be analogous to the EU attempting to renegotiate its recently agreed single European patent, eventually concluded after four decades of unsuccessful talks. Another key reason why officials greatly fear such a move is because – due to

the Lisbon reforms – this would now give the European Parliament a say over the arrest warrant. MEPs have tended to submit hundreds of amendments to EU justice legislation since gaining powers in this area in 2009. They would be sorely tempted to do likewise to any tentative deal amending the EAW, however painstakingly this was first eked out between national justice ministries. One senior justice ministry official from an EU country well-disposed to the UK told the author, in all seriousness: "If they re-open the arrest warrant, I will apply for early retirement."

"Most EU member-states currently consider any major re-negotiation of the EAW to be a 'red line' issue."

It is also clear that a strategy of leaving the EAW to force reform would simply neuter London's ability to shape how the European extradition regime develops in future. Some eurosceptics advocate this move knowing full well that it will leave Britain permanently outside EU co-operation in this area. They ignore the fact that miscarriages of justice can happen under any extradition regime and did so in Europe before the introduction of the EAW. They ignore that the EU is, in any case, creating a number of safeguards – such as the right of access to a lawyer and legal aid during hearings – that will apply to anyone arrested as a result of an EAW.

And they ignore the reduction since 2009 in the number of EAWs issued by Poland as a result of pressure brought to bear on the Polish authorities by other EU countries and the European Commission.¹⁰ Poland's prosecutors issue the highest number of EAWs overall in Europe (reaching a peak of 4,844 in 2009 compared with 2,000 for Germany, the largest EU member-state). Along with their Romanian counterparts, the Poles often demand that suspects be handed over from other EU countries for trivial crimes, such as stealing a chicken.¹¹

7: David Rennie, 'The continent or the wide-open sea: Does Britain have a European future?', CER report, May 2012.

8: The Fresh Start project, 'Manifesto for change: A new vision for the UK in Europe', January 31st 2013.

9: Dominic Raab, 'Co-operation not control: The case for Britain retaining democratic control over EU crime and policing policy', Open Europe report, October 2012.

10: See evidence quoting Detective Superintendent Murray Duffin of the London Metropolitan Police, 'UK's 2014 opt-out decision ('Protocol 36') written evidence', UK House of Lords, December 13th 2012.

11: Prosecutors in Poland and Romania are obliged under their constitutions to prosecute all reported crime, no matter how small.

UK critics of the arrest warrant usually cite the case of Andrew Symeou as a typical example of how badly the European arrest warrant system works. Symeou, a British national, was surrendered to Greece from Britain in July 2009 and subsequently spent ten months in a Greek prison in terrible conditions. The Greek authorities later dropped the case against him for lack of evidence. However, Symeou is one of only a very small number of instances in the UK where EAWs were issued to British citizens from another EU member-state on spurious grounds. The overall operation of the EAW in Britain was robustly defended by an independent review of UK's extradition procedures in 2011, led by Sir Scott Baker.

Baker, a retired senior judge, also suggested some ideas for how the warrant could be made to work better. One of these was that governments should make frequent use of the new European supervisory order (ESO) as an alternative to holding potentially innocent suspects in foreign prisons for lengthy periods. This legislation allows the authorities in one EU country to 'outsource' the supervision of a suspect to police in his or her home country until the date of their trial approaches. The ESO was due to be operational in every EU country by December 2012. Regrettably, Britain has not transposed the ESO into its national law yet – along with 13 other JHA measures – because these are also subject to the block opt-out and may be abrogated in 2014 anyway.

Furthermore, there is no hard evidence to back up the claim that ECJ jurisdiction over EU crime and policing agreements would be inherently bad for Britain. Eurosceptics believe this would be the case because most of the UK uses a legal system that is fundamentally different from that of most other member-states. But this does not necessarily follow. Consider the ECJ's track record in non-criminal or civil law, or specifically the cross-border rules regulating private contracts in Europe. Around 70 per cent of all commercial shipping globally is governed by contracts using common law, making this an area where Britain's national interests are clearly in play. Common law legal services are an important British export and the reason why so many large law firms are based in the City of London. Despite the fact that ECJ judges have had jurisdiction over such matters for several decades, they have done nothing to undermine how contracts are concluded in the UK or the ability of the City of London to export its legal expertise.

