



Chapter 9

Policing and Criminal Justice

The summary

- The Lisbon Treaty, which entered force in December 2009, radically increased EU control over policing and criminal law.
- EU laws in this area are now typically decided by qualified majority voting rather than unanimity in the Council of the EU, and the European Parliament's agreement to proposals must now usually be obtained.
- EU policing and criminal justice laws adopted since the Lisbon Treaty took effect also come under the full jurisdiction of the EU's Court of Justice (ECJ). This means that the ECJ can issue binding rulings in cases brought against a Member State by the European Commission, for what the Commission alleges to be that Member State's failure to abide by one of these laws. It also means the ECJ can rule on questions about the interpretation of these laws submitted to it by British courts – rulings that will be applied by UK judges.
- The UK can choose whether or not it becomes bound by individual EU policing and criminal justice laws proposed now the Lisbon Treaty is in force. If it chooses to participate, the UK cannot opt out of the relevant law again. Up to the end of May 2012, the UK has chosen to become bound by 20 post-Lisbon EU laws in this area.
- The EU treaties allow the UK to opt out of EU policing and criminal justice laws adopted *before* the Lisbon Treaty entered force, if the UK gives notification before June 2014 of its wish to do this. This opt out would be effective from December 2014. This is sometimes called the 'block opt out', as the UK would be opting out of all of these laws en masse.
- Around 130 EU laws currently fall under the block opt out. The Government has promised to give Parliament a vote on whether the UK should exercise this opt out, before a final decision is taken by ministers. The Government is currently considering whether, in its opinion, invoking the block opt out would serve the national interest.
- If the UK does not invoke the block opt out, under the EU treaties it will become bound irreversibly by these pre-Lisbon EU laws, which will come under the full jurisdiction of the ECJ from December 2014.
- If the UK does invoke the block opt out, it will be entitled to apply to re-join individual EU laws affected. The EU institutions would decide on the UK's application, and may set conditions before the UK is allowed to re-join. If the UK became bound by EU laws again through this process, it would not be able to opt out of them again and they would come under the full jurisdiction of the ECJ.
- Many provisions of EU laws under the block opt out regulate the internal criminal law of Member States, rather than establishing cross-border co-operation between EU countries. Other legislation under this opt out does create cross-border co-operation between EU states, such as the European Arrest Warrant (EAW). Use of the EAW to extradite people for trivial offences, and its requirement in many cases that people be extradited for acts that are not criminal offences in their home country, has caused major concern. The laws setting up Europol and Eurojust, the EU's policing and criminal justice bodies, are also currently covered by the block opt out.
- If a law covered by the block opt out is amended now the Lisbon Treaty is in force, and the UK chooses to participate in the new amending law, the pre-Lisbon law no longer falls under the block opt out. Up to the end of May 2012, the UK has decided to participate in seven post-Lisbon laws that take pre-Lisbon laws out of the block opt out.

The options for change

- ➔ Do not invoke the block opt out, and lead reform of EU laws it covers. The UK would become bound irreversibly by a large number of EU laws, which would from that point on be controlled and developed much more readily by the European Commission and the ECJ. However, the UK would continue to enjoy the benefits of these laws without having to negotiate replacement cross-border arrangements or its re-entry to desirable EU legislation. The UK could lead a quarter of Member States to propose changes to laws such as the EAW, though how much reform is likely to be agreed through the EU legislative process is not clear.
- ➔ Invoke the block opt out. The UK would regain control over a large amount of law. However, there are arguments for international co-operation in policing and criminal justice matters. This could be done bilaterally, multilaterally or on a pan-EU basis:
 - The UK could seek to opt back in to one or a group of EU laws covered by the block opt out. This opt in would be irreversible and entail the ECJ's full jurisdiction over the laws concerned.
 - The UK could pursue non-EU international agreements with other Member States that established any co-operation needed. This would give the British people much greater control over this area compared to control by the EU institutions. It would take time and determination.
 - The UK could seek provisions in certain pieces of EU legislation that allowed it to co-operate without being bound by these EU laws. There is precedent for this in the EU.

To extract itself from EU policing and criminal justice laws it is bound by but which do not fall under the block opt out, the UK would need EU treaty change as an EU member. Such treaty change would require the agreement of every other EU Member State. The UK will have negotiating leverage when EU treaty change is sought as a result of the Eurozone crisis.

- ➔ Seek EU treaty change that allows the UK to opt out of those EU laws not under the block opt out that currently exist. This includes the proposed European Investigation Order.
- ➔ Seek EU treaty change that limits or excludes ECJ jurisdiction over these laws in relation to the UK, while the UK is bound by them.
- ➔ Seek EU treaty change that makes reversible all past and future UK decisions to become bound by EU laws in this area.
- ➔ Refuse to apply EU policing and criminal justice laws that bind the UK under the EU treaties, where these are deemed unacceptable. This could be done in the UK legal order with an Act of Parliament. However, this action would breach the UK's EU treaty obligations in international law, which may prompt countermeasures by other Member States.

The introduction

Particularly since 1993, when the Maastricht Treaty entered force, the EU has had the power to pass laws on 'co-operation' between its Member States in policing and criminal justice.

At first, the European Commission had no right to propose EU laws in this area; subsequently, it shared this right with individual Member States. EU policing and criminal justice laws were typically decided by unanimity among Member States in the Council³⁵⁰. The jurisdiction of the EU's Court of Justice (ECJ) over these laws was significantly restricted.

Since 1993, successive amending EU treaties³⁵¹ have increased EU power over policing and criminal law. This has culminated in the Lisbon Treaty, which entered force on 1 December 2009.

Under the Lisbon Treaty's changes, new EU laws on policing and criminal justice can now only be proposed by the Commission or a quarter of Member States acting together. Such EU proposals are usually decided by qualified majority voting (QMV) in the Council, though unanimity still applies to some laws on operational co-operation in policing.³⁵² Furthermore, the European Parliament usually has to agree to the text of a proposal before it can be adopted (prior to the Lisbon Treaty, the EP could only give a non-binding opinion).

The UK can typically choose whether or not it takes part in new EU policing and criminal justice laws, following the Lisbon Treaty. If it does take part, however, the UK cannot opt out of the relevant EU law again.

The ECJ has full jurisdiction over EU policing and criminal justice laws adopted following the Lisbon Treaty's entry into force.

The Lisbon Treaty also introduced special transitional provisions for around 130 EU policing and criminal justice laws adopted before the Lisbon Treaty entered force.

These laws will come under full ECJ jurisdiction, for the first time, from December 2014 – and the UK has the right, if exercised before June 2014, to opt out of these laws en bloc.

The detail

EU policing and criminal justice laws proposed following the Lisbon Treaty

As noted above, the UK can typically choose whether or not it takes part in new EU policing and criminal justice laws, following the Lisbon Treaty.

If it wishes to take part in voting on a proposal, the UK has to decide that it will participate within 3 months of that proposal being made. Once it has done this, the UK cannot opt out of the proposal again, and will be bound by whatever EU law results. When QMV and 'co-decision' with the European Parliament apply, this means the UK may find itself bound by a law it did not agree with.

The UK does, alternatively, have the possibility of opting in to an EU policing or criminal justice law after its adoption by the other Member States, though it has no vote over the law's provisions

³⁵⁰ : Sometimes known informally as the Council of Ministers.

³⁵¹ : In chronological order: the Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty.

³⁵² : A procedure known informally as the 'emergency brake' can also be applied to some criminal law proposals. The 'emergency brake' allows a Member State to prevent itself becoming bound by an EU proposal it believes would "affect fundamental aspects of its criminal justice system" (in the words of the EU treaties).

in this case. UK participation in this case is also subject to approval by either the Commission or the Council, which may apply, at least in some instances, conditions before the UK is allowed to join. If the UK's request to opt in is approved, it cannot opt out of the relevant law again.

Under UK law, it is the Government's decision whether or not the UK participates in an EU policing or criminal justice measure.³⁵³ The current Government has undertaken to give Parliament a vote on the question of participation in cases where there is "particularly strong Parliamentary interest"³⁵⁴ – though it is not clear precisely what constitutes this.

