



Statewatch Analysis

The Mother of all Opt-outs?

The UK's possible opt-out from prior third pillar measures in June 2014

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Introduction

The Treaty of Lisbon offers the possibility that the UK can decide, as of 1 June 2014, to opt-out of all EU policing and criminal law measures adopted before the Treaty of Lisbon. Since this possibility is attracting discussion as the deadline date comes closer, this analysis looks in detail at the legal framework and practical implications of any UK decision to adopt such an opt-out.

Legal Framework

The UK's option to opt-out from all pre-Lisbon third pillar measures is set out in the Protocol to the EU Treaties on transitional measures, which provides as follows (Article 10):

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.
2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen *acquis* integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

First of all, it can be seen that Article 10 takes the form of a transitional rule relating to the Court of Justice's jurisdiction: the prior rules relating to acts adopted before the entry into force of the Treaty of Lisbon as regards policing and criminal law measures ('third pillar acts') stay in force (Article 10(1)). This rule applies for a period of five years (Article 10(3)), so will expire on 1 December 2014. The rule also ceases to apply in the event that one of the pre-Lisbon third pillar acts is *amended* before 1 December 2014 (Article 10(2)).

In practice, this rule means that, until 1 December 2014: (a) the Court of Justice has no jurisdiction over infringement actions brought by the Commission against Member States as regards pre-Lisbon third pillar acts; and (b) the Court of Justice only has jurisdiction as regards references from national courts on the interpretation and validity of pre-Lisbon third pillar acts where the Member State concerned chose to opt in to that jurisdiction. Two-thirds of Member States opted in to that

jurisdiction: the exceptions are the UK, Ireland and Denmark (among the first fifteen Member States) and Poland, Bulgaria, Slovakia, Malta and Estonia (among the twelve most recent Member States). Of the Member States which opted in to the Court's jurisdiction, one (Spain) has limited the power to send questions to the Court of Justice to final courts only. The other seventeen Member States allow all their national courts or tribunals to send questions to the Court of Justice.

Since eighteen Member States opted in to the Court's jurisdiction, it is clear that such jurisdiction existed already before the entry into force of the Treaty of Lisbon, and continues to exist even during the five-year transitional period. The end of the transitional period will simply mean the application of the normal rules on the Court's jurisdiction in a uniform manner for all Member States. In practice, national courts in the Member States which have opted in to this jurisdiction have referred 3-5 cases a year on pre-Lisbon third pillar acts to the Court of Justice, both before and after the Treaty of Lisbon entered into force. These cases have almost exclusively concerned three third pillar acts: the Framework Decision on crime victims; the Framework Decision on the European Arrest Warrant; and the Schengen Convention rules on cross-border double jeopardy. Only one case has concerned another act (the Framework Decision on mutual recognition of financial penalties).

Article 10(4) of the transitional protocol then sets out the specific rule relating to the UK (which does not apply to any other Member State). By 1 June 2014 'at the latest', the UK 'may' decide that it does not want to accept the Court's jurisdiction, in which case none of the pre-Lisbon third pillar acts will continue to apply to it, as from 1 December 2014. However, this 'block opt-out' cannot apply where the acts in question have already been amended after the entry into force of the Treaty of Lisbon.

In the event that the UK takes this decision, the Council can, by qualified majority, adopt transitional arrangements and decide that the UK will have to bear the 'direct financial consequences' of the mass opt-out.

The UK will retain the option, 'at any time afterwards', of opting back in to the pre-Lisbon third pillar acts which it has opted out of (Article 10(5)). In that case, the Council will decide on whether to re-admit the UK by unanimity, if the measure builds upon the Schengen *acquis*; if it does not (the majority of cases) the Commission will decide. Once the measure applies to the UK again, the Court of Justice will have its usual jurisdiction.

What would be the impact of the 'block opt-out'?

At the outset, it must be pointed out that while a block opt-out officially would take the form of a refusal to accept the Court of Justice's jurisdiction in this area, its more important impact would be the non-application of the EU measures concerned to the UK as of 1 December 2014. That prospect is therefore the focus on this analysis. As for the timing of the block opt-out decision, it must be taken 'at the latest' by 1 June 2014. So after that point, there will be no opportunity to make a block opt-out decision. But conversely, the block opt-out decision could be taken at any time

before that point. However, even if the UK notifies its decision at an early stage, it would clearly only take effect as from 1 December 2014 (Article 10(4)), not before (and not after).

It is even possible that the pre-Lisbon third pillar acts would continue to have some historical effect in the UK after any block opt-out decision. Since it is up to the Council (without the UK's vote) to decide on transitional arrangements, it might decide, for instance, that any European Arrest Warrants transmitted to the UK by other Member States (and vice versa) before 1 December 2014 still had to be executed in accordance with the Framework Decision, even after that date. If that happened, and if the UK thought that the Council had exceeded its legal powers as regards transitional arrangements by adopting such a decision, it could sue the Council to annul that decision before the Court of Justice. If the UK refused to comply with such a decision, however, presumably it could not be sued in the Court of Justice, because the block opt-out decision is intrinsically linked to a refusal to accept that Court's jurisdiction. But the Court would have jurisdiction to rule on the interpretation and validity of the transitional decision if the national court of another Member State asked it to – for instance, if the German authorities were executing a European Arrest Warrant issued by the UK before 1 December 2014.