3. Make sure the alternatives are plausible

Eurosceptics argue that there are viable alternatives if, after exercising its block opt-out, Britain is locked out of

Those in Britain who urge the use of the block opt-out also ignore recent developments at the ECJ, which provide clues about how the Court intends to deal with criminal justice issues after 2014.¹² Important ECJ rulings to the Italian courts in 2011 and 2012 clarify that the existence of minimum European standards for judicial co-operation should not undermine existing national procedures for hearing criminal cases.¹³ Such rulings should be considered along with the fact that under the Lisbon treaty, the EU may not undermine the fundamental aspects of any national criminal justice system.¹⁴ In addition, the expansion of its remit to include police and justice issues in 2014 will not transform the ECJ into a higher criminal court for ordinary plaintiffs to turn to after national appeals are exhausted. This is what happens in the case of the European Court of Human Rights in Strasbourg (a non-EU body). The Luxembourg-based ECJ will remain merely a tribunal where judges deliberate on the balance between European and national law. They can do this only after receiving queries on points of European law from judges in national courts and after hearing evidence from governments and the other EU institutions.

“There is no evidence to back up the claim that ECJ jurisdiction would be inherently bad for Britain.”

Ironically, the jurisprudence of the ECJ is one route by which the EAW can be at least partially reformed without first having to re-open the politically contentious legislation. Eleanor Sharpston is one of the ECJ's eight influential advisory judges or 'advocate generals'. In October 2012, Sharpston, a British national, issued an opinion in the so-called Radu case which proposes a new 'proportionality' test for the EAW.¹⁵ Sharpston advised that national courts should be able to strike down "grossly disproportionate" EAWs from other EU countries, if they fail to comply with certain human rights standards such as the right to a fair trial. The Court normally follows the opinions of its advocate generals. If it adopts the Sharpston test in its ruling on the case, the eurosceptic objections against the EAW, and the expansion of the ECJ's jurisdiction, will seem weaker still.

the EAW or other forms of European judicial co-operation. One is that the UK can fall back on the 1957 Convention

12: Nineteen EU countries have voluntarily accepted ECJ jurisdiction over EU crime and policing rules for almost a decade. Hence there is already a body of case law on such issues.

13: See the ECJ's judgements, respectively, in Case C-507/10 X and Case C-79/11 Giovanardi, December 21st 2011 and July 12th 2012.

14: The EU's efforts to improve judicial co-operation must "take into account the differences between the legal traditions and systems of

the member-states". Furthermore, any country is entitled to object to measures which would affect "fundamental aspects of its criminal justice system", Treaty on European Union, Titles V and Article 82 respectively.

15: The case involved the refusal of Romania to surrender a suspected thief subject to an EAW from Germany.

on Extradition, a treaty concluded under the non-EU Council of Europe. The problem with this claim is not just that practitioners found the Council of Europe extradition system to be inefficient and overly-politicised. (The Baker review described its operation as “cumbersome, beset by technicality and blighted by delay”.¹⁶) It is that the terms of the Convention on Extradition were formally abolished between EU member-states under the text of the European arrest warrant itself. Britain would not be able to resurrect it unless each of the other member-states adopted legislation in parallel with the UK’s decision to opt out from the EAW. This means Britain would be entirely reliant on the voluntary co-operation and legislative schedules of 26 other governments.

The latter would have to be convinced to draft, propose and push through their parliaments the necessary emergency legislation, mainly to accommodate the UK. Such an approach would be very difficult to co-ordinate and carry out, even in a benign political environment. This view is confirmed by Jeremy Hill, a former British diplomat who worked on JHA issues in Brussels in the late 1990s. According to Hill, such parallel legislative arrangements were a “nightmare” to make work properly when they were still the norm in European judicial co-operation 15 years ago.¹⁷

Dominic Raab, a backbench Conservative MP, has suggested that the UK could negotiate a multilateral, EU-wide ‘memorandum of understanding’ (MoU) on

extradition with the other member-states. That might avoid the parallel legislation scenario or the spectre of Britain having to negotiate 26 bilateral extradition treaties simultaneously. This type of international agreement is often used by police to formalise co-operation with their counterparts abroad and sometimes does not require ratification through national parliaments.

“Britain would be entirely reliant on the voluntary co-operation and legislative schedules of 26 other governments.”