Also as stated above, the ECJ has full jurisdiction over EU policing and criminal justice laws adopted following the Lisbon Treaty's entry into force. This means, among other things, that the ECJ can hear cases brought against a Member State by the Commission, for what the Commission alleges to be that Member State's failure to abide by one of these laws. Consequent rulings by the ECJ are binding on the relevant Member State. It also means the ECJ can receive questions about the interpretation of these laws submitted by national courts from any Member State (known as 'preliminary references'), and can set down authoritative rulings in response that will be applied by national courts.³⁵⁵

Under the pre-Lisbon Treaty rules, the Commission had no power to refer a Member State to the ECJ for alleged infringement of an EU policing or criminal justice law.³⁵⁶ The ECJ did have the power to rule upon questions of interpretation of these laws referred by national courts, *but only* where the Member State of the national court seeking the ECJ's opinion had explicitly accepted such ECJ jurisdiction. This does *not* include the UK or seven other Member States.³⁵⁷ The ECJ also had jurisdiction to rule in disputes *between Member States* on how EU policing and criminal justice laws should be construed and applied. However, no such case has ever been taken to the ECJ by one Member State against another.

³⁵³ : With a handful of exceptions regulated under the European Union Act 2011, in which the electorate and/or Parliament have the final say on UK participation.

³⁵⁴ : HC Deb 20 January 2011, cc51WS-52WS.

³⁵⁵ : Article 276 of the Treaty on the Functioning of the European Union (TFEU, one of the EU treaties) says: "...the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." The effect of this provision is not clear, and will be for the ECJ to determine. A narrow reading of the provision would, for instance, entail little if any limitation on the ECJ's power to interpret EU law on a question referred by a national court. This is because, formally, the ECJ does not *apply* EU law to the facts of the case before the national court, but gives an authoritative ruling on the meaning of EU law, which is then applied by the national court.

³⁵⁶ : That said, the ECJ did have the power to rule on a dispute between the Commission and a Member State over the interpretation and/or application of an EU 'convention' in policing and/or criminal justice. Title VI of the Treaty on European Union (TEU) – which was known as the EU's 'third pillar' before the Lisbon Treaty – allowed the Council to draw these conventions up, but they then required national ratification by Member States. Basically, these were not like usual EU laws, being more akin to international agreements (between Member States) in their own right. Significantly, not many conventions were agreed; when the Lisbon Treaty took effect, only four EU conventions, in the main, were relevant going forward.

³⁵⁷ : House of Commons Library, *UK Government opt-in decisions in the Area of Freedom, Security and Justice*, October 2011, p.4. The other Member States are: Republic of Ireland, Denmark, Poland, Slovakia, Malta, Bulgaria and Estonia.

EU policing and criminal justice laws adopted before the Lisbon Treaty entered force

The Lisbon Treaty also introduced special transitional provisions for EU policing and criminal justice laws adopted before the Lisbon Treaty entered force. These are laws adopted on the basis of the pre-Lisbon Title VI of the Treaty on European Union (one of the EU treaties), sometimes known as ‘third pillar’ laws. According to the Government, these laws number 133³⁵⁸.

Apart from those that have lapsed or been replaced, these EU laws continue to have force and bind the UK.

The jurisdiction of the ECJ over these laws remains the same as before the Lisbon Treaty, until December 2014.³⁵⁹ At that point, however, the ECJ irrevocably gains full jurisdiction over them, entailing the effects described above.

The UK, though, is given the option of refusing to accept full ECJ jurisdiction over these laws. The consequence of this is that all of these laws would cease to bind the UK from December 2014. In effect, the UK would be opting out of them en masse.

The deadline for the UK to state that it is opting out is 31 May 2014. If it does not actively invoke this opt out by this date, the UK will remain bound by these laws, subject to the full jurisdiction of the ECJ, and will have no further right to opt out of them.

This UK ‘block opt out’ does not apply to pre-Lisbon third pillar laws that are amended now the Lisbon Treaty is in force, where the UK decides to take part in the new EU amending law. In these cases, the UK loses its right to opt out of the relevant law. It is worth stressing that the block opt out also does not apply to any completely new EU policing or criminal justice laws adopted following the Lisbon Treaty’s entry into force, which the UK chooses to participate in.

Under UK law, it is the Government’s decision whether or not the UK invokes the block opt out. However, the Coalition Government has promised to arrange a vote in both Houses of Parliament on the question of this opt out, before the decision is taken.³⁶⁰ The Government is currently considering whether, in its opinion, invoking the block opt out would serve the national interest.

If the UK invokes the block opt out and thereby ceases to be bound by the relevant pre-Lisbon laws, the EU treaties provide that the Council will decide “the necessary consequential and transitional arrangements”, acting by QMV but without a UK vote.³⁶¹ The Council can also require the UK to bear “the direct financial consequences, if any, necessarily and unavoidably incurred as a result” of the UK’s opt out from the laws concerned, again acting by QMV but this time with a UK vote.³⁶² Clearly, there are likely to be some technical legal changes required as a result of the UK’s departure from the relevant laws, perhaps to clarify in these instruments that they no longer bind the UK. It should be noted that the possibility for the UK to bear costs is only that – a possibility, not a certainty – and the EU treaties require that these costs must be “direct” and “necessarily and unavoidably incurred” as a result of the UK opt out.

³⁵⁸ : Letter from Home Secretary Theresa May to the Chairman of the House of Commons European Scrutiny Committee, 21 December 2011: <http://www.parliament.uk/documents/commons-committees/european-scrutiny/Ministerial%20Correspondence%202010-12.pdf>. These are the EU laws in this category that were still in force when the Government drew up its list ie. they had not lapsed or been repealed/replaced. In fact, the Government appears to have overlooked that a couple of measures had been repealed and replaced when it drew up its list; this is examined below.

³⁵⁹ : Apart from where one of these laws is amended by a new EU measure adopted now the Lisbon Treaty is in force. In this case the ECJ gains full jurisdiction over the amended law after the amendment takes place, including in relation to the UK where the UK has chosen to participate in the new amending law.

³⁶⁰ : HC Deb 20 January 2011, cc51WS-52WS.

³⁶¹ : Article 10(4) of Protocol (No. 36) to the EU treaties, on transitional provisions.

³⁶² : *Ibid.*

Opting back in to EU laws following the block opt out

If the UK invokes the block opt out, the EU treaties allow it to seek to opt back in to any of the individual EU laws affected.

If the UK did this, the same procedure would be followed as currently applies if the UK wants to join an EU policing or criminal justice law adopted by the other Member States without UK participation. This procedure is different depending on whether or not the EU law in question is deemed to be part of the 'Schengen *acquis*'.³⁶³

UK applications to re-join laws within the Schengen *acquis* are subject to the unanimous agreement of the Council.³⁶⁴

For laws not deemed to be part of the Schengen *acquis*, the Commission is tasked in the first instance with approving a UK request to join. The Government believes that the EU treaties allow the Commission to set conditions that must be met before the UK can become bound by the relevant law.³⁶⁵ If, however, the UK does not meet any such conditions, it can direct its request to join to the Council, which can then decide on UK participation by QMV of the Member States bound by the law.

The EU treaties provide that, should the UK seek to re-join any of these pre-Lisbon policing and criminal justice laws after invoking its block opt out, "the Union [EU] institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* [law] 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".³⁶⁶ This is a very double-edged provision, which might be interpreted in particular cases as encouraging the approval of the UK's application, but in other situations might be seen as requiring the UK to accept other EU policing or criminal justice laws before it can be admitted to those laws it wants.

If the UK applied to re-join any of these pre-Lisbon policing and criminal justice laws, and its application was accepted, it would not be able to opt out of those laws again. Furthermore, the ECJ would have full jurisdiction over the law(s) concerned.