Next, it is necessary to determine the scope of the possible block opt-out.

First of all, it should be emphasised that the possible block opt-out would *not* apply (as is sometimes suggested) to all pre-Lisbon 'Justice and Home Affairs' measures, but only to pre-Lisbon *policing and criminal law* measures. So it would not apply to measures concerning immigration, asylum or civil law.

Secondly, as is self-evident, the block opt-out could only apply to measures adopted *prior* to the entry into force of the Treaty of Lisbon, not measures adopted after its entry into force (such as the proposed Directive on the European investigation order).

Thirdly, the block opt-out can only apply to those measures which have not been amended since the entry into force of the Treaty of Lisbon. The exact meaning and scope of this rule is discussed further below.

Finally, the block opt-out would only apply to EU measures ('acts of the Union': see Article 10(1)), rather than international treaties to which the UK is separately a party outside the EU legal framework. For instance, the EU's Framework Decision on the European Arrest Warrant has essentially replaced, as between EU Member States, the regime established by the Council of Europe Convention on extradition and its Protocols. If the UK were no longer bound by the Framework Decision, the requests for extradition from the UK to other EU Member States (and vice versa) would then revert to being governed by the Council of Europe system (unless the UK decided separately to denounce the Council of Europe extradition Convention as well). Of course, the Council of Europe extradition system is not the same as the European Arrest Warrant (for good or ill), but it should not be forgotten that there would be some multilateral framework for extradition in place in relations with other Member

States, rather than none at all. The same is true of issues such as the transfer of prisoners, money laundering and mutual assistance, and certain substantive criminal law issues such as drug trafficking.

However, there are some areas of law where the relevant EU act has not replaced a Council of Europe measure (such as mutual recognition of pre-trial measures) or where the UK and/or some other Member States is/are not a party to the relevant Council of Europe measures (such as mutual recognition of financial penalties). In those cases, there is either no international framework to fall back on, or the UK and/or the other relevant Member States would have to ratify the relevant treaty (ie the Council of Europe treaty on the validity of criminal judgments) for there to be one. This 'fallback' issue should be taken into account when deciding on whether to invoke the block opt-out. For instance, the UK could, if it wished, seek to mitigate the impact of a planned block opt-out in certain areas, where possible, by signing up to the relevant treaties and/or by encouraging other Member States to sign them. It should not be forgotten that signing up to such treaties would affect the UK's relations with non-EU states as well. Or conversely, it could, if it wished, exacerbate the effect of a block opt-out by denouncing some or all of the treaties concerned. Obviously there would be political and practical consequences to such courses of action. A detailed list of cases where an alternative legal framework exists is set out in Annex I. Since Croatia will likely be a Member State by 2014, its position is also mentioned.

Opting back in

The discussion over the use of the block opt-out sometimes overlooks the possibility that the UK has the option to opt back in to any of the measures concerned, according to Article 10(5) of the transitional protocol. The UK can do so 'at any time afterwards', so there is no final time limit, but it appears from the literal wording of the Protocol that the UK cannot make any request to opt back in until the measures concerned 'have ceased to apply to it', ie after 1 December 2014.

So this means that the UK is not forced to make a choice between continuing to apply *all* of the pre-Lisbon third pillar acts and continuing to apply *none* of them. It could instead, continue to apply *some* of them, although formally speaking, it would have to take a two-step approach to that end (opting out of all of the measures first, and then opting back in to the ones it wishes to continue with). Although the official application to opt back in to the measures concerned cannot be lodged until 1 December 2014, the UK government could nevertheless announce to the public and to the EU institutions its intention to opt back in to certain measures at an earlier date than that. Indeed, the UK government could announce its intention to opt back in to certain measures *at the same time* that it makes the formal decision to opt out of all of them – so that, in effect, it would only be opting out of some of them. The UK could even, if it wished, opt back in to the large majority of pre-Lisbon third pillar measures, if it only fundamentally objected to the continued application of (and the Court of Justice's jurisdiction concerning) a few of them. For instance, it would be

possible, if the UK wished, to use this process *only* to terminate the UK's obligation to apply the European Arrest Warrant, and not any other measure.

Admittedly, since the UK could not officially apply to opt back in to any EU measures until 1 December 2014, there would be a formal gap of at least a few months before the Commission's and/or the Council's decision on the UK's opt-in could be formally adopted. But as regards criminal procedural law, there is no bar to the retroactive application of the opt-in decision. In other words, if the UK opted back in to (for example) the Framework Decision on the transfer of prisoners as from 1 March 2015, the decision approving the opt-in could provide that the UK's requests to other Member States to transfer prisoners there (and vice versa) would still be valid even if they were issued between 1 December 2014 and 1 March 2015. If necessary, the opt-in approval decision could also specify that transfer requests issued before 1 December 2014 were also still valid – although it would probably be possible to provide already for the continuing validity of such requests in the Council decision on transitional measures (Art. 10(4), second sub-paragraph). Given that the UK would have previously been applying the measures concerned, there would be no need to give it any transposition period before it applies them again.

