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By Hugo Brady

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★ Britain must choose by June 2014 either to accept a role for the European Court of Justice in crime and policing or leave most EU co-operation in this area. Such co-operation includes the European arrest warrant, which facilitates extradition.

★ Eurosceptics view this 'block opt-out' as a rare opportunity to repatriate powers back to Westminster from Brussels. But they ignore the considerable risks to the UK's security and diplomatic influence that opting out would entail.

★ The Conservative-Liberal Democrat coalition should forgo the block opt-out. The UK can better defend its interests by other means, including closer links between its 'common travel area' (shared with Ireland) and the EU's Schengen area of passport-free travel.

Britain has an important decision to make which has wide-ranging implications for the security of its citizens and the country's influence in the EU. Should the UK leave most EU co-operation on cross-border policing and justice, a policy area where Britain is currently a central player? Its coalition government is free to do so, thanks to a special deal tacked on to the EU's Lisbon treaty in 2007.[1] The UK parliament is due to vote on the question before June 2014. Given the strength of anti-EU feeling in British politics, MPs are likely to say 'yay'.

This policy brief tries to dissect this complex matter, which would baffle even a seasoned observer of EU matters. First, it gives a background to the Lisbon treaty's impact on European co-operation on crime and policing, including why Britain sought and won a 'block opt-out'. Then, the brief discusses which policies the opt-out covers, how it would work and how the issue is perceived by the relevant players in the UK's political and policy-making establishments. Next, it argues that Britain's significant success in shaping EU internal security policy to date would be undermined if the block opt-out were used. A fuller analysis of the likely political fall-out from the block opt-out follows along with proposed alternatives for promoting UK interests on immigration, crime and policing in the EU.

The block opt-out: The what and the why

The option for a block opt-out from EU crime and policing policy is a legacy of British negotiations on the Lisbon treaty in 2007. Before the treaty's entry into force in 2009, EU co-operation in these areas was based on roughly 130 'justice and home affairs' (JHA) agreements.[2] Most of these are so-called framework decisions which cover how police, prosecutors and courts across the EU should co-operate together to investigate crime, organise extraditions, share criminal records and exchange evidence. Originally, such agreements had a unique legal status closer to international treaties than binding European legislation. The Commission could not enforce them by taking non-compliant countries to the European Court of Justice (ECJ). And local courts could not ask ECJ

1: Protocol 36 on transitional measures, Consolidated version of the Treaty on European Union, 2009.

2: For a full list of these with explanations of each agreement, see: 'Opting out of EU criminal law: What is actually involved', Alicia Hinarejos and others, CELS working paper, University of Cambridge, September 2012.

judges to define the precise meaning of EU crime and policing measures – a regular practice in other areas of European law – unless specifically allowed to do so by their national governments.[3] As a result, EU countries apply some JHA rules properly but not others.

The Lisbon treaty sought to address this problem through a series of reforms. Under its terms, decisions by ministers in the EU's JHA Council on crime and policing will be enforced like single market rules from 2014 onwards. The Commission will be able to pursue – or, in EU terminology, 'infract' – those countries which fail to comply. And judges in the ECJ can ensure that JHA rules are evenly applied throughout the EU by fining laggards and handing down legal advice in the form of 'preliminary rulings' on such matters to national courts. Uniquely, the European Commission does not enjoy a 'sole right of initiative' in EU crime and policing policy: prior to 2009 any government could propose its own pet projects in this area, leading to confusion in policy-making. Lisbon changed the rules so that governments can bring forward their own legislative ideas only if jointly proposed by a quarter of them.

Britain is often a curmudgeon in European negotiations. But it is normally quite good at implementing EU deals once they are concluded. And UK officials agree that JHA policy did not always work well prior to the Lisbon reforms. Yet the country is still seriously considering the block opt-out. Why? Before 2009, EU crime and policing agreements were made by unanimity only. But in addition to empowering the Commission and ECJ to enforce such rules, the Lisbon treaty abolished national vetoes for criminal justice legislation. National discretion not to allow local courts to request legally binding ECJ advice on EU crime and policing legislation will also end from 2014.[4] These changes mean that the emphasis of JHA policy is shifting from 'co-operation' to a limited form of 'integration', by enabling the EU to adopt and enforce more ambitious laws in this area.

Of the larger EU members, only Britain uses common law, where the defence and prosecution argue out criminal cases before a neutral judge and jury. The criminal law of most other EU countries is based on a mix of Roman law and the Napoleonic legal code, amongst other influences such as national constitutions. Any country in which these are among the main sources of criminal law – rather than custom or precedent, as in the common law tradition – is a 'civil law' jurisdiction. (Separately, and confusingly, the term 'civil law' also generally applies to legal proceedings where crime is not at issue but rather family, property or commercial disputes.)

Some key contrasts between these two types of criminal justice system include civil law countries use of 'investigating magistrates' (judges who also serve as the prosecution); their lower emphasis on trial by jury; and their greater focus on written statements than courtroom questioning. Another contrast is that common law judges often shape the meaning of the law through interpretative rulings whereas their civil law counterparts are meant only to apply the law as written down in statute.[5] The Lisbon reforms could potentially bring the differences between these two long-established legal traditions into conflict if EU criminal justice rules – or how they are interpreted by judges – radically change how criminal cases are heard throughout the Union.

All legal systems in Europe are distinct to some degree: Nordic-style civil law has not been influenced by the Napoleonic code, unlike that of the Mediterranean countries, for example. But EU countries recognise that Britain's common law jurisdictions – Scotland's legal system is partly based on civil law – are so fundamentally different as to warrant special treatment. Hence the Lisbon treaty allows the UK, along with Ireland (another common law country) to opt in to any new EU law affecting criminal justice on a case-by-case basis. But 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 legally binding after 2014.

