



Analysis

The UK opt-out from Justice and Home Affairs law: the other Member States finally lose patience

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Introduction

The UK government has decided to exercise a 'block opt-out' from EU police and criminal law measures adopted before the entry into force of the Treaty of Lisbon, but has indicated its intention to opt back in to some of these measures, including the controversial European Arrest Warrant. At the same time, the government wants the UK to participate in the Schengen Information System, and to reform the operation of the European Arrest Warrant System. On top of that, the Conservative party wants to renegotiate the UK's membership of the EU and hold an in/out referendum on that membership. It has now become clear that at least some other Member States have lost patience with these contradictory demands, and so the government may have to decide which it wishes to pursue, and which will not.

Background

The Treaty of Lisbon, which entered into force on 1 December 2009, included a five-year transition period relating to EU police and criminal law measures adopted before that date. These measures were subject to a special legal regime (known as the 'third pillar') before that date, and so the purpose of the transition period was to delay the application of the usual EU rules to such measures.

According to the transitional protocol to the Treaty of Lisbon ('Protocol 36'), after the end of the transitional period (so by 1 December 2014), the usual jurisdiction of the

Court of Justice of the European Union ('CJEU') would apply to EU police and criminal law measures adopted before the entry into force of that Treaty ('pre-Lisbon third pillar acts'). This means that the European Commission will be able to bring 'infringement actions' complaining that Member States are not properly applying their legal obligations established in pre-Lisbon third pillar acts before the CJEU. It also means that all Member States will have to permit all of their national courts to send questions to the CJEU about the interpretation and validity of pre-Lisbon third pillar acts, although in fact the majority of Member States permit this already.

Another key feature of the transitional rules is that the UK (but not any other Member State) can invoke a 'block opt-out' from all pre-Lisbon third pillar acts at the end of the transitional period. The UK invoked this already back in the summer of 2013. This means that all pre-Lisbon third pillar acts cease to apply to the UK as from 1 December 2014. However, the UK can apply to opt back in to some of the acts concerned, and the UK government has indicated that there are 35 pre-Lisbon third pillar acts which it wishes to opt back into. This process is subject to approval of the European Commission (for most of the measures concerned), and to the Council (ie Member States' justice and interior ministers) acting unanimously, where the measures concerned are related to the 'Schengen acquis', ie the rules on abolition of internal border controls within the EU. While the UK has not agreed to abolish border controls, it has agreed to apply some related measures concerning police and criminal law cooperation, most notably the 'Schengen Information System' ('SIS'), a system for information exchange on wanted persons or objects.

For EU policing and criminal law measures adopted after the entry into force of the Treaty of Lisbon (including those which replace or amend pre-Lisbon third pillar acts), the UK has the power to opt in or out on a case-by-case basis, which is not subject to any control by the Commission or the Council (unless the UK seeks to opt in to a measure after it has already adopted, in which case the Commission decides on whether to accept the application). The block opt-out does not apply to such measures.

The process of considering the UK's request to opt back in to pre-Lisbon third pillar acts has recently begun in the EU's institutions. The Council has set up a 'Friends of the Presidency' group, made up of national civil servants, with three tasks: to identify a list of pre-Lisbon third pillar acts; to decide which of them may be considered obsolete or repealed; and to decide on the UK's application to opt back in to some of them. Of course, as noted already, it is the Commission, not the Council, that will decide on the bulk of the UK's application to opt back in to 35 of these acts.

As regards the first of these tasks, the Commission has prepared an initial draft list of pre-Lisbon third pillar acts, with some notes on them. For some detailed comments on the accuracy of this list, and these notes, see the annex to this analysis. Work has not yet begun on the second task (identifying obsolete acts).

As for the third task, the UK has requested to begin its participation in the second-generation Schengen Information System ('SIS II') as from October 2014 – a date only a few weeks before its block opt-out would take effect. This request has resulted in a very negative reaction from some other Member States, who have queried its timing, not just as regards the block opt-out decision, but also in light of the intention of one of the largest party in the UK government (the Conservative party) to demand a renegotiation of the terms of the UK's membership of the EU, followed by an 'in/out' referendum, in the event that it wins a majority of the seats in the May 2015 British general election. The UK's request for a form of proportionality assessment as regards the transmission of European Arrest Warrant (EAW) alerts through SIS II has also not been welcomed.