On the other hand, it would not be possible to provide for any retroactive application of measures concerning substantive criminal law, given the ban on retroactivity of criminal liability set out in the ECHR and the EU's Charter of Fundamental Rights. But the impact of this would be limited in practice, since the UK could always retain in force its existing national criminal law which gives effect to the EU measures in the interim. Finally, the UK could not have access to EU criminal law databases or other mechanisms for the exchange of information between national police forces in the period between 1 December 2014 and the date when it officially opts back in to the measures concerned. Access to these sources could not be granted informally during the period concerned, since the exchange of personal data can only take place on the basis of a formal, detailed legal act, according to the ECHR and the EU Charter.

While the UK would need the formal approval of the Commission or, in a few cases, the Council to opt back in to the prior measures, in practice this will not likely be a problem. The UK and Ireland have in practice opted in to a number of Justice and Home Affairs measures without any difficulty obtaining approval from the Commission. For its part, the Council has been reluctant to approve UK participation in Schengen measures relating to border controls, unless the UK takes part in Schengen fully, but it has approved the UK's participation in the criminal law and policing aspects of Schengen.

The scope of the block opt-out – which pre-Lisbon measures have been amended?

To date, only one pre-Lisbon third pillar Decision (concerning the 'migration' from the first-generation Schengen Information System to the second-generation system) has been amended, and two pre-Lisbon third pillar Framework Decisions have been replaced (these concerned trafficking in persons and sexual exploitation of children).

In practice, the Directives replacing pre-Lisbon Framework Decisions also state in their preambles that they are amending those acts.

However, although there has obviously only been a very modest reduction of the scope of the pre-Lisbon third pillar *acquis* to date, the replacement or amendment of pre-Lisbon third pillar measures is very to intensify in the run up to June 2014. The Council has already agreed in principle to replace three more Framework Decisions (concerning crime victims, attacks on information systems and the European evidence warrant). In each case, the legislation concerned still has to be agreed with the European Parliament, but it seems unlikely that the EP will reject any of the relevant proposals altogether. Furthermore, the Commission is planning to make a number of proposals to replace other pre-Lisbon measures in 2012. Other proposals may be tabled in 2013 and the first five months of 2014. It should be recalled that legislation in this area can be proposed not only by the Commission, but by a group of Member States.

To date, the UK has always opted in to each proposal which replaces a pre-Lisbon third pillar act. It has also opted in to some of the criminal law proposals which do *not* replace pre-Lisbon third pillar acts. So even if the UK decides to invoke the block opt-out, the Court of Justice will still have some jurisdiction over criminal law measures as regards the UK. In fact, it will gain this jurisdiction even before 1 December 2014, as some of the measures concerned have to be transposed into national law before that date. Obviously, it remains to be seen whether the UK will opt in to all of the upcoming proposals replacing pre-Lisbon third pillar acts; it could choose instead to opt in to only some of them, or even opt out of all of them. In the event that the UK does not opt in to such proposals, then it will continue to be bound by the pre-Lisbon third pillar acts which they replace, since the prior acts will only be repealed as regards the participants in the new act; but the UK could still end its obligations under the previous acts if its invokes its block opt-out.

It is likely that most or all of the proposals for legislation in this area which are tabled by mid-2013 will be adopted by 1 June 2014, since there is usually a major effort made to agree on most legislative proposals before each European Parliament election (the next election is due in June 2014). However, there will likely still be at least a few proposals in this area not yet agreed or adopted at that point. The critical issue in those cases will be whether the UK has already opted in to the proposal concerned; if so, then the UK's decision to invoke the block opt-out would have no real impact as regards the pre-Lisbon third pillar measure which is due to be replaced, since the UK will sooner or later be bound by the replacement measure – unless (improbably) that measure is not ultimately agreed.

A complete list of pre-Lisbon third pillar measures appears in Annex II, which also indicates which measures have already been replaced or amended, which replacement measures have been agreed in principle, and which replacement measures are likely to be proposed. The latter information is based on the Commission's work programme for 2012 (and for earlier years, where proposals have been delayed) as well as the Commission's action plan on the implementation

of the Stockholm programme. It is always possible that planned proposals will be cancelled or delayed, or not agreed if they are made, and conversely that the Commission or a group of Member States will make further proposals which have not been announced at time of writing. In particular, the Commission has not yet decided much of its agenda for 2013 or 2014.

Furthermore, as indicated in detail in Annex II, some existing EU measures are due to lapse automatically (legislation establishing funding programmes will expire by the end of 2013) or will be repealed effective from the start of operations of the second-generation Schengen Information System, which is currently scheduled for the first quarter of 2013. Annex II lists all Framework Decisions and Decisions, even though some of them were repealed or lapsed before the Treaty of Lisbon entered into force, or were annulled by the Court of Justice. However, it does not mention other pre-Lisbon third pillar measures that are no longer in force.

Overall, it can be seen from Annex II that about half of the third pillar Decisions originally adopted will likely have lapsed or been repealed (33 will still be in force, 26 will not be). However, but **quantitatively** speaking some of the most important measures would have been amended (Europol, Eurojust, European Police College and the Customs Information System); the most important Decisions still in force without amendment would be measures concerning the exchange of information. However, of these, the UK will possibly not yet be applying the Schengen Information System in 2014, and UK police only have limited access to the Visa Information System. The 'Prum Decision' on police cooperation would, however, cease to apply.