> *"JHA policy has shifted from being about 'co-operation' to a limited form of 'integration'."*

During the Lisbon negotiations, governments assumed that most of these older criminal justice accords would be 'repealed and replaced' with standard EU regulations and directives over a five-year period. This was deemed necessary because, whilst such agreements could not be enforced, EU governments had a tendency to view them as political window-dressing rather than real law to be implemented to the letter. One example is a 2008 framework decision which laid down minimum standards for combating racism and xenophobia. Britain considers such decisions loosely worded and fears their potential impact on its justice system if expansively interpreted by EU judges. Accordingly, the then Labour government negotiated an additional insurance policy for Britain during the 2007 treaty negotiations: the option to leave all EU criminal justice measures agreed prior to the Lisbon reforms, before the shift to integration begins in earnest in 2014.

3: Under the Nice treaty, governments could voluntarily accept ECJ jurisdiction affecting crime and policing agreements: only eight chose not to do this, including the UK, Ireland and Denmark.

4: However, national vetoes remain – and ECJ jurisdiction does not apply – for any issue affecting the domestic conduct of the police, their organisation or operations. The treaty also states that 'national security' is solely a matter for the member-states.

5: The European Court of Justice operates more like a common law court in this sense since its judges have the power to shape EU law through their legal analysis.

If most of the pre-Lisbon JHA canon had been renegotiated as intended, the question of the block opt-out would be redundant today. The UK would have had a chance to opt out of or choose to participate in each of the overhauled framework decisions individually. It would have argued for various caveats to be inserted into the new texts that would help satisfy its concerns over criminal justice harmonisation. But only a few of these agreements have been re-negotiated since 2009, such as existing EU measures against human trafficking and cyber-crime. EU interior and justice ministries have focused more on new legislation to tackle security, justice and migration priorities. Hence most JHA laws agreed before Lisbon will become the law of the land in their original form from December 2014 onwards.

Britain's concern is hardly trivial or neurotic.[6] The issue cuts to the bone of national sovereignty: criminal law defines the fundamental power relationship between the citizen and the state. Over time – the thinking in Whitehall goes – the ECJ could undermine Britain's common law traditions in criminal justice, knowingly or otherwise, in favour of the civil law models that the great majority of its judges know best. One – admittedly unlikely – scenario is that a future ECJ ruling dealing with racism and xenophobia might undermine British traditions on freedom of speech, for example. If the UK chooses not to use the opt-out, it will have to accept the ECJ's new jurisdiction fully, as well as the risks that go with it, like any other EU member. Otherwise the coalition government must inform other member-states before June 1st 2014, six months before ECJ jurisdiction is formally extended to crime and policing.

A 'no-brainer' for Britain?

David Cameron, Britain's prime minister, leads the most eurosceptic Conservative party ever to sit in government in the UK. The Conservatives were elected in 2010 on a mandate to repatriate powers from Brussels, including to "limit the European Court of Justice's jurisdiction over criminal law to its pre-Lisbon level…ensuring that only British authorities can instigate criminal investigations in Britain".[7] This position conflicts sharply with the stance of the Liberal Democrats, the Conservatives' coalition partners, which is discussed later.

Conservatives in the UK are arguably more hostile to the Luxembourg-based ECJ than to any other EU institution, and prize Britain's common law traditions more than any other element of national identity. (Tory distrust of international courts also extends to the European Court of Human Rights in Strasbourg.) In October 2011, over 80 Conservative MPs staged a parliamentary revolt of unprecedented size in an attempt to force the government to hold a referendum on Britain's EU membership. Consequently, the Conservative leadership offered the fig leaf that MPs in parliament – rather than the executive acting alone – would get a vote on whether the block opt-out from EU crime and policing rules should be used. As if to make their future voting intentions clear, 102 Tory MPs voiced their support for the opt-out in an open letter in early 2012, arguing that closer co-operation with EU partners on security should not come at the cost of a loss of democratic control from Westminster to Brussels.[8]

The nuances of the block opt-out decision itself are unusually complex and likely to get lost in the forthcoming parliamentary debate. First, the move does not cover EU laws on asylum, immigration and civil (meaning private or commercial) law. The ECJ already has jurisdiction over these areas and the EU legislation which the UK has opted into will continue to apply to it as before. That will surely disappoint those Conservatives whose distaste for the EU is tied to the issue of immigration.

> *"UK Conservatives are arguably more hostile to the Luxembourg-based ECJ than to any other EU institution."*

Second, Britain would not leave EU co-operation on crime and policing altogether: the block opt-out only covers those JHA agreements in force before December 2009. The UK will still be able to opt in as normal to any crime and policing legislation proposed after that date. Indeed, Britain's current government has done so for almost all JHA laws proposed since Lisbon entered into force and these already come under the sway of the ECJ. For example, in 2010, the newly-elected Conservative-Liberal Democrat coalition opted to participate in the so-called European Investigation Order (EIO). When implemented, this ambitious new EU measure will allow the authorities in one member-state to mandate police and prosecutors in another to initiate a criminal investigation on their behalf. Negotiations over the EIO have proved tortuous but are expected to conclude in 2012.[9]

Third, as previously noted, the EU is slowly overhauling the pre-Lisbon JHA regime anyway. When a framework decision is 'repealed and replaced', or converted into an EU directive or regulation, then the legislation in question is automatically covered by the ECJ's jurisdiction. So far, EU member-states have only converted about ten out of approximately 130 framework decisions. Similarly, the Commission will in 2013 propose new regulations to

6: Others, not least Germany's constitutional court, also worry about the dilemmas for national sovereignty, human rights and democratic legitimacy posed by more powers for the EU in the field of internal security.

7: David Cameron quoted in Charles Grant with others, 'Cameron's Europe: Can Britain's Conservatives achieve their EU objectives?', CER report, December 2009.

8: 'Repatriate powers on crime and policing, say Conservative MPs', *The Daily Telegraph*, February 17th 2012.

9: Catherine Heard, 'The UK's right to opt out of EU crime and policing laws from 2014', *Fair Trials International*, July 2012.

replace the old legal arrangements that govern Europol – the EU's police office – and Eurojust, an agency tasked with co-ordinating the prosecution of cross-border crime.

