



In brief: the 2014 bloc opt-out and selective opt-back-ins

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The Government has said it intends to exercise its EU Treaty option of opting out of all police and criminal justice measures that remain unamended since the Lisbon Treaty came into force in December 2009. It will later opt back into some of these measures selectively.

This note looks briefly, with regard to the parliamentary debate on 15 July 2013, at the current situation and lists the 35 measures the Government would like to opt back into.

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1 Introduction

According to the Government's [table](#) of opt-in decisions between 1 December 2009 (when the Lisbon Treaty came into force) and 12 February 2013, out of a total of 83 Title V or Schengen decisions, the UK opted into 49 (59%) and did not opt into 34 (41%).

Under [Article 10 of Protocol 36](#) to the *Treaty on the Functioning of the European Union* (TFEU), by the end of May 2014 the UK Government must notify the EU Council of its decision on whether to opt into around 133 police and criminal justice measures in the former 'third pillar' of the EU Treaties that remain unamended since the Lisbon Treaty came into force in December 2009. Opting into the measures en bloc means accepting the enforcement powers of the European Commission and the jurisdiction of the Court of Justice with regard to them.

Not opting into them means the measures will not apply to the UK. The EU Council will decide on transitional rules and there might be financial implications for the UK.

The UK may later notify the Council that it wishes to opt back into such measures on an ad hoc basis, but doing so will not be automatic and will need the authorisation of the Commission or Council. If the UK opts back into a measure, it must accept the roles of the Commission and Court.

On 15 October 2012 the Home Secretary, Theresa May, [announced](#) that the Government was minded to opt out of all the measures and opt back into those "that it is in our national interest to rejoin".

In a [statement on 9 July 2013](#) the Home Secretary confirmed the 2012 announcement:

For reasons of policy, principle and pragmatism, I believe that it is in the national interest to exercise the United Kingdom's opt-out, and rejoin a much

smaller set of measures that help us to co-operate with our European neighbours in the fight against serious and organised crime. I also believe that Her Majesty's Government must strike the right balance between supporting law enforcement and protecting our traditional liberties.

[Command Paper 8671](#), *Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union*, July 2013, provides a detailed analysis of Protocol 36 and the obligations under it with regard to the UK block opt-out and selective opt-back-ins.

2 The 35 potential opt-back-in measures

[Command Paper 8671](#) sets out the Government's views on the 2014 block opt-out and measures it is indicating it would like to participate in afterwards, and also contains the Government's Explanatory Memoranda on the 35 measures subject to the decision. The 35 measures are as follows:

2.1 Non-Schengen Measures

- Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime
- Council Act of 18 December 1997 drawing up the Convention on mutual assistance and co-operation between customs administrations (Naples II)
- Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)
- Council Decision 2000/375/JHA to combat child pornography on the internet
- Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)
- Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for co-operation between financial intelligence units of Member States in respect of exchanging information
- Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime
- Council Decision 2003/659/JHA amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
- Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes
- Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
- Council Decision 2002/348/JHA concerning security in connection with football matches with an international dimension
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
- Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
- Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders
- Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union
- Council Decision 2007/412/JHA of 12 June 2007 amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension
- Council Decision 2007/845/JHA of 6 December 2007 concerning co-operation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime
- Council Decision 2008/617/JHA of 23 June 2008 on the improvement of co-operation between the special intervention units of the Member States of the European Union in crisis situations
- Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings
- Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union
- Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of 10 persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial

- Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States
- Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA
- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
- Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes
- Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
- Council Decision 2009/371/JHA establishing the European Police Office (Europol)

2.2 Schengen measures

- SCH/Com-ex (98)52 on the Handbook on cross-border police co-operation
- Convention implementing the Schengen Agreement of 1985: Article 39 to the extent that that this provision has not been replaced by Council Framework Decision 2006/960/JHA, Article 40, Article 42 and 43 (to the extent that they 11 relate to article 40), Article 44, Article 46, Article 47 (except (2)(c) and (4)), Article 48, Article 49(b) – (f), Article 51, Article 54, Article 55, Article 56, Article 57, Article 58, Article 71, Article 72, Article 126, Article 127, Article 128, Article 129, Article 130, and Final Act - Declaration N° 3 (concerning article 71(2))
- Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders
- Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders
- Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

3 Timetable

The EU Council must be notified about the block opt-out decision by 31 May 2014, with the decision taking effect in December 2014. The EU Treaty states in Article 10 of Protocol 36

that notifications to participate in measures the UK opted out of can be made “at any time afterwards”.