Similarly, about 18 of the 34 Framework Decisions will still be in force. Most of these concern mutual recognition (the European Arrest Warrant, transfer of prisoners, probation and pre-trial measures, financial penalties), and some concern substantive criminal law (terrorism, non-cash payments, organised crime, racism), plus there are measures concerning the exchange of policing information: the 'Swedish framework decision' and the Framework Decision on joint investigation teams.

As regards international treaties, the only relevant measures, the EU/USA treaties on extradition and mutual assistance, largely supplement (and are implemented by) bilateral treaties, so their abrogation as regards the UK would have little practical effect. As for Conventions between EU Member States, a block opt-out would particularly impact on customs cooperation (the 'Naples II' Convention) and corruption. Finally, none of the remaining Joint Actions are hugely significant, and the impact of not applying the remaining Schengen *acquis* would largely concern police cooperation and the double jeopardy rules. If the new version of the Schengen Information System is not yet operational, the UK could not have access to the old version as a result of the block opt-out (again, the UK's access to the system is not currently operational).

Conclusions

Given that the UK can retain in force its existing substantive criminal law rules if it wishes to, the main practical impact of the block opt-out would be to end the UK's access to policing databases and other forms of exchange of police information, and to terminate the UK's involvement in some aspects of criminal law judicial cooperation, in particular the European Arrest Warrant and the transfer of prisoners. In most, but not all, of the areas addressed by EU criminal law (but not police cooperation), there is in any event another international law framework in place. However, in all cases, that framework is less detailed than the EU rules, and in many cases the UK and/or some other Member States do not participate in the relevant rules. The UK's block opt-out could also be ameliorated in part by an opt-in to some of the measures concerned.

Annex I

Alternative international frameworks

Council of Europe

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

ETS 24 Extradition Convention (1957)

ETS 30 Convention on mutual assistance (1959)

ETS 90 Convention on the suppression of terrorism (1977)

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

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

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

ETS 98 Second Protocol, Extradition Convention (1978)

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

Signed by: 1 Member State: Greece

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

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

Signed by: Malta

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

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

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

ETS 173 Criminal law Convention on corruption (1999)

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

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

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

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

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

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

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

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

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

ETS 52 Convention on road traffic offences (1964)

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

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

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

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

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

ETS 73 Convention on transfer of criminal proceedings (1972)

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

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

ETS 86 First Protocol, Extradition Convention (1975)

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

Signed by: 1 Member State: Greece

ETS 189 Protocol to Cyber- crime Convention (2003)

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

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

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

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

Signed by: 11 Member States: all other Member States

CETS 196 Convention on the prevention of terrorism (2005)

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

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

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

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

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

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

Ratified by: no Member States

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

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

United Nations

Convention on transnational organized crime

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

Signed by: 2 Member States: Czech Republic

Protocol on smuggling, Convention on transnational organized crime

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

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

Convention on corruption

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

Signed by: 2 Member States: Czech Republic and Germany

OECD

Anti-bribery (corruption) convention (1997)

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

Annex II

Pre-Lisbon third pillar acts

a) Common Positions [*several others have lapsed*]

1. Combatting terrorism (OJ 2001 L 344/90)

2. Application of specific measures to combat terrorism (OJ 2001 L 344/93)

- both measures apply both to international terrorists and to domestic terrorists, hence they have a foreign policy legal base as well. They might possibly be amended as regards domestic terrorists by an upcoming proposal (2012) to be based on Art. 75 TFEU. Arguably, this legal base also applies to the adoption of measures concerning international terrorists as well. This legal issue will be resolved by the Court of Justice in the near future: see Case C-130/10 EP v Council (the Advocate-General's opinion will be released on 31 Jan. 2012).

3. Common Position on transfer of data to Interpol (OJ 2005 L 27/61)

b) Decisions

Overview – 59 decisions; 14 are no longer in force; 3 will lapse when SIS II begins operations; one of these has already been amended post-Lisbon; 2 others will lapse at the end of 2013

- so as of Jan. 2012, 45 still in force, 1 of those amended post-Lisbon*
- as of June 2014, 2 will certainly lapse, 2 are projected to lapse; Commission proposals expected 2012 regarding 6 Decisions, and possibly one further in 2013*
- this would leave 33 Decisions in force without amendment*
- note that the Stockholm programme refers to the possible adoption of an 'EU police code'; this could result in amendments to other measures*

1. Exchange of information on counterfeit travel documents (OJ 2000 L 81/1)

2. Combatting child pornography on the Internet (OJ 2000 L 138/1)

3. Decision 2000/586/JHA: Procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of Schengen Convention (OJ 2000 L 248/1)

