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**Neither in nor out:
Coalition policy in the EU Area of
Freedom, Security and Justice**

Andrew Blick

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Neither in nor out: Coalition policy in the EU Area of Freedom, Security and Justice

Key findings

The special position of the UK with regard to Freedom Security and Justice is suggestive of a country which is and sees itself as something less than a full member of the European Union.

Clearly the EU could not function if all – or even a significant minority – of its members shared this outlook. Moreover, how far this approach serves the national interest of the UK is debatable.

As only a limited participant in the EU, the ability of the UK to wield influence over its business is often dependent upon other member states wishing to accommodate its sensitivities, in the hope of inducing it to participate more fully at a later stage. It is not guaranteed that this kind of goodwill towards the UK will persist indefinitely.

In depicting its approach to Justice and Home Affairs, the Coalition has stressed the looseness of the links between the UK and the EU even more than previous governments. The idea of a possible congruence between national and European interests is neglected. But regardless of its claimed position, the Coalition is in practice opting in to more measures than its official stance might suggest is likely, and than was anticipated – perhaps even by some government ministers at the outset of the present administration. In this sense the Coalition is in a rhetorical trap it has created for itself. It has come to find the legislative measures it has stigmatised desirable for the UK.

Rather than portraying its decisions as grounded solely in the 'national interest' and resistance to 'loss of sovereignty', the Coalition could propose that gains can be made both for the EU as a whole and the member states comprising it, through the pooling of sovereignty.

However, it may well be that, in the prevailing eurosceptic environment, such lines of argument are not considered politically viable. When the UK participates in a measure, it is always considered necessary to justify such action as not amounting to an unacceptable transgression of certain principles, rather than simply explaining its positive value.

Against this background the British government will have to decide whether to accept the extended jurisdiction of the European Court of Justice (ECJ) in mid-2014. This issue will be controversial within the Conservative Party, with opponents of the EU resistant to the extension of the scope of the ECJ, while members of the government may be reluctant to avoid the complications attendant upon opting out. There is also likely to be Coalition tension between the Liberal Democrats – in principle less hostile towards the ECJ – and the Conservatives; and to some extent possibly within the Conservatives. The decision falls to be taken a year before the scheduled date of the next General Election, a proximity likely to have some bearing upon the political calculations surrounding it.

It seems unlikely that the merits of the case will be decisive over the European Court issue. Political considerations are likely to predominate. This circumstance is problematic from the perspective of the national interest, since the decision is of substantial importance to the UK. If the UK opted-out of full ECJ jurisdiction for 'third pillar' measures the outcome would be more than an inconvenience. It would entail a spectrum of legal uncertainty relating to European law produced over a period of 16 years from 1993. If, faced with this prospect, the government did in 2014 decide it preferred in principle to accept the full authority of the Court, it might find that its traditional rhetoric deprives it of a positive narrative about Justice and Home Affairs – and the EU in general – that would help support its case. If the Prime Minister allows party political calculations to take precedence, the Liberal Democrats might regard the issue and timing apt for withdrawal from the Coalition.

Introduction

In recent years, there has been considerable divergence between the approaches of the Conservative and Liberal Democrat parties in the area of European policy. Even so, there were seemingly few difficulties in reconciling their divergent outlooks in the negotiations leading to the formation of the Coalition government in May 2010. In the Coalition agreement, the euro-scepticism of the Conservative Party was to some extent diluted – in particular through the leaving out of the Conservative commitment to the ‘repatriation of powers’ from the European level. In return, the Liberal Democrats accepted in the agreement some major planks of Conservative policy on the European Union. In particular there was a commitment neither to join nor to prepare to join the single currency over the course of the Parliament. Subsequently the European Union Act has created a legal requirement for binding referendums to be held on further so-called ‘transfers of power’ to the EU; and the Act also included what is known colloquially as a ‘sovereignty clause’, seeking to clarify the proposition that European law is only effective in the UK by virtue of the will of the UK Parliament.

In private, representatives of both parties accept that their negotiations on European policy were as much about symbolism as about real political choices. Senior Conservatives privately acknowledge the goal of ‘repatriation of powers’ is almost impossible to achieve, although under pressure from their backbenchers their public utterances may be different. Liberal Democrats point out that the circumstances for Britain to join the euro are anyway unlikely to be propitious in the next five years.

In contrast to these speculative considerations, there is one element of the Coalition agreement which bears directly upon decisions relating to European policy which are falling continuously to be taken throughout the period of the Coalition government, in the Area of Freedom, Security and Justice (often known as Justice and Home Affairs). The Coalition agreement (section 13) states that:

We will approach forthcoming (European) legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country’s security, protecting Britain’s civil liberties and preserving the integrity of our criminal justice system. Britain will not participate in the establishment of any European Public Prosecutor.

In January 2011, the government elaborated on its approach. It stated:

This Government recognises that co-operation on Justice and Home Affairs can deliver key benefits, helping us to tackle cross border crime and to make it easier for British citizens to do business across borders. Such co-operation can also help enhance the UK's security. It also increases certainty in legal disputes both for business (which is essential for the City) and families (for example about child custody across borders). It can also provide opportunities for practical co-operation and capacity-building work on immigration, organised crime and judicial co-operation.