EU laws covered by the UK's block opt out

As noted above, the Government has said that, in December 2011, there were 133 pre-Lisbon EU laws on policing and criminal justice that were covered by the UK's block opt out. However, some of these laws have already been removed from the UK's opt out, or are set to be removed. This is because the UK has chosen to participate in EU laws introduced since the Lisbon Treaty's entry

³⁶³ : The Schengen *acquis* is a part of EU law originally based on the Schengen Convention, which was agreed between certain Member States in 1990, with the primary aim of abolishing border controls between the participating countries. The provisions of this Convention were incorporated into EU law via the Amsterdam Treaty in 1999, and have been developed since by new EU laws termed 'Schengen-building' measures. The UK remained outside the Schengen *acquis* at first, but the EU treaties allow it to apply to join some or all of this body of law. In 2000, following a request by the UK Government, the Council agreed on UK participation in certain provisions of the Schengen *acquis*, mainly relating to policing, criminal justice and illegal immigration, but not abolition of border controls (which the UK had not requested). Before the Lisbon Treaty, the parts of the Schengen *acquis* relating to policing and criminal justice were outside the full jurisdiction of the ECJ, just like non-Schengen EU laws in these matters.

³⁶⁴ : Though the Council does not include the Republic of Ireland when it comes to decisions on UK participation, given this Member State is also not automatically bound by the Schengen *acquis*.

³⁶⁵ : Letter from Home Secretary Theresa May to the Chairman of the House of Commons European Scrutiny Committee, 21 December 2011.

³⁶⁶ : Article 10(5) of Protocol (No. 36) to the EU treaties, on transitional provisions.

into force, which either repeal and replace or amend EU laws that otherwise fell under the block opt out. The laws in question are:³⁶⁷

	Pre-Lisbon law	Post-Lisbon law	Date of UK Government decision that the UK should participate in post-Lisbon law	Date of repeal/replacement or amendment of pre-Lisbon law for the UK
1	Decision 2008/839/JHA on migration from the Schengen Information System to the second generation Schengen Information System <i>[this law is not mentioned in the Government's December 2011 list]</i>	Regulation 542/2010. This Regulation amends Decision 2008/839/JHA, partly to extend the transition period to the second generation Schengen Information System. The 2008 Decision is still due to expire by the end of 2013, and Decision 2007/533/JHA establishing the second generation Schengen Information System still falls under the UK block opt out.	May 2010 (Labour Government)	June 2010
2	Framework Decision 2004/68/JHA on combating sexual exploitation of children and child pornography	Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography (repeals and replaces Framework Decision 2004/68/JHA)	June 2010	December 2011
3	Framework Decision 2008/978/JHA on the European Evidence Warrant	Proposed Directive on the European Investigation Order. This is still being negotiated but is subject to QMV, meaning the UK cannot block the proposal on its own. The proposal would repeal and replace Framework Decision 2008/978/JHA. It would also introduce new provisions in place of part of Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence. It is not clear whether this would also take the whole of Framework Decision 2003/577/JHA out of the UK's block opt out.	July 2010	Proposed new law is not yet adopted.

³⁶⁷ : Correct as at the end of May 2012.

	Pre-Lisbon law	Post-Lisbon law	Date of UK Government decision that the UK should participate in post-Lisbon law	Date of repeal/replacement or amendment of pre-Lisbon law for the UK
4	Framework Decision 2005/222/JHA on attacks against information systems	Proposed Directive on attacks against information systems. This is still being negotiated, but is subject to QMV. However, the 'emergency brake' is available, meaning the UK should still be able to prevent itself becoming bound by the proposal. The proposal would repeal and replace Framework Decision 2005/222/JHA.	December 2010	Proposed new law is not yet adopted.
5	Framework Decision 2002/629/JHA on combating trafficking in human beings	Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (repeals and replaces Framework Decision 2002/629/JHA)	May 2011. The Government's wish to opt in to the Directive was endorsed by a resolution of the House of Commons on 9 May 2011.	October 2011
6	Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings	Proposed Directive establishing minimum standards on the rights, support and protection of victims of crime. This is still being negotiated, but is subject to QMV. However, the 'emergency brake' is available, meaning the UK should still be able to prevent itself becoming bound by the proposal. The proposal would repeal and replace Framework Decision 2001/220/JHA.	August 2011	Proposed new law is not yet adopted.

	Pre-Lisbon law	Post-Lisbon law	Date of UK Government decision that the UK should participate in post-Lisbon law	Date of repeal/replacement or amendment of pre-Lisbon law for the UK
7	Framework Decision 2008/977/JHA on protection of personal data processed in the framework of police and judicial cooperation in criminal matters	Proposed Directive on protection of individuals with regard to processing of personal data by authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. This draft Directive is still being negotiated but is subject to QMV, meaning the UK cannot block the proposal on its own. The new Directive would repeal and replace Framework Decision 2008/977/JHA.	April 2012. The Government's position on participation was endorsed (on a Division) by a resolution of the House of Commons on 24 April 2012.	Proposed new law is not yet adopted.

The Annex to this chapter shows the Government's list of EU laws subject to the block opt out, with the laws mentioned above omitted, apart from where the UK could still invoke the 'emergency brake' to stop these laws being removed from the opt out.

The European Commission shows no sign of easing off proposing new EU policing and criminal justice laws that would take pre-Lisbon laws out of the UK's block opt out.

The EU laws covered by the block opt out, and EU policing and criminal justice laws that have arrived since the Lisbon Treaty's entry into force, usually have very positive-sounding names. Who could criticise measures to fight human trafficking, child sex exploitation or cyber attacks?

However, these laws represent further transfers of power away from the UK's democracy to the EU, which, in fact, may not be necessary to ensure international co-operation to fight these appalling scourges and protect British citizens.

EU regulation of domestic law rather than cross-border co-operation

Many of the provisions of EU laws under the block opt out deal solely with the *internal* law of Member States, rather than establishing cross-border co-operation *between* Member States.

For instance, the main provisions of Framework Decision 2005/222/JHA on attacks against information systems oblige Member States to criminalise and punish certain acts against computer systems, in their domestic law. These acts need not have any cross-border implications ie. they could be entirely domestic in source and effect.

Another example is Framework Decision 2003/568/JHA on combating corruption in the private sector. This requires Member States to criminalise and punish particular actions in their domestic law, such as intentionally "requesting or receiving an undue advantage of any kind, or accepting

the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties". Again, the offences included in the Framework Decision need not have any cross-border dimension.

EU control over the relevant aspects of internal criminal law will significantly increase when the ECJ gains full jurisdiction over the legislation concerned. This is because the ECJ will be much more able to enforce the application of particular interpretations of this legislation.

For instance, EU laws requiring Member States to criminalise particular actions often oblige Member States to punish such offences with "effective, proportionate and dissuasive criminal penalties", where they do not specify penalties more precisely. This is, of course, an ambiguous phrase, and the ECJ will be the final arbiter of what it requires in particular cases.

Some may argue that there is a need for international requirements to strengthen the domestic criminal law of countries. This could be aimed at preventing certain states from acting as 'safe havens' for criminality that could spill over national borders, or at providing people with minimum procedural rights as they travel through different countries.

As a general point, this may well be true. However, it is no argument for the UK to submit itself to EU criminal law, which could be developed dynamically by the EU institutions and would be irreversible by the UK short of withdrawing from the EU altogether. The UK is perfectly capable of adapting its domestic criminal law through its democratic system, which could include aligning that law with other countries' provisions if this was felt desirable. The UK does not need to transfer control to the EU to achieve this. Nor does it need to transfer control to the EU to achieve an improvement in the internal criminal law of other Member States. This is because, under the EU treaties, even if the UK opts out of such EU legislation, this legislation will continue to bind the other Member States.

EU laws on cross-border co-operation

Some of the EU laws under the UK block opt out do seek to establish cross-border co-operation between Member States in policing and criminal justice. Many of these, such as the European Arrest Warrant, concern what is effectively bilateral co-operation between two Member States at a time³⁶⁸. Some, such as Framework Decision 2002/465/JHA on joint investigation teams, are multilateral arrangements, setting out a legal framework in which multiple Member States can act together at once. There are also laws establishing specialised EU bodies and databases in policing and criminal justice. Foremost among these bodies are Eurojust and Europol.