Under Article 4 of the Schengen Protocol, the decision on whether the UK may re-join measures will be decided by the Council by unanimity. The Protocol does not provide the Commission or Council with powers to impose conditions on the UK’s re-participation and there is no time limit by which the Council must act on a request.

According to the procedure for rejoining non-Schengen measures (the majority in Cm 8671), the Commission has up to four months to confirm UK participation in a measure, but the Commission could give an immediate response, and, the Government states, there is nothing to prevent “agreement being reached informally ahead of the UK’s formal application”. Cm 8671 describes the role of the Commission in setting conditions for the UK rejoining a measure:

The Commission may impose conditions on the UK’s re-participation and set a time period for those to be fulfilled. If after expiry of the time period the Commission considers that conditions have not been fulfilled, the UK can refer the matter to the Council. The Council (minus the UK) will decide by QMV whether the UK can participate.

The Government has said it would like to link decisions on the measures with the outcome of the [Review of the Balance of Competences](#), which is due to be concluded towards the end of 2014.

4 Parliamentary involvement in opt-back-in decisions

The Government has committed to a vote on both the exercise of the opt-out and the list of individual measures, as Theresa May said in her [statement on 9 July](#):

The Government has committed to a vote in this House and the Other Place before formally deciding on this matter. We shall honour that commitment in full. Next week, Honourable Members will have the opportunity to debate and vote on this approach. Following our discussions in Europe, another vote will be held on the final list of measures that the UK will formally apply to rejoin.

The Home Secretary implied that the current list was indicative, pending further debate:

The Government are indicating today which measures we wish to seek to rejoin. There will be a debate next week in the House and an opportunity to vote on that. As I have indicated, there will be further consideration and a vote at a later stage.

And: “The decision on the form that any further vote will take in relation to these matters post negotiation is yet to be taken by the relevant House authorities and business managers”.

5 The application of the [European Union Act 2011](#)

The [2011 Act](#) does not specifically provide for the 2014 opt-out decision. It does not mandate a parliamentary vote to exercise the opt-out and does not provide for this “stand-alone” decision (as the Home Secretary called it in her 9 July statement).

On 25 October 2012, in reply to a question from Jacob Rees-Mogg as to whether the opt-back-ins would be subject to the ratification processes set out in the EU Act 2011, the Home Office Minister, James Brokenshire, replied:

If the UK opts out en masse pursuant to Article 10(4) of Protocol No 36 to the Treaty on the Functioning of the European Union, the ratification processes set out in the European Union Act 2011 will not be applicable to any measure that the UK may decide to opt back in to. This is because the European Union Act 2011 sets out restrictions relating to very specific areas and the measures on the 2014 opt-out list do not fall within its scope. For example, the opt-out decision clearly flows from existing Treaty obligations so any decision to opt back in to any measures would not require a Treaty change.¹

The EU Act 2011 referendum provisions would therefore also not apply to opt-back-ins. Lord Wood of Anfield asked in October 2012: “in the event that we opt out ... would the act of opting back in trigger a referendum under the Government's own legislation?” Lord McNally, for the Government, replied: “We do not believe that that would trigger a referendum”.^[1] His answer did not make clear whether this was because the 2011 Act did not apply to opt-back-ins *per se* or because the referendum condition would not be met because no new powers would be transferred. A similar question was asked in the Lords 13th Report, 2012–13, “[EU police and criminal justice measures: The UK's 2014 opt-out decision](#)”, 23 April 2013. The Committee concluded in para. 31 that if the Government sought to rejoin “particular measures that would become subject to Commission infringement procedures and the CJEU's jurisdiction, it is the Government's view, with which we concur, that this would not require a referendum under the European Union Act 2011”.