4. Decision 2000/641/JHA: Joint Secretariat for third pillar data protection authorities (OJ 2000 L 271/1)

5. Decision 2000/642 concerning Member States' Financial intelligence units (FIUs) (OJ 2000 L 271/4)

6. Decision 2000/799/JHA setting up a provisional Judicial Cooperation Unit (Eurojust) (OJ 2000 L 324/2)
- *lapsed*
7. Decision 2000/820/JHA on the provisional establishment of the European Police College (OJ 2000 L 336/1)
- *repealed by 2005 Decision*
8. Decision 2001/419/JHA on the transmission of samples of controlled substances (OJ 2001 L 150/1)
9. Decision 2001/427 on Crime Prevention Network (OJ 2001 L 153/1)
- *repealed by 2009 Decision*
10. 'Grotius II' Decision 2001/512 on criminal law cooperation (OJ 2001 L 186/1)
- *lapsed*
11. Decision 2001/513 on Oisin II programme (OJ 2001 L 186/4)
- *lapsed*
12. Decision 2001/513 on Stop II programme on sexual exploitation and trafficking in persons (OJ 2001 L 186/7)
- *lapsed*
13. Decision 2001/515 on Hippocrates programme on incentives, exchanges, training and cooperation for prevention of crime (OJ 2001 L 186/11)
- *lapsed*
14. Decision 2001/887/JHA on protection of the euro against counterfeiting (OJ 2001 L 329/1)
15. Decision 2001/886/JHA on funding SIS II within the third pillar (OJ 2001 L 328/1)
- *repealed by 2008 Decision*
16. Decision establishing Eurojust (OJ 2002 L 63/1)
- *amended in 2003 and 2008; Commission proposal planned 2012*
17. Decision 2002/348/JHA concerning security in connection with football matches with an international dimension (OJ 2002 L 121/1)
- *amended by 2007 Decision*
18. Decision 2002/494 on exchange of information and contact points concerning genocide, crimes against humanity and war crimes (OJ 2002 L 167/1)
19. Decision on a Title VI framework funding programme (OJ 2002 L 203/5)
- *lapsed*
20. Decision on network for protection of public figures (OJ 2002 L 333/1)
- *amended by 2009 Decision*
21. Decision on evaluating Member States' implementation of international commitments regarding terrorism (OJ 2002 L 349/1)
22. Decision 2003/48/JHA implementing the Common Position on terrorism as regards police and judicial cooperation (OJ 2003 L 16/68)
- *repealed by 2005 Decision*
23. Decision 2003/169 designating which provisions of the 1995 and 1996 EU extradition Conventions are related to the Schengen acquis (OJ 2003 L 76/25)
24. Decision 2003/170 on joint use of liaison officers (OJ 2003 L 67/27)
- *amended by 2006 decision*
25. Decision 2003/335 on investigation and prosecution of genocide, crimes against humanity and war crimes (OJ 2003 L 118/12)
26. Decision extending Convention on corruption to Gibraltar (OJ 2003 L 226/27)
27. Decision amending Eurojust decision (OJ 2003 L 245/44)
- *Commission proposal due 2012*
28. Decision amending Article 40, Schengen Convention to permit extended cross-border police surveillance (OJ 2003 L 260/37)

29. Decision on amending Sirene manual (OJ 2004 L 64/45)
- *will be obsolete when SIS II starts operations*
30. Decision amending Decision on European Police College (OJ 2004 L 251/19)
- *repealed in 2005*
31. Decision amending Decision on European Police College (OJ 2004 L 251/20)
- *repealed in 2005*
32. Decision on vehicle crime (OJ 2004 L 389/28)
33. Decision on future functionalities for SIS (OJ 2005 L 68/44)
- *will be obsolete when SIS II starts operations*
34. Decision on synthetic drugs (OJ 2005 L 127/32)
- *proposal for amendment or repeal due 2012*
35. Decision designating Europol as the central office for counterfeiting the euro (OJ 2005 L 185/35)
36. Decision on exchange of information on terrorism (OJ 2005 L 253/22)
37. Decision on European police college (OJ 2005 L 256/63)
38. Decision on criminal record information exchange (OJ 2005 L 322/33)
- *repealed by 2009 Decision*
39. Decision amending 2003 Decision on police liaison officers (OJ 2006 L 219/31)
40. Decision on SIS II (OJ 2006 L 411/78)
41. Decision establishing 'criminal justice' programme (OJ 2007 L 58/13)
- *will expire end 2013; replacement proposal Nov. 2011*
42. Decision establishing 'Crime prevention/fight against crime' programme (OJ 2007 L 58/7)
- *will expire end 2013; replacement proposal Nov. 2011*
43. Decision establishing SIS II (Criminal law/policing aspects) (OJ 2007 L 205/63)
44. Decision amending Decision on football hooligans (OJ 2007 L 155/76)
45. Decision establishing an asset recovery network (OJ 2007 L 332/103)
46. Decision on cross-border intervention teams (OJ 2008 L 210/73)
47. Decision on cross-border police cooperation (Prum Treaty Decision) (OJ 2008 L 210/1)
48. Decision on cross-border police cooperation (Prum Treaty Decision) (OJ 2008 L 210/12)
49. Decision on law enforcement access to VIS (OJ 2008 L 218/129)
- *does not apply to UK in any event; see Court of Justice judgment of 26 Oct. 2010 in Case C-482/08 UK v Council*
50. Decision establishing an anti-corruption network (OJ 2008 L 301/38)
51. Decision on migration from SIS to SIS II (OJ 2008 L 299/43)
- *amended by Regulation, 2010; Commission proposal for amendment due 2012*
52. Decision amending Decision establishing Eurojust (OJ 2009 L 138/14)
- *Commission proposal for amendment due 2012*
53. Decision on the European Judicial Network (OJ 2008 L 348/130)
54. Decision implementing the Framework Decision on the exchange of criminal records (OJ 2009 L 93/33)
55. Decision establishing Europol (OJ 2009 L 121/37)
- *Commission proposal for amendment due 2012*
- d56. Decision amending the Decision establishing a network for the protection of public figures (OJ 2009 L 283/62)
57. Decision amending and replacing the Convention establishing a Customs Information System, and its Protocols (OJ 2009 L 323/20)
- *Commission proposal to merge this decision with EC Regulations due 2012*
58. Decision on crime prevention network (OJ 2009 L 321/44)