Eurojust

Eurojust is an EU body based in The Hague in the Netherlands, established by a 2002 Decision (EU law)³⁶⁹. Its primary remit is to bolster "coordination" and "cooperation" between national authorities when it comes to investigations and prosecutions regarding various kinds of crime and which 'concern' more than one Member State. To this end, Eurojust can, among other things, ask national authorities of the affected Member States to carry out particular investigations or prosecutions – though national authorities can decline such requests – and it can ensure that the relevant national authorities keep each other informed about investigations and prosecutions brought to Eurojust's attention. Indeed, Member State authorities are obliged to provide Eurojust with "any information necessary for the performance of its tasks", and are entitled to obtain information from Eurojust. Each Member State seconds a 'national member' to Eurojust, who

³⁶⁸ : Though the EU law establishing the European Arrest Warrant does include one article in particular, on transit of surrendered persons through the territory of third Member States, that is more multilateral in nature.

³⁶⁹ : Council Decision 2002/187/JHA.

takes a seat and one vote on the body's College, which has overall responsibility for the way Eurojust is run.

In 2010 the European Commission said that it planned to propose a new EU Regulation on Eurojust, the provisions of which would include giving this body the power to initiate criminal investigations, rather than simply being able to ask national authorities to take such action.³⁷⁰ A new Commission proposal on Eurojust is expected this year³⁷¹, and will be decided by QMV in the Council.

It is likely that this new Regulation will seek to repeal and replace the existing 2002 Eurojust Decision. If the UK feels that the risk of the proposal giving Eurojust too much power (under full ECJ jurisdiction) means that it cannot opt in to it, there will probably be a serious question mark over whether the UK can continue to be bound into Eurojust as at present. This is because, unlike the UK, most other Member States will move on to the 'new' Eurojust.

Europol

The European Police Office (or 'Europol') first became operational in 1999, on the basis of an EU convention that required ratification by Member States. However, from January 2010 that convention was replaced by a Decision³⁷² (EU law), and this Decision now underpins Europol. Like Eurojust, Europol is an EU body based in The Hague.

Europol deals with various kinds of crime that 'affect' more than one Member State "in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences". Europol's remit also includes offences that are "related" to these crimes, such as offences that aim to procure the means to commit such crime.

Europol's principal activities include collecting, storing, analysing and exchanging information, and 'asking' national authorities to "initiate, conduct or coordinate" criminal investigations – though national bodies can refuse such requests. As with Eurojust, Member State authorities are obliged to supply Europol with "the information and intelligence necessary for it to carry out its tasks". Subject to conditions that the Member State which supplied the information can apply in some cases, Europol is also required to notify Member States of information concerning them it holds. Furthermore, Europol staff can take part "in supporting capacity" alongside criminal justice authorities of different Member States operating in ad hoc 'joint investigation teams', established under other EU laws, where those teams are investigating crime within Europol's mandate. Europol staff cannot, however, take any "coercive measures". Each Member State appoints a representative with one vote on Europol's Management Board, which, among other things, annually adopts a work programme for Europol.

A proposal for a new EU Regulation to re-found Europol is planned by the Commission in 2012.³⁷³ As with Eurojust, this new Regulation will be decided by QMV in the Council, and it will probably seek to repeal and replace the EU Decision that currently forms Europol's legal basis.

If the UK opted in to this new Regulation it would not be able to opt out again, and it would come under the full jurisdiction of the ECJ. On the other hand, if it did not opt in the UK may not be able to participate in Europol in the same way that it does now, given most other Member States would be operating on a different arrangement for the body.

³⁷⁰ : European Commission, *Delivering an Area of Freedom, Security and Justice for Europe's citizens: Action Plan implementing the Stockholm Programme*, April 2010, p.18.

³⁷¹ : European Commission, *Roadmap: Proposal for a regulation reforming Eurojust's structure*, available at: http://ec.europa.eu/governance/impact/planned_ia/docs/2012_just_028_eurojust_en.pdf.

³⁷² : Council Decision 2009/371/JHA.

³⁷³ : European Commission, *Roadmap: Establishing the European Police Office - EUROPOL*, available at: http://ec.europa.eu/governance/impact/planned_ia/docs/2011_home_010_europol_en.pdf.

Even setting aside the likelihood of new Regulations on Eurojust and Europol that expand their powers, if the UK did not opt out of the existing Decisions establishing these bodies full ECJ jurisdiction could cause major problems for this country. For example, the ECJ could apply the obligation to provide these organisations with information needed for the performance of their tasks in ways the UK did not expect or believe were in its interests.

European Arrest Warrant

Entering force at the start of 2004, the European Arrest Warrant (EAW) is established by EU Framework Decision 2002/584/JHA. In essence, it obliges EU Member States, subject to some limited exceptions, to arrest and remove persons from their territory to a Member State that has requested their extradition, for an alleged crime under the requesting country's law or to serve a custodial sentence passed in the requesting country.³⁷⁴ For a wide range of acts, the Member State that receives a European Arrest Warrant is banned from making the extradition of the relevant person conditional on the activity in question also being a criminal offence in *its* law. For these offences, this represents the abolition of the so-called 'dual criminality' requirement that previously applied. Decisions on carrying out an EAW must be taken by the Member State receiving the Warrant within strict time limits.

From its introduction up to 2011, 193 British citizens have been extradited from the UK under the EAW, with the rate of such extraditions steadily increasing over time.³⁷⁵ A great many more non-British nationals have also been extradited from the UK under this system.³⁷⁶ In 2010-11, for instance, 48 British nationals were extradited from the UK under an EAW, while 1,125 other persons were.³⁷⁷

Conversely, the UK received a total of 134 persons in 2010-11 after issuing an EAW for them.³⁷⁸ Since 2006, many more people have been extradited from the UK under the EAW than have been brought to the UK using this system.³⁷⁹

Over the two full years for which figures are available, 2009-10 and 2010-11, the Member State which obtained the extradition of the most British citizens by far from the UK under the EAW was Spain, with 27 British people being extradited there over the period. There is then a group of Member States who obtained between 7 and 9 British people each over those two years using the EAW, made up of France, Germany, Greece, the Republic of Ireland, the Netherlands and Poland.³⁸⁰

As noted above, the EAW has abolished the dual criminality requirement for a wide range of acts, which means British citizens may be extradited for actions that are not even crimes in the UK.

British nationals have also been subjected to appalling mistreatment in other ways through the EAW. A recurring criticism made by observers is that, generally speaking, the criminal justice systems of many other Member States leave much to be desired in terms of their treatment of criminal suspects, who, of course, should be regarded as innocent until proven guilty. Trial procedures themselves can be unfair, there can be very long periods of pre-trial detention, and detention conditions are sometimes abysmal.

³⁷⁴ : The European Arrest Warrant does not cover all crimes and sentences, though its scope is very wide. It covers crimes in the requesting Member State's law that are punishable by a maximum custodial sentence of at least 12 months, and sentences of at least four months' detention.

³⁷⁵ : Open Europe, *An unavoidable choice: More or less EU control over UK policing and criminal law*, January 2012, p.10.

³⁷⁶ : HC Deb 9 November 2010, c190W.

³⁷⁷ : HC Deb 24 November 2011, c478W.

³⁷⁸ : HC Deb 24 November 2011, c479W.

³⁷⁹ : HC Deb 9 November 2010, c190W.

³⁸⁰ : HC Deb 1 December 2011, c1063W.

The UK-based non-governmental organisation Fair Trials International gives a couple of examples of mistreatment of British people in a briefing paper on the EAW:

“Patrick Connor (not his real name) was 18 when he was arrested in Spain with two friends in connection with counterfeit Euros. Patrick had no counterfeit currency on him or in his belongings at the time of the arrest, and has no idea how the notes came to be on his two friends or in their apartment. In total, the police found €100 in two notes of €50. Patrick and his friends were released and returned to the UK. Four years later Patrick was arrested on an EAW and extradited to Spain. Held in a maximum security prison in Madrid, and facing the prospect of up to two years in pre-trial detention, he decided to plead guilty. Patrick spent 9 weeks in prison before coming home to recommence his university career, his future blighted by a criminal record.”³⁸¹

“Andrew Symeou, a twenty-one year old British student, was extradited to Greece in July 2009 to face charges in connection with the death of another young man at a nightclub on a Greek island. Andrew’s extradition was ordered despite evidence that the charges he was facing were based on statements extracted by Greek police through the brutal mistreatment of witnesses, who later retracted their statements...”