Once the UK opts in to these or any law that replaces a framework decision, they are removed from the list of agreements which apply to the block opt-out. This is true even if the draft regulation or directive in question is still not formally finalised by December 2014. The further along this process is by June 2014, the lower the stakes for Britain in triggering the opt-out. Importantly, this means that the British police are unlikely to be excluded from Europol, where much of the UK's international policing efforts are currently focused, so long as the Commission gets the draft legislation out in time for the UK to opt in.

Last, Britain can still apply to opt back in to individual crime and policing laws even after using the block opt-out. The government hopes to secure access to co-operation and data valued by Britain's police while limiting the country's exposure to future ECJ rulings. This is crucial because some of the pre-Lisbon JHA agreements, which will not be replaced before the 2014 deadline, matter greatly to British crime-fighting efforts. These include the European arrest warrant (EAW) for extradition between EU members: the "jewel in the crown of JHA co-operation", according to UK officials.

The EAW represents the greatest single encroachment on EU countries' sovereignty in criminal justice. (Interior ministers only signed up to it while under immense political pressure to advance EU internal security co-operation after the terrorist attacks of September 11th 2001.) Under the warrant, judges in one EU country must approve the extradition of a suspect to another, except in very carefully delimited circumstances. This innovation has reduced extradition times between most European countries to an average of 48 days or less since 2004 when the EAW entered into force. Previously, extraditions of criminal suspects took months or years and often failed to happen at all. British authorities have been able to prosecute hundreds of serious criminals using the EAW who would otherwise have gone unpunished.

Under the terms of the block opt-out, Britain must have the approval of the European Commission to opt back in to the EAW and any other EU crime and policing arrangements. In the case of co-operation which relates specifically to the Schengen area of passport-free travel, the approval of participating governments is also necessary. Britain and Ireland are not in Schengen since they maintain their own border controls and operate an alternative 'common travel area' with each other. But both countries do participate in some elements of the Schengen agreement. For example, British and Irish police are entitled to access the Schengen Information System, a shared database of wanted persons and stolen property. And the UK is a regular participant in joint police surveillance operations organised under Schengen rules.

These myriad qualifications make the option of triggering the block opt-out all the more politically attractive for Cameron. What seems like a radical repatriation of powers would not be as serious a break with Brussels as it first appears. And the move could help to please the powerful eurosceptic lobby within the Conservative Party. Unlike social policy or financial regulation – two areas where the Conservatives are unlikely to wrest powers back from Brussels – the block opt-out is a done deal. It has already been agreed to and ratified by other EU countries as part of the Lisbon treaty. Furthermore, Cameron's pollsters have told him that confrontations with 'Europe' play well with voters, however ham-fisted, as with his decision to block a new EU treaty in December 2011.

"These myriad qualifications make the option of triggering the block opt-out all the more politically attractive."

Given that the Conservatives can also count on some support from eurosceptic MPs amongst the opposition parties, there seems to be a lot to gain, and little to risk, by invoking the block opt-out. The Conservatives have 305 MPs in the Commons; the Liberal Democrats, their coalition partners, have 57 seats; and the opposition Labour Party has 254. It is arithmetically possible that the pro-European Liberal Democrats could join forces with Labour and a handful of independents in order to achieve the majority needed to defeat the block opt-out. But a divisive row over this one issue could precipitate the collapse of the government altogether by exposing the coalition's fundamental differences over European policy.

Interest in the minutiae of the EU is traditionally low in Westminster. Hence British MPs are greatly reliant on external analyses to shape their thinking on the block opt-out. Open Europe is a think-tank and campaign group that currently enjoys a central role in the UK's European debate. Funded by private donations, some of them also big Conservative Party donors from the world of business, the think-tank and lobby group has significant influence in the British press.[10] In a paper published in January 2012, Open Europe argued that a failure to trigger the opt-out would be "a gamble that could backfire on the UK's justice system", as the court "has a record of interpreting EU laws in a way in which national governments do not expect or agree with".[11]

According to Open Europe, Britain could choose – after opting out *en masse* – either not to opt back into any JHA laws; to opt into selected ones of particular importance;

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

11: Stephen Booth and others, 'An unavoidable choice: More or less EU control over policing and criminal law', Open Europe, January 2012.

or to go one better and negotiate an entirely new British arrangement on immigration, crime and policing with other EU countries. The latter option would put the UK in a similar position to Denmark, which has a special protocol that automatically excludes it from any JHA co-operation where the Commission and ECJ have enforcement powers.

The report concludes that even if Britain chose to stay completely aloof, or if the Commission refused to let it opt back in to certain legislation, the government would still have the option of falling back on the Council of Europe, a democracy and human rights watchdog that pre-dates the EU. A number of Council of Europe agreements cover extradition as well as multiple forms of 'mutual legal assistance' between sovereign states: these date from the 1950s, are independent of the EU and still in force. The so-called Fresh Start project, an intellectual sounding board for Conservative eurosceptics, has also published proposals on the block opt-out as part of a 'green paper' on Britain's EU membership. It argues that the Council of Europe system could be supplemented at need by bilateral agreements between the UK and key countries. The merit of each of these options for Britain is discussed in detail later.

A "self-defeating" gesture?

Not everyone in the UK is eager to trigger the block opt-out. British civil servants acknowledge the change of political wind in Westminster and are obedient to their political masters. If the opt-out is to be used, they want the decision made soon rather than waiting until the deadline in 2014. This would give them time to build support amongst other member-states and the European Commission for Britain to opt back in immediately to a package of around 50 EU crime and policing measures that are clearly important to the UK's security. An early decision would also steer the issue well clear of European parliamentary elections in June 2014, an event that usually sees a spike in eurosceptic feeling in the UK.