- *Stockholm programme calls for more ambitious measure in this area, possibly implies amendment or repeal of this act*

59. Decision extending EU/USA extradition treaties to Netherlands Antilles and Aruba (OJ 2009 L 325/4)

c) Framework Decisions

Overview – 34 Framework Decisions; 2 annulled by Court of Justice; 2 of the remainder have been replaced by Directives

- so as of Jan. 2012, 30 still in force; the Council has agreed on the replacement of 3 more and the partial replacement of a fourth (which would be fully repealed by an upcoming proposal)

- as of June 2014, the Commission will have proposed the repeal of another 8 – leaving 18 Framework Decisions

1. Criminal sanctions for counterfeiting the euro (OJ 2000 L 140/1)

- will likely be replaced or amended by planned 2012 proposal

2. Framework Decision 2001/220/JHA on the status of victims (OJ 2001 L 82/1)

- will be replaced by May 2011 proposal for Directive (UK opt-in); general approach in Council Dec. 2011

3. Framework Decision 2001/413/JHA on payment card fraud and counterfeiting (OJ 2001 L 149/1)

4. Framework Decision 2001/500 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ 2001 L 182/1)

- will likely be replaced or amended by planned 2012 proposal

5. Framework Decision 2001/888/JHA on criminal records for counterfeiting the euro (OJ 2001 L 329/3)

- will likely be replaced or amended by planned 2012 proposal

6. Framework Decision on terrorism (OJ 2002 L 164/3)

7. Framework Decision on European arrest warrant (OJ 2002 L 190/1)

8. Framework Decision on joint investigation teams (OJ 2002 L 162/1)

9. Framework Decision on trafficking in humans (OJ 2002 L 203/1)

- replaced by Directive (UK opt-in) adopted by Council in 2011

10. Framework Decision on the penal framework to prevent the facilitation of illegal entry and residence (OJ 2002 L 328/1)

- Commission plans for amendment or replacement proposal in 2012

11. Framework Decision on environmental crime (OJ 2003 L 29/55)

- annulled by judgment of Court of Justice (Case C-176/03, judgment of 13 Sept. 2005), and replaced by Directive

12. Framework Decision on the execution of orders freezing assets and evidence (OJ 2003 L 196/45)

- will be partly replaced by European Investigation Order Directive; would likely be fully replaced by early 2012 proposal

13. Framework Decision on corruption in private sector (OJ 2003 L 192/54)

14. Framework Decision on the sexual exploitation of children and child pornography (OJ 2004 L 13/44)

- replaced by Directive (UK opt-in) adopted Council in 2011

15. Framework Decision on illicit drug trafficking (OJ 2004 L 335/8)

- would likely be replaced or amended by 2012 proposal

16. Framework Decision on mutual recognition of financial penalties (OJ 2005 L 76/16)

- *would be replaced by Commission proposal originally planned for 2011, but this planned proposal has now apparently been shelved*

17. Framework Decision concerning attacks on information systems (OJ 2005 L 69/67)

- *will be replaced by Directive (UK opt-in) agreed by Council in 2011, not yet agreed with EP*

18. Framework Decision on confiscation (OJ 2005 L 68/49)

- *would likely be replaced or amended by early 2012 proposal*

19. Framework Decision concerning criminal sanctions for pollution resulting from shipping (OJ 2005 L 255/164)

- *annulled by Court of Justice (judgment of 23 Oct. 2007 in Case C-440/05, Commission v Council); replaced by Directive*

20. Framework Decision on the execution of confiscation orders (OJ 2006 L 328/59)

- *would likely be replaced or amended by early 2012 proposal*

21. Framework decision on exchange of data between law enforcement services (OJ 2006 L 386/89)

22. Framework decision on taking account of prior convictions in another Member State (OJ 2008 L 220/32)

23. Framework Decision on organised crime (OJ 2008 L 300/42)

24. Framework Decision on the transfer of custodial sentences (OJ 2008 L 327/27)

25. Framework Decision on data protection in the sphere of criminal law and policing (OJ 2008 L 350/60)

- *would be replaced by Directive to be proposed Jan. 2012; UK will not have opt-out*

26. Framework Decision on mutual recognition of alternative sanctions and suspended sentences (OJ 2008 L 337/102)

27. Framework Decision on racism and xenophobia (OJ 2008 L 328/55)

28. Framework Decision amending the framework decision on terrorism (OJ 2008 L 330/21)

29. Framework Decision on European evidence warrant (OJ 2008 L 350/72)

- *will be replaced by European Investigation Order Directive (UK opt-in) – general approach of Council, Dec. 2011*

30. Framework decision on criminal record exchange (OJ 2009 L 93/23)

- *presumed that the planned 2013 proposal on criminal records of third-country nationals will not amend this, but this may not be correct*

31. Framework Decision on 'in absentia' trials (OJ 2009 L 81/24)

32. Framework decision on mutual recognition of pre-trial supervision orders (OJ 2009 L 294/20)

33. Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal matters (OJ 2009 L 328/42)