“Once in Greece, Andrew spent a year in horrendous prison conditions, and has described how he awoke each morning covered in cockroaches and was frequently bitten by fleas in his bedding. The shower room floor was covered in excrement and the prison was infested with vermin...He was held in a filthy, overcrowded cell for almost a year before being finally given “local bail”. He was acquitted in June 2011, four years after the events in question. His father lost his business because of the costs incurred in helping with Andrew’s defence.”³⁸²

Technically, the EAW is not supposed to lead to extradition if that would violate a person’s human rights, but in practice it seems that national courts often presume that the destination Member State will uphold basic rights, and err on the side of facilitating EAW extradition.³⁸³

There is also a problem with Member States issuing EAWs for relatively trivial offences, extradition for which – given the distress and upheaval it causes the suspect – is disproportionate. This also puts an unnecessary burden on the resources of the Member State that is obliged to execute the Warrant.³⁸⁴

It should also be pointed out that, for their part, British police and prosecutors have lauded the EAW for the much shorter time period it now takes, on average, to extradite someone from another EU country. The EAW has also made the extradition process more straightforward and reliable for law enforcers. Previously, some EU countries refused to extradite their own citizens.³⁸⁵

Despite calls to revise the EU law establishing the EAW to address concerns about its operation, such a proposal does not feature in the 2012 Work Programme of the European Commission.

Even if an amending proposal was made, should the UK opt in to this it would be bound into full ECJ jurisdiction over the EAW after the proposal had been adopted (and it would not be able subsequently to opt out of the EAW). Such a proposal would be decided by QMV in the Council. Even if significant improvements to the text of the existing EAW Framework Decision were possible, full ECJ jurisdiction would radically increase EU control over this law in relation to the UK. Basically, the ECJ would be entrenched as the final arbiter of when British citizens must be extradited to other EU countries.

³⁸¹ : Fair Trials International, *The European Arrest Warrant eight years on – time to amend the Framework Decision?*, February 2012, p.4.

³⁸² : *Ibid*, p.9.

³⁸³ : *Ibid*, p.7.

³⁸⁴ : *Ibid*, p.3.

³⁸⁵ : Open Europe, *An unavoidable choice: More or less EU control over UK policing and criminal law*, pp.10-11.

EU laws not under the UK's block opt out

As discussed previously, EU policing and criminal justice laws the UK chooses to be bound by now the Lisbon Treaty is in force do not fall under the block opt out. The block opt out also does not cover EU laws that were adopted prior to the Lisbon Treaty but which have been amended since that treaty took effect, where the UK chooses to participate in their amendment.

The section above lists the 7 post-Lisbon EU policing and criminal justice laws that the UK has decided to participate in that take, or will take if they are adopted with the UK, pre-Lisbon laws out of the block opt out.

In addition to those new laws, the UK has chosen to become bound by the following EU policing and criminal justice laws since the Lisbon Treaty took effect, which do *not* amend or replace pre-Lisbon measures.³⁸⁶ Where the previous Labour Government took the decision that the UK would participate, the relevant EU law is in italics; otherwise, the decision was taken by the Coalition Government:

1. *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*
2. *Decision 2010/482/EU on the conclusion of an agreement between the EU and Iceland and Norway on the application of certain provisions of the Prüm Decisions on stepping up cross-border co-operation*
3. *Proposed Decision on the conclusion of an agreement between the EU and Iceland and Norway on the surrender procedure [extradition] between the Member States of the EU and Iceland and Norway*
4. *Proposed Decision on the conclusion of an agreement between the EU and Iceland and Norway on the application of certain provisions of the EU Convention on Mutual Assistance in Criminal Matters and its 2001 Protocol*
5. *Decision 2010/616/EU on the conclusion of an agreement between the EU and Japan on mutual legal assistance in criminal matters*
6. *Directive 2011/99/EU on the European protection order*
7. Regulation 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
8. Decision 2010/412/EU on the conclusion of an agreement between the EU and the USA on the processing and transfer of financial messaging data from the EU to the US for the purposes of the Terrorist Finance Tracking Program
9. Directive 2012/13/EU on the right to information in criminal proceedings
10. Proposed Directive on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime
11. Decision on the conclusion of an agreement between the EU and Australia on the processing and transfer of passenger name record data by air carriers to the Australian Customs and Border Protection Service
12. Decision on the conclusion of an agreement between the EU and USA on the use and transfer of passenger name record data to the US Department of Homeland Security

³⁸⁶ : Correct as at the end of May 2012.

13. Proposed Regulation establishing an action programme for customs and taxation in the EU for the period 2014-2020

Those EU laws that have not been adopted yet are described above as being ‘proposed’ – though the UK has decided, irreversibly, to take part in their adoption and in all cases QMV applies, meaning the UK cannot now block their adoption on its own.

One of the post-Lisbon decisions to become bound by an EU policing or criminal justice law that has aroused the most concern is the July 2010 opt in to the proposed Directive on the European Investigation Order (EIO). This Directive is mentioned in the previous section as, when adopted, it will take at least one pre-Lisbon law out of the UK’s block opt out.

The proposed Directive on the EIO is subject to QMV in the Council and must also be agreed by the European Parliament. Negotiations over the proposal continue, but in June 2011 the Council reached an interim political agreement on many of the Directive’s provisions.

In essence, the EIO would allow one Member State to oblige another Member State to carry out a particular investigative measure, for the purpose of criminal proceedings under the law of the Member State issuing the EIO. There would be limited grounds on which the Member State receiving an EIO could refuse to carry it out. Importantly, where it came to Orders that requested search or seizure, the EIO Directive would stop the UK from refusing to execute such requests on the grounds that the act being investigated was not a criminal offence in the UK, where the request related to one or more of a long list of activities. This list is the same as that in the Framework Decision on the European Arrest Warrant, covering those matters for which people must be extradited even if the act is not a criminal offence under the law of the Member State being asked to extradite.

Indeed, under the text agreed in the Council last June, a Member State would not be able to refuse to execute *any* EIO, no matter the coercive measures involved, on the grounds that the matter being investigated was not a criminal offence in that Member State, if the EIO related to this same list of acts. In cases other than search and seizure (which would have to be carried out), it is not clear if the Directive would allow the Member State receiving an EIO to claim, where the act under investigation was not a crime under its law, that it could not legally apply certain coercive measures under its national law. However, the UK Government felt strongly enough about this particular provision to withhold its support from the text of the proposed Directive agreed last summer; the text was nevertheless agreed by what would appear to be a qualified majority of Member States.³⁸⁷

³⁸⁷ : European Scrutiny Committee, *Documents considered by the Committee on 6 July 2011*, 36th report of Session 2010-12, para 10.8.

The options for change

The colour-coding used below for possible UK action follows the categorisation for all the Fresh Start Project's Green Paper chapters. Green are those measures that can be achieved within the current EU legal framework; Amber are those measures that require negotiated EU treaty change; Red are those steps that the UK could take unilaterally that would involve breaking its treaty obligations.

Options that do not require EU treaty change

Do not invoke the block opt out, and lead reform of EU policing and criminal justice laws

Instead of invoking the block opt out, the UK could remain bound by all pre-Lisbon EU policing and criminal justice laws and, where it finds these problematic, seek reform through the EU legislative process.

Aside from the European Commission, a quarter of Member States (currently 7) acting together can propose EU legislation in policing and criminal justice. The UK could lead an effort by Member States to change EU laws in this area, where it wished to see reform. For instance, there also seems to be concern in other Member States at the use of the European Arrest Warrant for relatively trivial offences.