Britain's Home Office has completed an internal government review on which EU crime and policing arrangements are important for maintaining the country's internal security. (This should not be confused with the overall 'competence review' of Britain's EU membership, ordered for 2014 by William Hague, the foreign secretary.) The value-added of EU anti-crime measures – like Europol and joint investigation teams – is greater when they are used together as a suite of crime-fighting tools. European arrest warrants are often issued via the Schengen Information System, for example. Hence it can be assumed that any official government wish-list would include the EAW, Schengen police co-operation arrangements, EU agreements on the transfer of prisoners between member-states, cross-border co-operation between judiciaries during criminal investigations and access to police databases in other countries.

Senior British police officers fret about how the arrest warrant and various forms of EU-sanctioned police co-operation are getting caught up in Britain's furious European debate. They fear that the block opt-out could impair their ability to deal with modern security challenges facing the UK. During a 2010 enquiry into judicial co-operation in the EU, a senior prosecutor with the Crown Prosecution Service told the House of Commons that – excluding domestic violence – some 80 per cent of homicides in London had an international connection.[12] And, according to the Home Office, over 7,000 organised crime groups were active in Britain in 2011.

> *"Police often find it difficult to co-ordinate investigations with their counterparts in another country."*

Criminals have greater freedom of action along with everyone else in today's EU, an area of free movement that stretches from John O' Groats in Scotland to the 'green line' that divides the island of Cyprus; from Faro in Portugal to Narvi on Estonia's eastern frontier with Russia.[13] The 27 member-states of the EU have more than 200 police forces, 30 separate legal jurisdictions, and different judicial and policing traditions, a situation that criminals are only too happy to exploit. When it comes to investigating and prosecuting crimes committed in more than one country, law-enforcement authorities face a range of obstacles, legal as well as practical. Police often find it difficult to co-ordinate investigations with their counterparts in another country, or to ask for their help in gathering evidence or intercepting communications.

Britain's police chiefs and security services have their own frustrations and reservations about working within EU structures. But they acknowledge too that the Union is the only body with the legal and political clout to ensure minimum standards of justice across the continent, steer the private sector in areas like transport security and spur police and prosecutors to tackle international crime together through bodies like Europol and Eurojust. British officers often compare the speedy extradition of Hussein Osman from Italy in 2005 under a European arrest warrant, with the situation that prevailed in the 1990s when France and Germany would not extradite their

12: Evidence given by Mike Kennedy, 'Justice issues in Europe', House of Commons Justice Committee, 5th January 2010.

13: EU citizens do not need residence or work permits to travel to or live in each others' countries, subject to some initial restrictions for new member-states. This right is often referred to simply as 'free movement'.

own nationals to other EU countries. (Osman was later convicted for his part in the terrorist bombing attacks on London in July 2005.)

The London Metropolitan police also points to 'Operation Golf', an international police investigation conducted through Europol with assistance from France, Spain and Romania. Since 2009, the operation has dismantled several child trafficking gangs active in London which forced hundreds of children trafficked from Romania to steal and engage in benefit fraud. The operation is partly financed by the EU and is reliant on pre-2009 JHA agreements that allow Britain's police to establish 'joint investigation teams' with their European counterparts (see box below).

British police have used the same EU crime-fighting tools to hunt down and bring to justice paedophiles in the Netherlands, drug-dealers in Spain, cyber-criminals from Denmark and other malefactors over the course of hundreds of cross-border police investigations over the last decade. In August 2012, several former police chiefs and a former head of Britain's MI5 internal security service signed a letter warning the coalition government that opting out *en masse* from such co-operation would be "entirely self-defeating".[14]

The Liberal Democrats, the Conservatives' junior coalition partner, would also prefer not to use the block opt-out. In the party's 2010 election manifesto, Liberal leader Nick Clegg pledged to keep Britain fully engaged in EU policies on crime and policing, a clear reference to the block opt-out decision. The Liberal Democrats worry that using the opt-out could hinder practical co-operation against international organised crime and harm Britain's overall influence in the EU.

The block opt-out could also meet resistance from the House of Lords, the upper chamber of the UK parliament. The unelected House of Lords works differently to the Commons. There are 213 Conservative 'peers'; 226 Labour and 90 Liberal Democrats. But the House is not solely divided up along party lines. Besides those peers who profess a formal party allegiance, there are also 177 so-called crossbench peers who vote according to their personal convictions without outside direction.

> *"The Liberal Democrats, the Conservatives' junior coalition partner, would prefer not to use the block opt-out."*

Furthermore, the tone and style of debate over European matters in the Lords is different to that of the Commons. Hardly any British MP under 50 would describe themselves as 'pro-European'. But pro-Europeans still hold significant clout in the upper chamber where many sit on the key committees which report to the rest of the House on EU policy. Typically, these reports tend to be more considered and of a higher quality than their House of Commons equivalents.

In 2008, an alliance of Liberal, Labour and crossbench peers defeated attempts by Lord Rodney Leach and other veteran eurosceptics to scupper Britain's ratification of the Lisbon treaty. (Lord Leach is also chairman of Open Europe.) During that 75 hour-long debate, the EU's expanding powers in crime and policing policy were a hotly contested issue. They are likely to be so again in the forthcoming debate over the opt-out.

Fighting international crime together: Three sample UK-EU success stories

★ **Operation Captura:** Crimestoppers is a UK charity founded and led by Tory party donor Lord Ashcroft. It has an active and highly successful programme working with British and Spanish authorities to track down and repatriate UK criminals that have fled to Spain using the European arrest warrant. Under the programme, called 'Operation Captura', 49 out of the 65 top UK fugitives hiding in southern Spain – a region that had become infamous as the 'Costa del Crime' in the British press – were identified and repatriated to face justice at home. In September 2012, the campaign was extended to Cyprus in an attempt to capture nine major British criminals believed to be hiding there.

★ **Operation Rescue:** This three-year police operation led to the discovery of the world's largest online paedophile network in 2011. It was launched by the London Metropolitan Police and co-ordinated by Europol across 30 countries. Some 670 suspects were identified, 184 arrests were made and 230 sexually exploited children were released, including 60 in the UK alone.