When assessing Justice and Home Affairs proposals 'on a case-by-case basis', the government would:

put the national interest and the benefits to our citizens and businesses at the heart of our decision-making. We will consider each decision...with a view to maximising our country's security, protecting civil liberties, preserving the integrity of our criminal justice and common law systems, and controlling immigration.

The UK would not:

opt into a proposal concerning a European Public Prosecutor and has no intention of joining Schengen measures that could weaken UK border controls.

The Government strongly believes in the importance of practical co-operation on asylum policy within the EU. Equally, we do not judge that adopting a common EU asylum policy is right for Britain.

The emphasis in these statements is almost solely upon national, rather than any conceivable European interest. Though the Coalition agreement did describe the UK as 'a positive participant in the European Union', it went on to state that it was 'committed to ensuring that all the nations of Europe are equipped to face the challenges of the 21st century' – a formulation strongly suggesting that, when the current government concerns itself with European questions, it does not think in terms of the EU as a whole, but rather as a group of nation states, acting together on an occasional and opportunistic basis.

The purpose of the following briefing paper is to discuss the decisions that have been made so far by the Coalition in the area of Justice and Home Affairs, assessing the rationale that ministers have offered for their actions; the tactics they have deployed; and the outcomes. Consideration is also given to how far the Coalition approach differs from that taken under Labour; and the relative prominence of Conservative and Liberal Democrat outlooks within Coalition policy. More general observations are made about the Coalition approach to Europe. The paper begins with an outline of the background to current provisions for the UK to opt in or out of Justice and Home Affairs measures; then discusses the course of Coalition decision-making to date. Detail is provided on the decisions that have been made; along with illustrative case-studies. There follows a conclusion.

Background: The Lisbon Treaty, Freedom, Security and Justice and the position of the UK
Development of the area of Freedom, Security and Justice

The European Union area of Freedom, Security and Justice covers a wide range of matters. They take in: free movement of persons; judicial cooperation in civil matters; judicial cooperation in criminal matters; cooperation between police and customs officials; EU citizenship; anti-discrimination activity; counter-terrorism; combating organised crime; preventing human trafficking; and anti-drugs activity.

The Maastricht Treaty of 1992 created a European Union of three pillars. The first pillar was the entity that was previously the European Community, with the second and third respectively the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). The first pillar operated through co-decision with the European Parliament and qualified majority voting in the Council of Ministers. The second and third pillars were intergovernmental. They operated through unanimous decisions in the Council. The European Parliament was restricted to a consultative role.

The Treaty of Amsterdam of 1997 established an area of Freedom, Security and Justice; and moved some JHA matters – immigration and asylum – into the first pillar. The third pillar was renamed Police and Judicial Co-operation in Criminal Matters, reflecting its remaining content.

The Treaty of Nice of 2001 shifted civil law – excluding family law – to qualified majority voting and co-decision with the Parliament. The Treaty also allowed for certain measures subject to unanimity to be moved – by unanimity – to qualified majority voting. In 2004 the Council moved border checks, free movement and parts of immigration to qualified majority voting (as well as co-decision with the Parliament).

The Treaty of Lisbon of 2007 moved remaining third pillar business into the first pillar, including police, judicial co-operation in criminal matters and legal migration. Thereby all measures were made subject to qualified majority voting and co-decision with the Parliament (except those relating to family law, which will continue to involve unanimity).

Before the Lisbon Treaty, the jurisdiction of the European Court of Justice (ECJ) was extensive for measures adopted under the first pillar, less so for those introduced under the third pillar. The Treaty of Lisbon, however,

placed the whole area of Freedom, Security and Justice under the general jurisdiction of the ECJ. Annulment actions, infringement proceedings and actions for failure to act became possible in all areas, with the exceptions of police and law enforcement activity. Those who object, particularly in this country, to the extension of ECJ jurisdiction in this fashion often regard the Court's role as a particularly unattractive erosion of national sovereignty; and fear that the ECJ might be unwilling to pay due regard to the special legal system of the UK. A notable point of likely forthcoming controversy in the United Kingdom is the extension of full jurisdiction for the ECJ to the third pillar after a five year transitional period which ends in 2014.

The Lisbon treaty would also allow for the establishment of a European Public Prosecutor, whose purpose would be to combat crimes affecting the financial interests of the EU. Creating a Prosecutor would require a unanimous decision by the Council following approval from the European Parliament. If unanimity could not be achieved, at least nine member states could establish a Public Prosecutor using procedures for 'enhanced co-operation'. If the UK did not accept the jurisdiction of the Public Prosecutor, the office would not have jurisdiction within the UK. However its activities would apply to UK citizens living in other member states subscribing to the system.