Not triggering the block opt out would allow the UK to keep the positive aspects of the EU laws concerned ie. certain forms of cross-border co-operation, without the time and diplomatic effort required to negotiate replacement arrangements or opt back in to desirable EU laws.

However, from December 2014 the ECJ would start applying to the UK its interpretations of the pre-Lisbon EU laws, in a way that would be unprecedented. From that point on, the ECJ would act something like a supreme court in significant areas of UK criminal law.

It is also highly questionable how much reform of problematic EU laws could be achieved through the EU legislative process. Typically, not only would a qualified majority of Member States have to support amendments, but so too would the European Parliament, which has a track record of supporting greater EU obligations on Member States. For instance, it is quite hard to see the EU reinstating the principle of dual criminality where it has been abolished under the EAW. Moreover, once the UK had forgone the chance to invoke the block opt out, it would not be able to opt out of any of these laws again, under the existing EU treaties.

Invoke the block opt out

If the UK did not invoke the block opt out it would be undertaking a major transfer of power to the EU. Under the EU treaties, the UK would become bound irreversibly by a large number of EU laws in this sensitive policy area, which would from that point on be controlled and developed much more readily by the supranational European Commission and European Court of Justice.

In February 2012, 102 Conservative Members of Parliament wrote to the *Telegraph* calling for the UK to invoke the block opt out.³⁸⁸ In January 2012, think-tank Open Europe recommended using this opt out after analysing the issue.³⁸⁹

However, there is widespread recognition of the need for international co-operation in Europe to tackle, in particular, cross-border crime. The options for doing this after invoking the block opt out

³⁸⁸ : <http://www.telegraph.co.uk/comment/letters/9062615/Repatriate-powers-on-crime-and-policing-say-Conservative-MPs.html#>.

³⁸⁹ : Open Europe, *An unavoidable choice: More or less EU control over UK policing and criminal law*, p.3.

will now be considered. These options are not mutually exclusive ie. different approaches could be used for different cases of co-operation.

Opt out of pre-Lisbon EU laws then seek to opt back in to certain of these laws where deemed necessary

As described above, the EU treaties make clear that the UK could apply to opt back in to particular pre-Lisbon EU policing and criminal justice laws after it had invoked the block opt out.

The UK might wish to do this in the case of, for example, the EU Decision establishing the policing and criminal justice aspects of the second generation Schengen Information System ('SIS II')³⁹⁰, unless that law is amended to allow the EU or Member States to conclude an international agreement with the UK providing it with access to the System, despite the UK not being bound by the EU Decision. SIS II is not operational yet, but is intended to enable 'alerts' on things such as wanted and missing persons to be sent around Member States using a single IT network. Member States will be obliged to take particular actions in response to such alerts.

It is possible the EU institutions might require the UK to fulfil certain conditions before it was allowed to re-join the relevant EU laws. However, the procedure that the Government believes could give rise to this has been used before by the UK to opt in to EU laws, and to date no conditions have ever been set.³⁹¹

Of course, the UK would have to weigh any advantages of this approach against the fact that opting back in to the EU laws concerned would be irreversible. Furthermore, the ECJ would have full jurisdiction over these laws, to apply them as it saw fit.

Opt out of pre-Lisbon EU laws and pursue international agreements with other EU Member States as desired

Rather than seeking to maintain co-operation with other EU countries through the EU's law and institutions, the UK could seek to conclude ordinary international agreements with other Member States that established any co-operation needed.

If other Member States accepted such co-operation with the UK through the EU, it should not be too difficult to persuade them to maintain similar arrangements through international agreements. That said, it is possible some Member States might have had greater integration in policing and criminal justice imposed upon them through EU law, which they would not want to repeat in an international agreement with the UK. However, it is likely in many cases that the UK would itself not want such a level of integration, given misgivings about loss of national control.

This would avoid the pitfalls of the EU institutional framework, whereby the provisions of laws governing co-operation often need to be agreed by the supranational European Commission and European Parliament, and which will see the ECJ able to develop dynamically the meaning of such laws in a way the UK would be obliged to accept.

Furthermore, seeking non-EU international agreements would allow the UK to tailor its relations with different EU countries, depending on the subject matter. For instance, the UK might not want co-operation anything like the European Arrest Warrant with some EU countries, due to concerns about the conditions British citizens would face if extradited there.

Concluding international agreements, rather than being bound by EU laws, would in practice provide the British people with much greater democratic control over how their country co-

³⁹⁰ : Decision 2007/533/JHA.

³⁹¹ : HC Deb 1 May 2012, c1157W ; HC Deb 1 May 2012, c1451W.

operated in police and criminal justice matters with other EU nations. This is because the UK could not be forced to accept provisions it did not agree with and, ultimately, such international agreements would be easier to renounce than membership of the EU.

It should also be noted that there are already some non-EU international agreements between the UK and all other EU countries, dealing with police and criminal justice co-operation similar to that in some EU laws falling under the block opt out.³⁹²

These international agreements would continue to apply regardless of the UK's exercise of the block opt out. The UK may feel in certain cases that it needed to supplement these agreements with new treaties of its own, concluded with some or all other EU countries.

This approach would not be without drawbacks.

It would take time to put in place all the relevant international agreements. That said, if the UK decided soon that it was going to invoke the block opt out, a lot of work could be done by the point at which the pre-Lisbon EU laws ceased to apply to the UK.

There is also the fact that without the co-operation being required as part of EU obligations, which from 2014 will entail the full EU enforcement mechanisms, the UK's international agreements might not be as diligently implemented by the other Member States as EU laws, hindering co-operation. However, there is nothing automatic about this, and the UK's international agreements could include oversight mechanisms to check whether they were being implemented and apply pressure if problems were occurring. Unlike, typically, with EU laws, the international agreements could allow the UK to suspend application of all or part of an agreement if the other state party was seriously deficient in abiding by their end of the deal.

In some areas, EU law might restrict other Member States' discretion over the exact content of international agreements they could conclude with the UK. This is unlikely to pose a major obstacle to co-operation, however.

Opt out of pre-Lisbon EU laws and seek provisions in particular EU laws that allow the UK to take part if it wishes

If the UK wished to take part in EU bodies created to facilitate co-operation in policing or criminal justice, it could lobby the other Member States and EU institutions to include provisions in the relevant laws that allowed the UK to take part in these entities, without actually being bound by the EU legislation.

There is precedent for this sort of relationship. In 2004 the EU adopted a Regulation³⁹³ to establish the EU agency Frontex. Frontex was created to help Member States manage their 'external borders' – that is, their borders with non-EU countries – when it came to the movement of people. The UK was actually excluded from the Regulation's application as the legislation was deemed to build on an aspect of the Schengen *acquis* in which the UK did not take part. The Regulation, therefore, does not bind the UK.

However, the UK was keen to play a role in Frontex's work, and the Frontex Regulation includes a provision explicitly authorising the agency to facilitate operational co-operation between the UK and other EU Member States, in its field of activity. The UK chooses which Frontex operations it wishes to be involved in, and while technically Frontex's Management Board has to approve UK

³⁹² : For a list of these international agreements, see Annex I to Professor Steve Peers, *The Mother of all Opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014*, Statewatch, January 2012.

³⁹³ : Council Regulation (EC) No 2007/2004.

participation in each of these operations, the UK has never been refused access and has taken part in a great many projects.³⁹⁴

Although the UK does not have a vote on the agency's Management Board, the Frontex Regulation requires the UK to be invited to all Board meetings, where it can feed into plans. It seems other Member States value the UK's operational knowledge and expertise in this area.³⁹⁵

This sort of approach might be used, for instance, in relation to Europol and Eurojust. As noted above, the Commission is planning to issue proposals this year for new EU Regulations establishing these bodies, which will almost certainly replace their existing founding laws. The negotiation process over these proposals would be an ideal opportunity for the UK to seek essentially the same relationship with these organisations as it has with Frontex – practical co-operation without EU legal obligations.