★ **Operation Golf:** This was a joint investigation between Europol and the London Metropolitan and Romanian police, launched in 2010. The investigation broke up an organised crime group operating a child-trafficking network in the UK and across the EU. In total, 121 suspects were arrested under the operation, 181 children were identified and released, saving £400,000 in related benefit fraud.

14: Toby Helm, 'Ex-MI5 chief urges Cameron to defy party on European Union crime policies', *The Observer*, August 26th 2012.

Whether the Lords approve a vote by the Commons to use the opt-out depends partly on its own separate inquiry into the merits and demerits of the move, expected in early 2013. British peers may decide that invoking the opt-out would make the country less safe because it would put the UK's access to instruments like the European arrest warrant in doubt. If so, they lack the power to stop the block opt-out outright. But well-grounded opposition from the Lords may prompt a re-think in the Commons and strengthen the hand of those MPs who also have reservations.

Why opting out is copping out

Britain's EU partners are blissfully unaware of the political furore about to break out in the Westminster village over the block opt-out. Outsiders often see Britain as a strategic leader which has set the agenda in European co-operation on crime and policing issues since 1997, when the EU first gained a serious role in this area under the Treaty of Amsterdam. For a country that is not in the Schengen area, possesses a minority legal system and selectively opts-out of common rules, this is a remarkable diplomatic achievement.

Consider some of Britain's past successes in shaping JHA policy since Amsterdam. In 1998, it headed off calls for a *Corpus Juris*, a single body of criminal law and procedure to be applied uniformly in EU member-states, by promoting instead the more pragmatic idea of the 'mutual recognition' of court rulings between EU countries for certain kinds of serious crime.[15] The application of this principle, on which the European arrest warrant is based, has since revolutionised inter-state co-operation on judicial matters in Europe. After September 11th 2001, Britain was at the forefront of efforts to develop counter-terrorism co-operation within the EU. This included the unprecedented step of sharing the designs of its 'Police National Computer' with EU officials to help build a comparable system for holding data on suspects and wanted persons in the Schengen area (known as the Schengen Information System or SIS).

Official British strategy on the fight against organised crime or terrorism routinely stresses the need for international co-operation as a pragmatic necessity to ensure the UK's security.[16] This has contributed to Britain's police playing a leading role in many major international criminal investigations in the EU and is the reason why they are among the most active collaborators with other European police forces within Europol. In 2005, Britain used its presidency of the EU's JHA Council across borders to create a 'European criminal intelligence model', very similar to the UK's own, in the first serious attempt to fight organised crime in Europe based on shared police intelligence. More recently, the UK nudged the European Commission to propose an ambitious new scheme to share the records of airline passengers ('passenger name record' or PNR data) travelling to and from EU countries between customs, police and immigration authorities.

Given Britain's intellectual standing in JHA policy, it is no coincidence that the current head of Europol, Rob Wainwright, is British, as were the last two presidents of Eurojust, the last two director-generals of the Commission's JHA directorate, and the first director of the EU's nascent intelligence service, the Joint Situation Centre (SITCEN). Nor is it chance that CEPOL, the EU's police training college, is based at Bramshill in the UK, where senior police officers from around Europe receive training on issues ranging from domestic violence to counter-terrorism.

> *"Official British strategy stresses that international co-operation is a pragmatic necessity to ensure the UK's security."*

Britain's prominent leadership role in JHA decision-making can be partially explained by the unusually muted positions of other key players. Take France and Germany. Berlin cannot centralise decision-making on internal security matters at the federal level due to prohibitions against such moves in Germany's constitution. New JHA initiatives must therefore first be discussed between the federal level and the country's sixteen *Länder*, each of which have their own independent courts, state justice ministries and police services. This means that the largest EU member-state is often limited to a reactive posture in the JHA Council.

By contrast, France has a fully centralised police and judicial system and, like the UK, a long tradition of policing the world beyond its own borders.[17] It worries deeply about crime and immigration problems connected to the EU's free movement and passport-free travel areas. But the conservative French security establishment is less optimistic than its British counterparts about the potential gains of Brussels-led co-operation to tackle these challenges, especially if this comes at the expense of national sovereignty. Accordingly, Paris is rarely at the forefront of efforts to develop what diplomats call an 'internal security architecture' for the EU.

If the block opt-out is used, Britain's influence on the overall development of EU crime and policing policy will

15: Valsamis Mitsilegas, 'The constitutional implications of mutual recognition in criminal matters in the EU', Common Market Law Review 43, 2006.

16: For example: 'A strong Britain in an age of uncertainty: The national security strategy' and 'Cross-government strategy on organised crime' UK government, respectively October 2010 and June 2011.

17: Felix Berenskoetter, 'Mapping the field of UK-EU policing', Journal of Common Market Studies, Volume 50, 2012.

be severely weakened. During a seminar at University College London in May 2012, Rob Wainwright noted that "British citizens are safer and better protected when the UK is fully engaged in policy-making at EU level because EU legislation is better as a result". Similarly, the block opt-out would prevent Britain's judges from querying the ECJ on the application of most European crime and policing policy. For eurosceptics this is a positive outcome. But it also means that British justices will have less opportunity to shape the development of EU crime and policing rules. According to one senior judge at the ECJ, "Britain has already missed a big opportunity by not allowing its own courts to refer such questions to the ECJ so far. He who asks the question in these matters also controls the answer to a great degree."

The period 2013-2015 is an inauspicious time for Britain to lose diplomatic influence in JHA matters. Although such co-operation accounts only for around three per cent of EU law, it is still the Union's fastest growing legislative area, with the possible exception of financial regulation. In 2011, some 20 per cent of the European Commission's legislative programme was related to crime, policing or immigration. And in late-2012, governments and the EU's institutions were busy preparing for key policy battles that will greatly influence the development of justice and internal security co-operation in the years ahead.

"The period 2013-2015 is an inauspicious time for Britain to lose diplomatic influence in JHA matters."