6 Further reading

6.1 Library papers

Standard Note 6268, [The UK's 2014 Jurisdiction Decision in EU Police and Criminal Justice Proposals](#), 20 March 2012

Standard Note 6087, [UK Government opt-in decisions in the Area of Freedom, Security and Justice](#), 19 October 2011

Standard Note 4979, [The European arrest warrant in practice](#), 23 February 2009

Standard Note 6105, [Extradition and the European Arrest Warrant – Recent Developments](#), 6 February 2013

6.2 Official publications

[Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union](#), Cm 8671, July 2013

[Table of 133 measures subject to the 2014 decision](#), Home Office, 15 October 2012

Ministry of Justice, [Third Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union \(TEU\) and the Treaty on the Functioning of the European Union \(TFEU\) \(“the Treaties”\) in Relation to EU Justice and Home Affairs \(JHA\) matters \(1 December 2011 – 30 November 2012\)](#), April 2013

6.3 Select Committee reports and Government responses

Commons European Scrutiny Committee, [The 2014 block opt-out: engaging with Parliament](#), 22 March 2013

¹ [HC Deb 25 October 2012, c1013W](#)

^[1] [HL Deb 15 October 2012 c 1309](#)

Lords European Union Committee, [EU police and criminal justice measures: The UK's 2014 opt-out decision](#), 13th Report of 2012–13, HL 159, 23 April 2013

[The 2014 block opt-out — engaging with Parliament: Government Response to the Committee's Thirty-seventh Report of Session 2012-13](#), First Special Report of Session 2013–14, 18 June 2013

DEP2013-0869, Letter 21 May 2013 from Theresa May MP and Chris Grayling MP to William Cash MP regarding the [Government response to the Committee's report of 22 March 2013](#)

DEP2013-0869 [Annex A](#) (Government letter to ESC in response to 37th report)

DEP2013-0869 [Annex B](#) (list of 133 measures)

DEP2012-0984 [Letter dated 21/12/2011 from Theresa May MP to Lord Roper regarding the operation of Article 10\(4\) of the Protocol on Transitional Provisions - Protocol 36 of the Treaty of Lisbon](#)

DEP2012-0984: [Annex](#)

6.4 Comment

University of Cambridge Faculty of Law paper, [Opting out of EU Criminal law: What is actually involved?](#) CELS Working Paper, New Series, No.1, Alicia Hinarejos, J.R. Spencer and Steve Peers, September 2012

Centre for European Reform, [Britain's 2014 justice opt-out: why it bodes ill for Cameron's EU strategy](#), Hugo Brady, January 2013

Open Europe, [An unavoidable choice: More or less EU control over UK policing and criminal law](#), Stephen Booth, Christopher Howarth and Vincenzo Scarpetta, January 2012

Fair Trials International, [The UK's right to opt out of EU crime and policing laws from December 2014: Frequently Asked Questions](#), July 2012

Centre for European Reform, [Cameron's European 'own goal': Leaving EU police and justice co-operation?](#) Hugo Brady, 3 October 2012

Statewatch, [The UK's planned 'block opt-out' from EU justice and policing measures in 2014](#), Professor Steve Peers, 16 October 2012

Open Europe, [Cooperation Not Control: The Case for Britain Retaining Democratic Control over EU Crime and Policing Policy](#), Dominic Raab, 29 October 2012

Fresh Start Group, [Manifesto for Change: A new vision for the UK in Europe \[Chapter 10: Policing and Criminal Justice\]](#), 16 January 2013

LSE blog, [Opting out of EU police and justice co-operation may be an 'own goal' for David Cameron](#), 9 October 2012

FCO blog, [Justice and Home Affairs: Opting Out to Opt In](#), 10 July 2013