It might be argued that the nature of Eurojust and Europol, as bodies dealing with continual exchange of information rather than the more discrete operations organised by Frontex, means that the UK would need a more integrated relationship with them to maintain the benefits it currently derives. If so, a slightly different approach could be for the UK, while remaining outside the EU laws setting up these bodies, to pursue provisions in those laws that mandated these organisations to conclude international agreements with the UK, which could then establish close standing co-operation (including some UK participation in the organisations' governing bodies). Both Eurojust and Europol currently have the power to conclude international agreements with non-EU countries, and have done so.

The advantage of this method would be that the provisions of such international agreements need not come under the control of the ECJ, and could include suspension or withdrawal mechanisms that the UK may use if it believed the agreements started to act against its national interest.

Irrespective of the precise course of action taken, this approach would require the UK to make clear that it was not going to opt in to the new Europol and Eurojust EU laws. Other Member States, the European Commission and the European Parliament might resist the idea of the UK being involved in Europol and Eurojust without being bound by the relevant EU legislation. However, the precedent for this has already been set with Frontex, and the UK could offer a good deal of operational know-how and resources if it was involved, which other Member States, at least, are likely to value. At the same time, the UK would need to remain firm that it was not prepared to subject itself to ECJ jurisdiction in these matters and become bound by the EU laws in question.

Options that require EU treaty change

To reiterate, EU policing and criminal justice laws the UK chooses to participate in now the Lisbon Treaty is in force, and any pre-Lisbon laws they amend, do not fall under the UK's block opt out.

Under the existing EU treaties, the UK cannot opt out again from these laws. The ECJ has full jurisdiction over them, which means their effect can be changed over time by ECJ rulings the UK has to accept.

³⁹⁴ : House of Lords European Union Committee, *Frontex: the EU external borders agency*, 9th report of Session 2007-08, March 2008, para 124; Home Office, *Deposited Paper DEP2012-0728 listing the UK's requests to participate in activities of the EU agency Frontex*, 30 April 2012, available at: <http://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?page=2&fd=2012-04-30&td=2012-05-02&house=1#toggle-728>.

³⁹⁵ : House of Lords European Union Committee, *Frontex: the EU external borders agency*, 9th report of Session 2007-08, March 2008, para 124.

If the UK wished to extract itself from these laws, either now or in the future, while remaining a member of the EU, it would have to obtain an amendment to the EU treaties. An amendment to the EU treaties might also provide a more ideal way of dealing with the pre-Lisbon EU laws that do fall under the block opt out.

Any such EU treaty amendment would require the agreement of all EU Member States.

EU treaty change allowing the UK to opt out of current post-Lisbon laws

The least radical change would be to insert a provision into the EU treaties allowing the UK to opt out of those EU policing and criminal justice laws not under the block opt out that are presently known.

Other Member States might insist that the UK opt out of negotiations on such laws that are not yet adopted, as otherwise the UK would have a vote on these laws but could then opt out of them straight away.

This amendment would leave the treaty provisions allowing the UK to take part in further EU policing and criminal justice laws, but which stipulate that the UK cannot opt out of such further laws it decides to participate in, and which provide for full ECJ jurisdiction over these measures.

This runs the risk of one Government/Parliament choosing to bind the UK into an EU law which future Parliaments cannot then extract the UK from (without leaving the EU), and which may be developed in an unexpected way by ECJ rulings.

On the other hand, this would allow the UK to opt out of measures such as the European Investigation Order, and the limited scope of this change would increase its chances of being accepted by the other Member States.

EU treaty change allowing the UK to stay outside full ECJ jurisdiction

There may be cases where, apart from full ECJ jurisdiction, the UK wished to remain bound by EU laws under the block opt out, or desired to take part in post-Lisbon EU laws in policing or criminal justice. The UK could seek an EU treaty amendment that applied, for the UK, the pre-Lisbon level of ECJ jurisdiction to these laws. Alternatively, the UK could seek the complete exclusion of ECJ jurisdiction from itself when it came to this legislation.

Denmark currently has an arrangement under the EU treaties whereby EU laws building on the Schengen *acquis* – if Denmark chooses to participate in them – apply between Denmark and the other Member States as an international legal obligation, rather than as EU law. This seems to mean that the ECJ does not have the power to issue rulings to Denmark on these laws' provisions. However, Denmark is also not allowed a vote on the adoption of these laws by the EU.

A treaty amendment limiting or excluding ECJ jurisdiction as described above would restrict the power of the supranational EU institutions to develop EU policing and criminal justice laws as they applied to the UK. However, it would not alter the fact that a UK decision to participate in such laws is, under the EU treaties, irreversible. This means a Government and/or Parliament could continue to require future Parliaments to abide by such laws, while the UK remained an EU member.

EU treaty change that made the UK decision to participate reversible

Probably the most radical change the UK could seek would be an amendment to the EU treaties that allowed the UK to opt out of EU policing and criminal justice laws it had previously decided to participate in.

This would enable the British people to exercise continuing democratic control over this area, in a way consistent with UK membership of the EU.

The main objection other Member States are likely to raise against making the UK decision to participate reversible is that the UK could take part in voting on a law that would bind the other Member States, but which the UK could then opt out of itself.

To mitigate this, the EU treaties could provide that the UK may only opt out of a law after three years had elapsed since it had to be implemented by Member States, or after a new Parliament had been formed in the UK since its adoption. This could be combined with a treaty provision allowing the UK to opt out of the adoption of (and voting on) a *proposed* EU policing or criminal justice law, where the UK had previously opted to take part in its adoption. Given the prevalence of QMV, this would be a useful safeguard to prevent the UK becoming bound by a law it believed was against its interests, even for a temporary period, after negotiations took an undesirable turn.

Alternatively, the EU treaties could allow the UK to opt out whenever it wished (subject perhaps to a notice period, where necessary), though at the same time they could prevent the UK from wielding a vote in the adoption of EU policing and criminal justice laws.

If the UK was given the right to opt out of these EU laws after becoming bound by them, this could reduce the need to restrict the ECJ's jurisdiction over these laws. This is because if the ECJ passed a ruling that applied one of these laws in a detrimental way, the UK would have the option of ceasing to be bound by that law altogether. Indeed, such a right for the UK could remove the need to invoke the block opt out from pre-Lisbon policing and criminal justice laws – the UK could instead opt out of selected laws from this category as and when it felt the need.

It should also be pointed out that there are articles in the EU treaties that could be used to pass EU policing and criminal justice laws, which may not currently be covered by the UK's ability to decide whether or not it is bound by such laws. This is because the EU treaties say this UK choice covers EU laws based on a particular part of the treaties, and these articles sit outside that part. Two articles in particular are Article 33 TFEU³⁹⁶ and Article 325 TFEU. Respectively, these allow the EU to pass laws on customs co-operation and the fight against fraud affecting the EU budget. Before the Lisbon Treaty, these articles said that EU laws based upon them could not "concern the application of national criminal law or the national administration of justice". The Lisbon Treaty removed this limitation. Such laws are decided by QMV in the Council.

It may be that the UK Government believes it can assert a UK right to decide whether or not to participate in EU laws based on these articles. However, if an EU treaty amendment takes place in this area, it would seem prudent to seek an explicit provision allowing the UK not to participate in EU laws based on these articles that would affect its criminal law or enforcement or administration of criminal justice.

Even with certain safeguards for the other Member States, allowing the UK to opt out of EU policing and criminal justice laws it had previously become bound by would probably be regarded as a very big request by the other EU countries. The same would go for special UK exemption from ECJ jurisdiction in this area.

³⁹⁶ : Treaty on the Functioning of the European Union, one of the EU treaties.

However, as noted, special rules already apply to the UK in this field. It is hard to see how the UK discretion sought would have any major adverse effects on other Member States.

Moreover, the UK may have negotiating leverage over EU treaty change in the coming months or years.

Firstly, Germany would like to incorporate the terms of the fiscal integration treaty agreed among most EU countries in March 2012 into the EU treaties.

Secondly, if (or perhaps this should be when) Greece leaves the Euro, there will almost certainly need to be an amendment to the EU treaties giving legal authority to this course of action, probably retrospectively. This is because the EU treaties do not currently provide for a Eurozone Member State to leave the single currency.

Such changes to the EU treaties would require the UK's approval.