One example is a proposed major reform of Eurojust, a body that co-ordinates the prosecution of cross-border crime in the EU and which the UK finds highly useful. (Britain referred the highest number of cases to Eurojust of any member-state in 2010.) Another is an initiative by EU justice commissioner, Viviane Reding, to establish a supranational European public prosecutor, an idea resonant of the *Corpus Juris* era, which Britain has always opposed on sovereignty grounds. More broadly, governments will sit down in late 2014 to negotiate a seven-year roadmap – the 'Rome programme' – that will set out how EU policies dealing with justice, internal security, immigration and asylum should develop over the next decade.

How the opt-out could backfire on Britain

If David Cameron asks MPs to use Britain's block opt-out – and they vote Yes – the move is ultimately likely to please no-one. By itself, the heavily qualified opt-out is hardly enough to satisfy eurosceptic backbenchers: it may only further radicalise their anti-European stance. This is especially true if the Commission and Schengen states do allow the UK to opt back into a new JHA package that includes the European arrest warrant.

Whatever the view of Britain's police and security services, it is the EAW itself – rather than some of the more obscure framework decisions – that many Conservative MPs dislike. Eurosceptics do not believe that British citizens can expect a fair trial in the courts of most other member-states. Furthermore, why would MPs support the handing back of such key powers to Brussels, having only just repatriated them? Are they not likely to demand another vote on the government's plan to opt back in again?

Much will depend on how the vote over the block opt-out is conducted. Currently, it is not clear whether Cameron will allow a free vote on just the block opt-out decision itself, or simultaneously present MPs with the list of EU crime and policing co-operation which the government wishes to retain. If the former, it is also unclear whether an executive decision to opt back in to specific measures would trigger the UK's 'EU act', which makes transfers of sovereignty to Brussels automatically subject to a vote in parliament or, possibly, a referendum.

Inevitably, the prime minister will have to choose whether he is willing to face down his own party over some aspect of the block opt-out issue. But the recent replacement of Kenneth Clarke as UK justice minister – hitherto the only Conservative pro-European with a senior portfolio in government – with Chris Grayling, a hard-line eurosceptic, suggests that Cameron intends to appease the anti-EU lobby. Concurrently, the pro-European Liberal Democrats are increasingly uneasy over their role in an unpopular government: leader Nick Clegg is under pressure from his own MPs to assert himself more vigorously within the coalition.[18] The scene seems set for a nasty and potentially destabilising internal government row over the opt-out.

Within the EU, Cameron will doubtless cite his government's concerns over harmonisation of criminal justice by stealth as justification for using the block opt-out. But his claims to British legal exceptionalism are unlikely to convince other EU countries that the block opt-out is anything other than a shallow political manoeuvre. Most EU countries have been subject to the court's jurisdiction on criminal justice policy for several years. They could voluntarily submit to the court's jurisdiction before the Lisbon treaty was agreed and most did so. These countries accepted that some harmonisation of criminal justice rules was necessary – or a risk worth taking – in order to ensure the application of justice within the EU's free movement area.

18: 'Party threat to oust Clegg the bumbler', *The Sunday Times*, September 2nd 2012.

Accordingly, the ECJ has already handed down rulings which have harmonised certain criminal justice procedures. For example, Italy was forced to change its criminal procedures in 2005 after the ECJ ruled that a victim of non-sexual child abuse should be allowed to give evidence out of court, citing an EU framework decision giving this right to "vulnerable victims". Under Italian law, such protection existed for sexual offences only. This so-called *Pupino* ruling established the principle that EU-level criminal justice rules trump contradictory national arrangements. (Britain and several other EU governments strongly supported Italy's opposition to the court's reasoning at the time.)

But if the current UK government frets about more rulings like *Pupino*, this is not evident from its negotiating behaviour in Brussels. It has enthusiastically opted in to recent EU legislation governing the rights of vulnerable victims, which further enshrines the *Pupino* decision. Furthermore, the UK is a strong supporter of current legislative efforts to establish a set of minimum rules for criminal justice procedures across the Union on issues such as translation and interpretation for foreigners, and access to a lawyer abroad. In other words, British anxiety about the possible impact of ECJ jurisprudence on criminal law appears confused and contradictory, given the country's negotiating posture since Lisbon. Clearly, British policy-makers believe that such rules are necessary to protect UK citizens abroad when they fall foul of the authorities in other EU countries or are subject to fast-track extradition through an EAW.

How likely is a partial opt-in?

British officials tend to assume that – whatever political difficulties arise from the block opt-out – the UK is too large and important an EU member-state to be excluded indefinitely from key legislation like the European arrest warrant. They believe that other EU countries benefit greatly from the co-operation that they receive from Britain's police and prosecutors, too. Hence the European Commission would be under intense pressure to agree to any British wish-list of JHA measures presented after the opt-out is triggered. Furthermore, the Lisbon treaty obliges the Commission to "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", if the block opt-out is employed.

But this official view ignores the fact that the block opt-out is as political an issue as it is technical. Other member-states are just as likely to consider the move as a bridge too far for a country that already enjoys a unique freedom of manoeuvre in EU crime and policing policy. Furthermore, British cherry-picking in JHA already annoys other member-states to an extent. For example, Schengen area countries have twice blocked British attempts to join Frontex, the EU's border agency, and the Visa Information System, a database of Schengen visa records, because of the UK's decision to maintain its own, separate border controls. Why should they now facilitate a British pick-and-choose from crime and policing policy?

The UK's standing in the EU would have to be high to guarantee support for such a ruse. This is not the case at present. Britain's seemingly opportunistic desire to 'repatriate powers' from Brussels has damaged the country's political capital in the EU: a fact not fully appreciated by UK politicians. Other members view this harsher British attitude towards the EU with a mixture of bafflement and resentment at a time when a majority of them are embroiled in a serious financial crisis. Moreover, the intricacies of JHA policy are understood only by a few insiders, making it even more likely that Britain's decision will be taken badly by other EU members.