However, such an agreement would only cover extradition and not the multiple other forms of co-operation tangled up in the block opt-out decision, such as British access to criminal record databases and other law enforcement data like DNA samples. In addition, Britain would still need a lot of time and political goodwill to conclude a multilateral MoU outside of the EU system with other European governments. Given the strength of feeling against Britain in other national interior and justice ministries, such goodwill might be in short supply. In any case, UK-EU MoU that sought co-operation similar to that which Britain already has under the EAW would have to be uniquely ambitious. Any such agreement would be subject to parliamentary approval and judicial scrutiny in at least some of, if not throughout, the Union.

4. Watch your own back yard

Euro-sceptics never mention Scotland when they propose using the block opt-out. Dominic Raab’s 95-page report on the subject makes no mention of the implications for Scotland, or its separate legal system. Yet Scotland has just as much at stake in EU co-operation on crime and policing as many individual member-states given the size of its population and the needs of its police in terms of internationally-related crime. The UN’s Office for Drugs and Crime has estimated that Scotland has the world’s highest number of cocaine users per capita, making it one of the EU’s most lucrative markets for international organised crime.¹⁸ The Scots cannot negotiate for themselves on such matters in Brussels. Yet there was no co-ordination between London and Edinburgh over the block opt-out, or the impact it would have if the British government cannot opt back in to various key instruments, prior to October 2012.¹⁹

Unsurprisingly then, Theresa May’s announcement that Britain may withdraw from the EAW and other forms

of police and judicial co-operation has not gone down well in Scotland. According to one editorial in the *Herald Scotland*: “The last thing Scottish police officers want is a reversal of the trend of growing cross-border co-operation between EU police forces. European arrest warrants have been instrumental in tackling Scottish gangsters residing in Spain who once saw themselves as untouchable.” The Association of Chief Police Officers in Scotland has formally confirmed this view.²⁰

Kenny MacAskill, Scotland’s Justice Minister, openly criticised the block opt-out on the grounds that it could “jeopardise the administration of justice in Scotland”. MacAskill’s Scottish National Party (SNP) is likely to use the issue as a stick with which to beat the Conservatives in the run-up to Scotland’s independence referendum. The SNP could quite easily characterise the move as a nationalistic Westminster unintentionally making Scotland less safe by following an ideological agenda on Europe. The overlap in timing between the decision –

16: Sir Scott Baker, ‘A review of the United Kingdom’s extradition arrangements’, UK Home Office, September 2011.

17: Jeremy Hill, a former UK ambassador to Lithuania and Bulgaria, is also one of the founders of Justice Across Borders, an NGO committed to keeping Britain fully involved in cross-border judicial co-operation within the EU.

18: Lewis Smith, ‘United Nations says Scotland is a global hotspot for cocaine use’, *The Independent*, June 24th 2010.

19: See letter from Kenny MacAskill to Lord Boswell, chairman of the House of Lords EU committee, December 18th 2012.

20: Simon Johnson, ‘UK risks becoming ‘refuge for foreign criminals’, January 14th 2013.

which must be finalised by June 2014 – and the Scottish referendum, expected in the autumn, is unfortunate for those opposed to Scottish independence.

The block opt-out may also tarnish the Conservative Party's one-time image as the traditional party of law and order. Britain's police are opposed to leaving the EAW and many other forms of EU co-operation in this area. Their concerns have yet to be acknowledged as relevant by either eurosceptic backbenchers or the Conservative leadership. Speaking in November 2012, Bill Hughes, a former director-general of the UK's Serious

and Organised Crime Agency, spoke of how EU-led co-operation has improved cross-border crime-fighting beyond recognition over the last decade. "In any fast-moving investigation or operation, there has developed an attitude of 'let's get this to work effectively, quickly and lawfully'. That did not used to be the case, I can assure you ... Relationships between the UK and some of our immediate neighbours used to be dreadful, and much of this was based upon a series of complex legal systems trying to be worked through, with each side accusing the other of dragging their feet or not being helpful enough."²¹

5. Beware of unintended consequences

Even those who negotiated the block opt-out in 2007 are unsure as to what it would mean in practice. Charles Clarke, who was British Home Secretary at the time, said subsequently that he did not then believe the measure necessary, or even desirable.²² The relevant protocol is a unique agreement in the history of EU treaty negotiations and this partly explains the instinctive resistance on the part of other member-states to support Britain in using it. The UK government would need an unlikely amount of luck to secure an alternative form of extradition arrangement with other EU countries in a timely fashion. But even if it did so, there would still be no guarantee that national courts would accept a political wheeze intended to ensure that judicial co-operation continued after the block opt-out was used.