34. Framework Decision on accreditation of forensic laboratory activities (OJ 2009 L 322/14)

d) International treaties

1. Treaties with US on mutual assistance and extradition (OJ 2003 L 181/25)

2. PNR treaty with USA (OJ 2007 L 204) – applied provisionally

- *will be replaced by 2011 agreement, signed by EU and USA (decision on UK opt-in pending)*

3. PNR treaty with Australia (OJ 2008 L 213/47) – applied provisionally

- *replaced by 2011 agreement, concluded by EU (UK opt-in)*

Note: a PNR treaty with Canada (not listed here) was an EC measure, and has lapsed; no other treaties agreed pre-Lisbon were finally concluded pre-Lisbon, and the treaties concluded post-Lisbon are not subject to the June 2014 decision

e) Conventions

Extradition (1995)

Ratified by: 20 Member States: all the first fifteen Member States except Italy, plus Cyprus, Poland, Estonia, Lithuania, Latvia and Slovenia

Applied by: 14 Member States: the ratifying States except Greece, Ireland, Netherlands, Portugal, Cyprus and Estonia

Extradition (1996)

Ratified by: 20 Member States: all the 'old' Member States except Italy, plus Cyprus, Poland, Estonia, Lithuania, Latvia and Slovenia

Applied by: 14 Member States: the ratifying States except Greece, Ireland, Netherlands, Cyprus, Estonia and Latvia

Note: the Conventions have little practical relevance in light of the Framework Decision on the European Arrest Warrant

Convention on Protection of EC Financial Interests (PIF) (1995)

Ratified by: 26 Member States: all except Czech Republic

First Protocol to PIF Convention (1996)

Ratified by: 26 Member States: all Czech Republic

Court of Justice Protocol to PIF Convention (1996)

Ratified by: 25 Member States: all except Estonia and Czech Republic

Second Protocol to PIF Convention (1997)

Ratified by: 26 Member States: all except Czech Republic

Note: the Commission is planning to propose a measure on this issue in 2012; this will presumably replace some and possibly all of the text of the Convention and Protocols

Convention on corruption (1997)

Ratified by: 25 Member States: all except Malta and Czech Republic

Naples II Convention (1998)

Ratified by: all Member States

Driving Disqualification Convention (1998)

Ratified by: 7 Member States: Bulgaria, Cyprus, Spain, UK, Ireland, Romania and Slovakia

Applied by: Ireland and UK

Note: the Commission is planning to propose on disqualifications in 2013; this might replace some and possibly all of the text of the Convention

Convention on mutual assistance (2000)

Ratified by: 24 Member States: all except Greece, Italy and Ireland

- will be partly replaced by European Investigation Order Directive (UK opt-in) – general approach of Council, Dec. 2011

Protocol to Convention on mutual assistance (2001)

*Ratified by: 23 Member States: all except Estonia, Greece, Italy and Ireland
- will be partly replaced by European Investigation Order Directive (UK opt-in) – general approach of Council, Dec. 2011*

Note: the Europol Convention and the Customs Information Convention, and all their Protocols, were replaced by Decisions adopted in 2009, so are not listed above

There were also treaties between Member States concluded within the framework of 'European Political Cooperation' before the Maastricht Treaty was ratified. In the area of policing and criminal law, these treaties concerned double jeopardy (1987), the transfer of sentenced persons (1987), the faxing of extradition requests (1989), the transfer of criminal proceedings (1990) and the enforcement of criminal sentences (1991). None are yet in force. The UK has only ratified the extradition treaty.

f) Joint Actions (still in force)

1. Joint Action 98/700/JHA on European Imaging Archive System ([1998] OJ L 333/4)
2. Joint Action 96/277/JHA on exchange of liaison magistrates ([1996] OJ L 105/1)
3. Joint Action 96/750/JHA on drug trafficking ([1996] OJ L 342/6)
4. Joint Action 98/427/JHA on good practice in mutual legal assistance ([1998] OJ L 191/1)
5. Joint Action 98/699/JHA on money laundering and confiscation of proceeds ([1998] OJ L 333/1)
Note: Framework Decision of 2001 amended and supplemented this Joint Action in part (see above); planned proposal of 2012 might further amend or replace it
6. Joint Action 96/610/JHA on directory of specialist counter-terrorist expertise ([1996] OJ L 273/1)
7. Joint Action 96/698/JHA on customs and business cooperation in drug trafficking ([1996] OJ L 322/3)
8. Joint Action 96/699/JHA on exchange of information on chemical profiling of drugs ([1996] OJ L 322/5)
9. Joint Action 96/747/JHA on directory of expertise on international organised crime ([1996] OJ L 342/2)
10. Joint Action 97/339/JHA on cooperation in law and order ([1997] OJ L 147/1)
11. Joint Action 97/372/JHA on targeting criteria for police ([1997] OJ L 159/1)
12. Joint Action 97/827/JHA on evaluation ([1997] OJ L 344/7)
13. Joint Action 98/429/JHA on collective evaluation of application of *acquis* by applicant states ([1998] OJ L 191/8)
14. Joint Action 96/658/JHA on US Helms-Burton legislation ([1996] OJ L 309/7)

g) Schengen *acquis*

1) Schengen Convention:

Arts 39-45, 47-49 (police cooperation), 51 (mutual assistance), 54-58 (double jeopardy), 71-72, 75-76 (drugs), 92-119 (SIS), 126-30 (data protection); also some provisions of Schengen accession treaties

Notes: Arts 92-119 have been amended by Decisions concerning the SIS in 2005 and 2008 (see above); they will be repealed with effect from when the decision setting up SIS II (adopted in 2007, see above) becomes operational (planned for 2013)

Arts 39(1), (2) and (3) and 46 were repealed by the Framework Decision on exchange of data between law enforcement services; Art 47(4) was repealed by a 2003 Decision; Art 40(1) and (7) were amended by a 2003 Decision

Arts 49(a), 52, 53 and 73 were repealed by the 2000 EU mutual assistance Convention, Art 2(2); Art 50 was repealed by Art 8(3) of the 2001 protocol to that Convention (see above); but note that a few Member States have not ratified the Convention or the Protocol, so the Schengen Convention provisions still apply; also they still apply as regards relations with to Switzerland and Liechtenstein; note that these provisions and Art. 51 would largely be replaced as between EU Member States by the Directive on the European Investigation Order (except that Ireland and Denmark will not be covered by that Directive)

Arts 59-60, 62-66 (extradition) were repealed by the Framework Decision on the European Arrest Warrant, but might still apply in a few cases where the effect of the EAW is restricted, and to Schengen associates (except that a treaty between the EU, Norway and Iceland has signed and might enter into force as a post-Lisbon act; this would effectively replace the Schengen provisions)

Articles 67-69 were repealed by the Framework Decision on transfer of prisoners; they still apply to Schengen associates

2) Schengen Executive Committee Decisions/Declarations/Central Group acts:

i) repealed with effect from when SIS II Decision is operational:

SCH/Com-ex (93) 16 - 14.12.1993 - Financial Regulations on the installation and operating costs for the Schengen C.SIS

SCH/Com-ex (97) 18 - 7.10.1997 - Contributions from Norway and Iceland to the C.SIS operating costs

SCH/Com-ex (97) 24 - 7.10.1997 - Future of the SIS

SCH/Com-ex (97) 35 - 15.12.1997 - Amendment to the C.SIS Financial Regulations

SCH/Com-ex (98) 11 - 21.4.1998 - C.SIS with 15/18 connections

SCH/Com-ex (99) Decl 2 Rev - 28.4.1999 - SIS-structure

SCH/Com-ex (99) 4 - 28.4.1999 - C.SIS installation costs

SCH/Com-ex (99) 5 - 28.4.1999 - SIRENE Manual

ii) other (within scope of third pillar)

SCH/Com-ex (93) 10 - 14.12.1993 - Confirmation of the declarations by the Ministers and Secretaries of State of 19 June 1992 and 30 June 1993 on bringing into force

SCH/Com-ex (93) 14 - 14.12.1993 - Improving practical cooperation between the judicial authorities to combat drug trafficking

SCH/Com-ex (97) 2 Rev 2 - 25.4.1997 - Awarding the tender for the SIS II preliminary study

SCH/Com-ex (97) 6 Rev 2 - 24.6.1997 - Schengen Manual on police cooperation in the field of public order and security

SCH/Com-ex (97) 29 Rev 2 - 7.10.1997 - Bringing into force the Convention implementing the Schengen Agreement in Greece

SCH/Com-ex (98) 26 def - 16.9.1998 - Setting up of the Schengen implementing Convention Standing Committee

SCH/Com-ex (98) 29 Rev - 23.6.1998 - Catch-all clause to cover the whole technical Schengen acquis
SCH/Com-ex (98) 37 def 2 - 16.9.1998 - Action plan to combat illegal immigration
SCH/Com-ex (98) 43 Rev - 16.12.1998 - Ad hoc Committee for Greece
SCH/Com-ex (98) 49 Rev 3 - 16.12.1998 - Bringing the Convention implementing the Schengen Agreement into force in Greece
SCH/Com-ex (98) 52 - 16.12.1998 - Handbook on cross-border police cooperation
SCH/Com-ex (99) 3 - 28.4.1999 - Help Desk budget for 1999
SCH/Com-ex (99) 6 - 28.4.1999 - Telecomms situation
SCH/Com-ex (99) 7 Rev 2 - 28.4.1999 - Liaison officers
SCH/Com-ex (99) 8 Rev 2 - 28.4.1999 - Payments to informers
SCH/Com-ex (99) 11 Rev 2 - 28.4.1999 - Agreement on cooperation in proceedings for road traffic offences
SCH/Com-ex (96) Decl 6 - Rev 2 - 26.6.1996 - Declaration on extradition
SCH/Com-ex (97) Decl 13 - Rev 2 - 21.4.1998 - Abduction of minors
SCH/C (98) 117 - 27.10.1998 - Action plan to combat illegal immigration
SCH/C (99) 25 - 22.3.1999 - General principles for the remuneration of informants and infiltrators

3) International treaties

in force:

1. Schengen association agreement with Norway and Iceland ([1999] OJ L 176)
2. Schengen association agreement with Switzerland ([2008] OJ L 53)

Note: the Protocol to the Schengen association agreement with Switzerland, as regards Liechtenstein ([2011] OJ L 160), is a post-Lisbon measure

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