Refuse to apply EU policing and criminal justice laws deemed unacceptable

If the UK found EU policing and criminal justice laws it was bound by intolerable, perhaps because of rulings by the ECJ, and other Member States were not willing to agree changes to the EU treaties that allowed the UK to opt out of such laws, the UK could unilaterally stop applying these laws in its territory.

This would be perfectly possible in the UK's legal order, though to be legally watertight it would almost certainly require an Act of Parliament.

This course of action would, however, be a breach of the UK's EU treaty obligations in international law. While, ultimately, the EU cannot enforce its treaties against the UK, in general international law the other Member States might be able to suspend obligations they owe to the UK internationally, including but not limited to EU treaty obligations. This action could, though, help to force a meaningful negotiation if other Member States had previously refused to take the UK seriously. The suitability of this approach is likely to depend on the UK's priorities and its bottom line regarding its future relationship with the EU.

Appendix: EU policing and criminal justice laws under the UK block opt out³⁹⁷

No.	Year of adoption	Title
1	1995	Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests
2	1996	Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union
3	1996	Joint Action 96/610/JHA concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between the Member States of the European Union
4	1996	Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking
5	1996	Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combating illicit drug trafficking
6	1996	Joint Action 96/747/JHA concerning the creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international organized crime, in order to facilitate law enforcement cooperation between the Member States of the European Union
7	1996	Joint Action 96/750/JHA concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking
8	1996	Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests
9	1997	Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union
10	1997	Joint Action 97/339/JHA of 26 May 1997 with regard to cooperation on law and order and security
11	1997	Joint Action 97/372/JHA of 9 June 1997 for the refining of targeting criteria, selection methods, et. and collection of customs and police information

³⁹⁷ As provided by the Government in December 2011, though with four of the laws on the Government's list struck off – see the section of this chapter 'EU laws covered by the UK's block opt out'. Correct as at the end of May 2012.

12	1997	Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests
13	1997	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
14	1997	Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations
15	1998	Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications
16	1998	Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters
17	1998	Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime
18	1998	Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)
19	1999	Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees
20	1999	Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties
21	1999	Council Decision of 2 December 1999 amending the Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, with regard to the establishment of remuneration, pensions and other financial entitlements in euro
22	2000	Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents
23	2000	Council Decision 2000/375/JHA to combat child pornography on the internet
24	2000	Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
25	2000	Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union

26	2000	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)
27	2000	Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements between financial intelligence units of the Member States in respect of exchanging information
28	2001	Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings
29	2001	Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment
30	2001	Council Decision 2001/419/JHA of 28 May 2001 on the transmission of samples of controlled substances
31	2001	Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (repealing Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA)
32	2001	Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union
33	2001	Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting
34	2001	Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
35	2002	Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime
36	2002	Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA
37	2002	Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension
38	2002	Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams
39	2002	Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism

40	2002	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
41	2002	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
42	2002	Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence
43	2002	Council Decision 2002/956/JHA of 22 November 2002 setting up a European Network for the Protection of Public Figures
44	2002	Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism
45	2003	Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States
46	2003	Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector
47	2003	Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
48	2003	Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union
49	2003	Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2
50	2003	Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes
51	2004	Council Decision 2004/731/EC of 26 July 2004 concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information Agreement between Bosnia and Herzegovina and the European Union on security procedures for the exchange of classified information
52	2004	Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking

53	2004	Council Decision of 2004/843/CFSP 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information
54	2004	Council Decision 2004/919/EC of 22 December 2004 on tackling vehicle crime with cross-border implications
55	2005	Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol
56	2005	Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property
57	2005	Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
58	2005	Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems
59	2005	Council Decision 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information (Council Decision 2005/296/CFSP/JHA of 24 January 2005)
60	2005	Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances
61	2005	Council Decision 2005/481/CFSP of 13 June 2005 concerning the conclusion of the Agreement between the European Union and Ukraine on the security procedures for the exchange of classified information
62	2005	Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro-counterfeiting
63	2006	Council Decision 2006/560/JHA of 24 July 2006 amending Decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States
64	2005	Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences
65	2005	Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA
66	2006	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders

67	2006	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
68	2006	Council Decision 2006/317/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the European Union and the Republic of Croatia on security procedures for the exchange of classified information
69	2006	Council Decision 2006/467/CFSP of 21 November 2005 concerning the conclusion of the Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information
70	2007	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
71	2007	Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime
72	2007	Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security
73	2007	Council Decision 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information
74	2008	Council Decision 2008/206/JHA of 3 March 2008 defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions
75	2008	Council Decision 2008/426/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
76	2008	Council Decision 2008/568/CFSP of 24 June 2005 concerning the conclusion of the Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information
77	2008	Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime
78	2008	Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime
79	2008	Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations

80	2008	Council Decision 2008/651/CFSP/JHA of 30 June 2008 on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service
81	2008	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
82	2008	Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime
83	2008	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
84	2008	Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law
85	2008	Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism
86	2008	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
87	2008	Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network
88	2009	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 persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial
89	2009	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
90	2009	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
91	2009	Council Decision 2009/371/JHA establishing the European Police Office (Europol)

92	2009	Council Decision 2009/796/JHA of 4 June 2009 amending Decision 2002/956/JHA setting up a European Network for the Protection of Public Figures
93	2009	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 of supervision measures as an alternative to provisional detention
94	2009	Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA
95	2009	Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities
96	2009	Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes
97	2009	Agreement on mutual legal assistance between the European Union and the United States of America
98	2009	Agreement on extradition between the European Union and the United States of America
99	2009	Council Decision 2009/933/CFSP of 30 November 2009 on the extension, on behalf of the European Union, of the territorial scope of the Agreement on extradition between the European Union and the United States of America
100	2009	Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information
101	2009	Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements
102	2009	Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files
103	2009	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters
104	2009	Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information
105	2009	Council Decision 2010/348/EC of 17 November 2009 concerning the conclusion of the Agreement between the Government of the Russian Federation and the European Union on the protection of classified information

The EU laws above are non-Schengen measures. The following measures are EU Schengen laws:

106	1985	<u>Convention implementing the Schengen Agreement of 1985</u> Article 27(2) and (3) 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 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 Final Act - Declaration N° 3 (concerning article 71(2))
107		<u>Accession Protocols:</u> (amended in conformity with article 1(b) of CD 2000/365/EC and CD 2004/926/EC article 1) Italy: Articles 2, , 4 + common declaration on articles 2 and 3 to the extent it relates to article 2, Spain: Articles 2, 4 and Final Act, Part III, declaration 2 Portugal: Articles 2, , 4, 5 and 6 Greece: Articles 2, 3, 4, 5 and Final Act, Part III, declaration 2 Denmark: Articles 2, , 4 and 6 and Final Act Part III joint declaration 3 Finland: Articles 2, , 4 and 5 and Final Act, Part II joint declaration 3 Sweden: Articles 2, , 4 and 5 + Final Act, Part II Joint declaration 3
108	1993	SCH/Com-ex (93) 14 on improving practical judicial cooperation for combating drug trafficking
109	1996	SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition)
110	1998	SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen
111	1998	SCH/Com-ex (98)52 on the Handbook on cross-border police cooperation
112	1999	SCH/Com-ex (99)6 on the Schengen acquis relating to telecommunications
113	1999	SCH/Com-ex (99)7 rev 2 on liaison officers
114	1999	SCH/Com-ex (99)8 rev 2 on general principles governing the payment of informers

115	1999	SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences)
116	2000	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.
117	2003	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
118	2004	Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen Acquis
119	2005	Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism
120	2006	Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
121	2006	Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
122	2006	Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
123	2007	Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar)
124	2007	Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)
125	2008	Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation Schengen Information System (SIS II)
126	2008	Commission Decision 2008/334/JHA of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II)
127	2008	Council Decision 2008/328/EC of 18 April 2008 amending the Decision of the Executive Committee set up by the 1990 Schengen Convention, amending the Financial Regulation on the costs of installing and operating the technical support function for the Schengen Information System (C.SIS)
128	2008	Council Decision 2008/149/EC of 28 January 2008 on the conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis
129	2009	Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)