This is not just a case of 'Brit-bashing' in Brussels: it would be true for any country that suddenly decided to abrogate the EAW, whatever its reasons. For example, the *Bundesverfassungsgericht*, Germany's constitutional court, struck down the German law implementing the EAW in 2005, on the grounds that it had been incorrectly drafted. The German government reassured other EU countries that the problem was just a technicality, which would be swiftly remedied. Nonetheless, Spanish judges suspended co-operation with German prosecutors, on

the grounds that extradition relations were no longer reciprocal, until emergency legislation was passed by the *Bundestag*.

“There is no guarantee that national courts would accept a political wheeze intended to ensure that judicial co-operation continues.”

Any negotiation over judicial co-operation following a British block opt-out could therefore become a prime target for judicial bloody-mindedness. And this includes judges at the ECJ itself, who may block new bilateral extradition deals between member-states if these undermine EU law or the arrest warrant regime. Governments cannot force judges to accept the outcome of such negotiations – especially if concluded in the form of a memorandum of understanding – without undermining the independence of the judiciary. To guard against this threat of 'judicial warfare', a legally watertight alternative regime between the UK and the rest of the EU would have to be in force on December 1st 2014. This is the date from which Britain would formally leave the EAW and other legislation on policing and justice.

Why the eurosceptic analysis is flawed

To outsiders, the UK's intention to leave most EU JHA co-operation seems hard to fathom. This is because the idea is being considered with the narrow goal of restoring Britain's 'sovereignty' rather than addressing its pragmatic concerns. Proponents of the block opt-out have failed to make a convincing case as to why the block opt-out should be used. They have built their arguments on the flawed premise that EU co-operation on crime and policing is something that – like European integration in general – was inflicted on a persecuted Britain from outside.

UK eurosceptics have also failed to articulate properly any precise threat to the common law from the formal extension of the ECJ's jurisdiction to criminal justice. They have failed to demonstrate with any certainty that there are plausible alternatives for Britain outside of EU co-operation in this area. And they have mis-read or ignored UK public opinion. Despite a general antipathy to 'Brussels', British voters overwhelmingly support close co-operation with other EU countries in the areas of counter-terrorism, policing and border security, irrespective of

21: William Hughes, speech at 'The future direction of EU Criminal Justice: an open discussion', organised by the Law Society of England and Wales, November 29th 2012, London.

22: See remarks given by Lord Hannay, chairman of the House of Lords EU sub-committee for home affairs, at the Institute of Advanced Legal Studies, December 10th 2012.

party preference.²³ This cannot be achieved without Britain remaining party to the relevant European legislation governing such co-operation.

Over the last decade, the UK has helped to create a new system to govern judicial co-operation in Europe that is immeasurably better than what had existed hitherto. This system has succeeded where others failed because it is based on pooled sovereignty, mutual goodwill and shared responsibility between all 27 EU countries, as well as the incremental development of mutual trust between different legal regimes. Other common law member-states, such as Ireland, which also have habitual concerns about EU-led judicial co-operation, accept this view.

Britain's diplomats were unable to prepare the diplomatic groundwork that would have enabled it to use the opt-out safely. This is because British officials in Brussels must negotiate not only in accordance with the line taken by Theresa May's Home Office, but also with an eye to the as-yet undecided position of the coalition government. (Attempts within the coalition to find a common UK government position on the block opt-out had foundered at the time of writing.) They must then try and guess what sort of deal will pass muster with an unpredictable UK

Parliament. Nonetheless, British eurosceptics will portray any reluctance in Brussels or national capitals to agree to a special dispensation for the UK as the great, clunking fist of European federalism refusing to honour a treaty commitment. The truth was more accurately expressed by ex-SOCA director, Bill Hughes in a speech before the Law Society of England and Wales in November 2012. "The fact that there is an opt out provision was not the issue. It was rather the view being expressed that the UK could withdraw and then 'cherry-pick' its way back in. The view was that this was not the way that an honest broker would behave. I will go further. They thought that this was arrogant and rude."

All the eurosceptics have achieved so far is to weaken Britain's negotiating hand in Brussels. This position will only be undermined further by Theresa May's decision to sell the premises in which CEPOL – the EU's police training college based in Bramshill in south-eastern England – is based. (The agency will now relocate outside Britain and may be merged with Europol in The Hague.) There is already talk in some Brussels quarters that Rob Wainwright, the British head of Europol, should step down given that the UK appears ready to detach itself from EU police co-operation completely.