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Eurosceptics in Britain who would like a Denmark-style position for Britain in EU crime and policing policy should also consider how the Danes themselves view their arrangement. Denmark negotiated its own opt-out from JHA policy after its voters rejected the Maastricht treaty in 1992. This goes further and is more strictly defined than the British and Irish version: Denmark cannot opt in to any JHA co-operation where the Commission and ECJ have enforcement powers. Instead the Danes must apply for a 'parallel agreement' with the EU each time their government wishes to participate in individual immigration, crime and policing initiatives.

To date the Commission has rejected about half of the Danish government's requests for such arrangements. Furthermore, Denmark's awkward opt-out means that it has little diplomatic scope to shape JHA policy, or as importantly, stop developments which it does not like. This is a serious problem for a country that is also a Schengen member.[19] Contrast the Danish situation with the flexibility enjoyed by Britain's negotiators, who can remain in the room and suggest amendments and drafting fixes even to legislation from which the UK

19: Denmark's unwieldly protocol means that it will soon be locked out of any JHA initiatives, including agencies like Europol and Eurojust, that rely on legislation adopted under the Lisbon treaty.

is opting out. During the Lisbon treaty negotiations, Denmark's then government successfully negotiated for the right to switch its opt-out to the British and Irish model.[20] The current Social Democratic government intends to hold a referendum to approve such a move in 2013 or 2014.

The Commission's attitude towards the Danish opt-out indicates an instinctive dislike in Brussels of special arrangements in JHA policy for specific member-states. James Brokenshire, Britain's Home Office Minister for Crime and Security, has acknowledged that EU officials would not necessarily make it easy for Britain to re-enter those forms of JHA co-operation that the government would wish to retain. In September 2011, he noted in a speech: "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." This hints that Britain may end up sacrificing its political influence in JHA policy only to end up in a similar but less advantageous position to that which prevailed prior to the block opt-out.

Can Britain really go back?

Some analysts have also argued that, even if Britain does encounter obstacles whilst attempting to opt back into measures such as the arrest warrant, it will still be able to rely on the older Council of Europe arrangements. This form of police and judicial co-operation is mainly based on the 1957 European Convention on Extradition and 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters. Under the 1959 Convention, for example, countries that need a witness summons, an order to compel somebody to produce evidence, a search-and-seizure warrant or an order to freeze assets, may send a 'rogatory letter' to a court in another country requesting this be done on their behalf by the local authorities.

But the processing of such requests between EU countries was often so slow – particularly in the case of Spain and Italy – as to render them redundant. (In addition, the Spanish authorities failed to co-operate effectively with Britain on extradition because of the two countries' long-running dispute over Gibraltar.) Typically, judiciaries have relatively little experience of co-operating with each other, and may be antagonistic to foreign jurisdictions, which they invariably see as inferior to their own. Hence co-operation under Council of Europe conventions rarely proved efficient unless the crime in question was defined more or less in exactly the same way in both countries.

During the 1990s, the slow pace of co-operation under the Council of Europe led Elisabeth Guigou, then France's justice minister, to remark in frustration that "Europe is trying to combat 21st- century crime with 19th-century legal instruments".[21] This is precisely the reason why EU governments were forced to come up with new approaches like the European arrest warrant and the concept of mutual recognition. It is highly unlikely that it would be viable – either politically or from an operational point of view – for Britain to return to the clunky, politicised regime that prevailed before these innovations.

The UK could try to anticipate these difficulties by negotiating bilateral extradition treaties with other EU members, as argued by the Fresh Start project. But bilateral treaties with Britain could be struck down by the ECJ if they undermine the EAW regime. And the UK would need a separate extradition treaty with every other country in the EU free movement area for a policy of bilateral co-operation to work. Furthermore, Britain – free of most EU rules in crime and policing – would be likely to deepen co-operation in the so-called five-country group, an internal security cabal including Australia, Canada, New Zealand and the United States. Such a move would make bilateral co-operation with European partners more potentially problematic. Given how long such treaties take to negotiate, the mutual suspicions involved, and the multiple things that can go wrong during talks, the Fresh Start option seems an unlikely one.

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There are a plethora of other risks associated with triggering the opt-out. For example, if Britain no longer applies the European arrest warrant or there is a hiatus before it can rejoin the EU's extradition regime, the country may become, in the words of one British official, "like Brazil, a place where criminals go in the knowledge that they will be safe from extradition".[22] This could become a new source of tension between Britain and other EU countries, as with the ten-year long legal battle to extradite the Paris metro bomber, Rachid Ramda, from the UK to France, a saga which ended only in December 2005. (The British authorities were eventually able to hand Ramda over to the French authorities after exhausting his legal appeals against extradition.)[23] Britain will also be liable to other EU member-states for any financial costs

20 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 Institute for International Studies, 2010

21: Ben Hall with Ashish Bhatt, 'Policing Europe', CER report, October 1999.

22: Hugo Brady, 'Should Britain leave EU justice and policing policy?', CER bulletin article, April 2010.

23: The EAW did not apply to the Ramda case since France initiated extradition proceedings long before its agreement in 2002.

associated with triggering the block opt-out. This could mean overheads like the expense of re-locating CEPOL and its staff to another country or the cost of unhooking Britain from certain common databases.

However, the most compelling argument against the block opt-out is that Britain would still have to apply EU free movement rules regardless of its diminished involvement in crime and policing policy. These are part of the single market and ensure that EU citizens are free to move to any member-state without the need for a residence or work permit. If Britain cannot re-enter the EU tools that mitigate the negative effects of free movement, such as the arrest warrant and databases for exchanging DNA data and criminal records between countries, using the block opt-out means taking a gamble with public security. For example, if a convicted sex offender from another EU country moves to Britain to work in a school or hospital after 2014, routine background checks are likely to fail if the UK authorities cannot access measures like the European criminal records system (ECRIS), set up under a pre-Lisbon JHA agreement.[24]

Even Britain's traditional allies around the EU table, such as the Netherlands and Sweden, would be exasperated by a move to trigger the block opt-out. Both co-operate enthusiastically with Britain on crime and policing issues but say that this co-operation depends partly on the UK remaining party to the arrest warrant and legislation allowing different member-states to work together on the same crimes through joint investigation teams. Moreover, the British authorities could find it harder to work with Ireland, arguably their closest partner on internal security matters. The Irish government will remain party to the arrest warrant and all other pre-2009 JHA agreements from which Britain would withdraw.