In particular:

- (a) Austria requests 'legal certainty' on the UK opt-in position, and questions the UK request to send entire EAWs separately from SIS II;
- (b) France states that the UK's requests will place an 'undue burden' on other Member States, and that the request for complete EAWs for a proportionality check is an 'unusual demand' not provided for in EU law;
- (c) Germany states that there is no 'lasting reliability' of the UK's position, that the UK has had years to join SIS, that the timing of the SIS II participation is questionable, that the UK's requests regarding EAWs are not in line with the EU rules on SIS II and the EAW, and that the UK's replies regarding SIS II evaluation are partly 'not satisfactory';
- (d) Lithuania objects to the planned EAW proportionality check by the UK;
- (e) Slovakia is concerned about all involved 'wasting' their efforts as regards SIS II;
- (f) Spain objects to the transfer of EAWs to the UK, as well as to the planned proportionality checks; and
- (g) The Netherlands suggests waiting until the outcome of the UK referendum in 2017 as regards SIS II, although it should be noted that it is not yet certain whether this referendum will take place, and also the EU has admitted some non-EU States (Norway, Iceland, Switzerland and Liechtenstein) to the Schengen system already.

Conclusion

It is clear that the UK's decision to exercise the block opt out from pre-Lisbon third pillar measures, along with simultaneous demands to opt back in to 35 measures, to participate in SIS II five weeks beforehand, to check all other Member States' EAWs for proportionality, and to insist that all EAWs be transmitted separately to the UK authorities, topped off by the Conservative party's plan to hold an in/out referendum, has pushed some other Member States' patience to the breaking point. If this results in a delay in the UK's participation in SIS II – which currently seems likely in light of Member States' initial reactions – then it will be manifestly clear that the UK

government's position as regards the block opt-out, along with the possibility of an in/out referendum, has reduced Britain's ability to deal with cross-border crime effectively. Moreover, other Member States' hostility to the UK's plans regarding proportionality checks for EAWs mean that these plans – a major part of the government's justifiable attempt to ensure that EAWs are not issued or executed for minor offences – will be difficult to implement in practice when and if the UK participates in SIS II.

Documents

Council - setting up the special working group:

<http://www.statewatch.org/news/2014/mar/eu-council-jha-transition-prot36-7519-14.pdf>

Commission - preliminary list of third pillar acquis:

<http://www.statewatch.org/news/2014/mar/eu-com-draft-third-pillar-acquis-swd-109-2014.pdf>

Council – discussion paper with Member States' reactions:

<http://www.statewatch.org/news/2014/mar/eu-council-prot-36-paper-7038-14.pdf>

Annex

Comments on the preliminary list of pre-Lisbon third pillar measures

Measures 1 and 4 – largely superseded by the EAW; the treaties as such are not yet in force

Measures 2, 10, 11 and 15 – the proposed replacement measure will not apply to all Member States, since the Council and EP agree that it should have a different legal base than the Commission proposed

Measures 12 and 17 – some Member States have not ratified these treaties

Measures 20, 50, 61 and 94 – the proposed Directives have now been adopted

Measures 30 and 35 - the proposed Directive has been adopted; some Member States have not ratified these measures

Measure 34 – partly replaced by the Directive on confiscation of assets, now adopted

Measure 69 – this will be amended in the meantime by a Member States' initiative, which the EP and Council have agreed upon

Measure 78 – this number is used twice

Measure 85 – this was superseded by a new treaty in 2012

Measures 104 and 106 – refer to the same measure

Measure 116 – makes no reference to the provisions replaced by the Protocol to the Mutual Assistance Convention, the EAW Framework Decision, the Framework Decision on prisoner transfer or the Directive on the European Investigation Order

Measure 117 – the Convention makes no reference to repealing this measure

Measure 133 – listed as part of measure 116 already

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