What Britain should do now

Despite the tough talk, other member-states and the EU's institutions could eventually be persuaded of the merits of tweaking the EAW in a limited way to make it more effective and fair. The European supervisory order and the ECJ's forthcoming ruling in the Radu case (explained on page 5) are promising and important developments. But these could be built upon by including certain safeguards directly in the EAW legislation itself.

Britain is on strong ground in calling for some reform. In the period 2010-11, it received 5,382 EAW requests but made just 221 of other members of the EU.²⁴ The EU's Council of Ministers, Commission and Parliament have all previously acknowledged that the arrest warrant could be improved. For example, a formal evaluation of the warrant's operation by the EU's JHA Council in 2009 recommended that "the issue of proportionality should be addressed as a matter of priority."²⁵ This view was later echoed strongly by Viviane Reding and prominent MEPs.²⁶

One potentially safe way of inserting a proportionality test into the EAW would be to lift an idea, almost word for word, from the proposed European investigation order (EIO). The EIO is intended to complement the arrest warrant by allowing police to have their counterparts in

another EU country investigate a crime on their behalf. Afterwards, suspects, evidence and case files could all be handed over to the requesting country for trial. Should a request to investigate a crime seem trivial or ill-considered, the current draft of the EIO would allow police to ask the country of origin to check again if the offences involved justify a full international investigation. For example, British police could query Romania on whether it really wishes them to initiate a police investigation over the theft of a goose. If the country in question insists, then the investigation will go ahead.

“London can only achieve reform if it remains bound by the same EU legislation as its partners.”

This 'yellow card' for EIO requests has been agreed in principle by both the JHA Council and the European Parliament, meaning it has already passed the most important hurdles within the EU system. The EU could create a similar yellow card procedure for EAW requests without damaging the presumption that, as a norm,

23: 'British attitudes towards the UK's International Priorities', Chatham House-YouGov survey 2012, July 2012.

24: By contrast, Britain only received 114 extradition requests from outside the EU and issued 87 in the same period.

25: Justice and Home Affairs Council, 'The practical application of the

European arrest warrant and corresponding surrender procedures between member-states', final report of the fourth round of mutual evaluations, May 2009.

26: Toby Vogel, 'Reding wants to limit use of European arrest warrant', *European Voice*, April 2011.

suspects will be surrendered to another member-state after a request is made.

But other EU countries and the European Commission will not risk re-opening the EAW at all if they think that Britain is simply trying to turn the clock back on the advances made in judicial co-operation over the last decade. London can only achieve reform by remaining bound by the same EU legislation as its partners. A possible deal would be for the UK government to decide against triggering the opt-out in return for a clear sign from its European partners that they are taking British concerns seriously. Such a sign could take the form of an independent 'Office for the protection of

the common law' (OPCL), to be split between the European Commission's legal service and at the ECJ in Luxembourg.

The model for such an office would be the European data protection supervisor (EDPS), which issues formal opinions on draft EU legislation that could potentially imperil the personal privacy of ordinary citizens. Similarly, an OPCL would have to be consulted on draft legislation from the EU's justice commissioner and ECJ rulings, where these may undermine fundamental aspects of the criminal justice system in any of the member-states that use common law, namely Britain, Cyprus, Ireland and Malta.

Conclusion

The coalition government's handling of the JHA opt-out to date does not bode well for the Conservatives' policy of repatriating powers from Brussels to Westminster. After all, the UK's attempt to take back powers in crime and policing, an area where it has the legal right to do so, must now run the gauntlet of dissent at home, ill-will abroad and the near-certainty of unintended consequences in future. What prospect then is there to repatriate powers in areas such as social policy, which would first be subject to a fresh treaty negotiation?

To achieve this, the UK government would have to demonstrate an ability to build coalitions within the EU, deploy credible arguments against opponents, and

be prepared to face down eurosceptics at home where this is in the country's long-term best interests. Finally, British ministers would need plausible alternatives should negotiations in Brussels fail. None of these are on display in the case of the block opt-out from EU police and justice policy. Indeed the looming debacle over this issue is likely to reveal the self-defeating nature of the UK government's current European strategy.

Hugo Brady

Senior research fellow, Centre for European Reform.

January 2013

For more information on this topic, and others, visit our website:
www.cer.org.uk