An alternative British approach to JHA policy

Britain's coalition government should present a united front and make clear to MPs that the block opt-out is contrary to the UK's national interest, given the risks and uncertainties surrounding its use. One key argument for Cameron to employ is how the move could badly undermine a traditional Conservative commitment to punish law-breakers. For example, 'Crimestoppers UK', a charity funded by Conservative deputy chairman, Michael Ashcroft, enlists the help of holiday-makers and other travellers to alert authorities to the whereabouts of major British criminals currently hiding in Spain, Cyprus and elsewhere throughout the EU. This hugely successful initiative simply could not have happened without UK participation in the EAW (see box on page 7).

Cameron should instead present his backbenchers with an alternative agenda for protecting and advancing Britain's interests in EU criminal and justice policy. This could have four elements. First, Britain could seek a political assurance from the European Commission that JHA laws agreed prior to 2009 are not a priority for evaluation or infringement proceedings in the medium term. Commission officials already say privately that the EU agenda is busy enough with new legislation and acknowledge that some framework decisions are too badly drafted to enforce. This would reduce significantly the incidence of EU judges ruling on crime and policing matters.[25] Concurrently, the government can point out that Britain has already implemented all but 14 out of over 130 existing JHA agreements. This makes the spectre of multiple infractions against Britain for non-implementation of crime and policing rules highly unlikely.[26]

Second, Cameron should announce his readiness to invoke a special clause in the Lisbon treaty – the so-called emergency brake procedure – if future EU criminal justice initiatives threaten Britain's common law traditions. To date this procedure has yet to be used.[27] It was included in the Lisbon treaty as a safeguard to be used by any EU country worried that new JHA legislation might "affect fundamental aspects of its legal system". The clause allows a member-state to halt negotiations on ambitious new proposals – such as the drive for a European public prosecutor, for instance – and bring the issue in question to summits of EU leaders for further discussion. If no compromise can be reached, other member-states are free to press on with the initiative without the objecting country, which would not have to take part.

> *"Although the EAW is a vast improvement on previous extradition arrangements, it does have some flaws."*

Third, Cameron could make remaining at the core of EU crime and policing policy contingent on a minor reform of the European arrest warrant. Sir Scott Baker, a retired senior judge, robustly defended the need for, and operation of, the warrant as part of an independent review of Britain's extradition arrangements in September 2011.[28] However, although the EAW is a vast improvement on previous European extradition arrangements, it does have some flaws. The categories of crime covered by the scope of the warrant are deliberately vague so as to avoid

24: ECRIS became operational in April 2012 and is currently a pilot project between eight EU countries, including Britain. This system is set to grow to a huge scale as more EU countries join.

25: 'The workload of the Court of Justice of the European Union', House of Lords report 14, March 2011.

26: See parliamentary questions addressed to the UK government by Liberal Democrat MP, Lorely Burt in July 2011, http://theyworkforyou.com.

27: See Article 83(3), Treaty on the functioning of the European Union, 2009.

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

the need for a body of harmonised EU criminal offences. And erroneous investigations made by authorities in other European countries have led to the UK police arresting and extraditing innocent citizens abroad on a handful of occasions.[29]

Some countries, like Poland and Romania, interpret their constitutions in such a way as to require the issuing of EAWs even for very minor crimes. Warrants have been issued to Britain and other places for offences as petty as the theft of two bicycle wheels. In 2010, the UK received 116 alleged criminals, mostly from Spain, to face trial for alleged crimes in Britain. The same year it 'surrendered' 1,068 suspects to other countries, with Poland making the largest single number of requests (only 48 of these were for British nationals). The EAW arrangement can therefore be a somewhat unfair deal to Britain, given that it hosts millions of EU nationals on its territory and each extradition costs the government around £18,000 to execute.

Cameron could push for the EU legislation governing the EAW to be changed so that it is the country which issues the warrant that pays the costs of the subsequent extradition. This is likely to reduce the volume of frivolous EAW requests from other countries without the need for ambitious attempts to harmonise criminal law. Cameron could further press for some categories of crime covered by the EAW to be clarified and other improvements made to ensure that suspects have adequate legal representation at all stages of the extradition process. If the Commission refused to initiate such reforms, the UK could assemble a coalition of at least six other countries to bring forward the legislation independently.

Fourth, Britain's coalition government could seek a special treaty on security and migration issues between the Schengen area and the common travel area which the UK shares with Ireland. Specifically, the treaty would allow for Britain and Ireland to join Frontex, the EU's border agency, the Visa Information System and data from the Schengen Information System on those persons refused entry at the Union's common border. In return, Britain and Ireland would offer up their own border data voluntarily as a *quid pro quo* and work more closely with Schengen countries on border procedures such as the stamping of passports and administration of visa policy, including in their consular missions abroad. This would primarily be aimed at facilitating the movement of tourists and business people between the two areas.

None of these ideas would require changes to the EU's treaties (as, for example, an attempt to seek a cumbersome Danish-style opt-out for Britain would). Nor would they mean Britain throwing away considerable diplomatic influence in an important and fast-developing area of EU policy. Rather, it would demonstrate a justifiably cautious British commitment to work closely on security and migration questions with other governments in the free movement area, while strengthening the UK's own borders. Most importantly, this alternative approach could stop public security from becoming a casualty of Britain's fraying relationship with the rest of the EU.

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29: For several examples, see 'The European arrest warrant: seven years on – The case for reform', *Fair Trials International*, May 2011.