UK opt-in/opt-out arrangements

The beginnings of the UK opt-in/opt-out arrangements that are the focus of this paper can be traced to the Amsterdam Treaty of 1997. As noted above, the treaty shifted some aspects of Freedom, Security and Justice from the third to the first pillar, making them subject to qualified majority voting. This change created the prospect of member states becoming subject to measures which they had opposed. The UK (along with Ireland) negotiated special provisions providing it with a blanket opt-out. It was permitted to opt in to particular measures as it chose. For those matters which remained in the third pillar, the unanimity requirement continued to apply. Consequently in these areas no opt-out was required, since any member state, including the UK, could exercise a veto over a measure it disliked.

Further developments in the practice of opt-ins/opt-outs were prompted by the Schengen Protocol, which covered both the abolition of checks at

internal borders and co-operation between police and between the judiciary in the EU. When Schengen was established in 1997, the UK (and Ireland) initially did not participate in it at all. The UK could request to take part in some or all Schengen measures with the Council making a unanimous decision on whether to allow the UK to participate in a given measure. After 2000, the UK was permitted to take part in police and judicial co-operation in criminal matters, anti-drugs measures and the Schengen Information System. But member states could deny permission to the UK to participate in proposals building on measures within the Schengen acquis into which it had not opted. In 2005 the UK took legal action to be allowed to take part in the Frontex borders agency; and the introduction of biometric passports. However in 2007 the ECJ found against it in both cases.

Under the Lisbon Treaty, the UK (and Ireland) has a choice whether or not to opt in to most measures proposed within the area of Freedom, Security and Justice. A decision to opt in to a particular proposal must be sent to the President of the Council within three months of its first being presented to the Council by the Commission. The UK has the right to decide not to participate in measures building on parts of Schengen in which it already takes part. Again it must notify the Council within three months. But the UK still lacks an automatic right to opt-in to Schengen measures introduced in areas in which it does not participate already.

There is a five-year transitional period for the extension of jurisdiction of the ECJ. At this point the UK can choose to opt-out from the extended jurisdiction of the court over third pillar measures. The relevant transitional protocol states that in such circumstances 'The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision.' The UK might also be charged for costs necessarily and unavoidably arising from its decision. It will have the right to seek to opt back in to these measures on an individual basis. However the full jurisdiction of the ECJ (and the powers of enforcement of the Commission) would apply to all measures into which it opted back.

In terms of domestic parliamentary scrutiny, the UK government has established a practice of tabling a report in the Westminster Parliament each year, made available for debate. It covers the approach to opt-ins in

the previous year, and considers future business. Moreover, after a particular proposal is published, the government is committed to:

- providing the Scrutiny Committee of each House with an Explanatory Memorandum within 10 days of publication;
- provided they report within 8 weeks of publication, taking into account the views of the scrutiny committees on whether to opt in or not; and
- for that 8 week period, not to notify the Council of a decision.

These provisions for parliamentary oversight existed from the outset. They were added to by undertakings from the Coalition early in 2011 to:

- *make a written statement to Parliament on each opt-in decision to ensure that Parliament is fully informed of the Government's decision and of the reasons why it believes its decision is in the national interest. Where appropriate and necessary, this statement may be made orally to Parliament.*
- *in circumstances where there is particularly strong Parliamentary interest in the Government's decision on whether or not to opt in to such a measure, the Government expresses its willingness to set aside Government time for a debate in both Houses on the basis of a motion on the Government's recommended approach on the opt-in.*

Analysis of the Coalition approach Rhetoric and policy reality

Important to an assessment of the Coalition approach to Justice and Home Affairs is the rationale it offers for its actions; and its relationship with actual practice. A key theme has been stressed repeatedly in the Coalition era by the UK at Justice and Home Affairs Council meetings. It is the supposed need to focus not on legislation but 'on non-legislative solutions: practical co-operation and sharing of best practices between member states'. For instance, at the Council held on 20/21 of January 2011, in a discussion of organised crime, the UK:

said that it recognised organised crime as a real threat alongside counter-terrorism and would be developing a new strategy. In particular the UK acknowledged cybercrime as requiring particular attention, although it was often old crimes committed by new methods. The UK welcomed practical co-operation, rather than legislation.

Another exposition of this outlook came when, at the Council of 9/10 June 2011, in relation to asylum policy, 'the UK raised concerns about the emphasis on legislative solutions: the problem was not a lack of rules, but implementation of the existing ones'.

It is possible to detect a difference of philosophical approach with the previous Labour government here. For instance at the Council 21/22 January 2010, the Labour Home Secretary, Alan Johnson, supported, along with all member states, a draft programme presented by the Presidency for an internal security strategy. Mr. Johnson 'additionally called for an organised crime strategy which would identify priority issues and enhance co-operation at EU level'. During discussion of an attempted terrorist attack in Detroit, Mr. Johnson:

identified a number of areas for EU action, including: the need to collect advanced passenger information on intra-EU flights; expedite an EU PNR agreement where we needed a clear legal framework that included intra-EU flights; proposals on allowing scanners as primary screening tools; targeted capacity-building to countries where there was an al-Qaeda threat and we should not forget the work currently being done to reduce radicalisation and recruitment.

In this case the UK appeared happy to engage in legislative change and new rules, rather than simply operating within the existing framework.

Underpinning the Coalition dislike of new legislative measures is Conservative opposition to the transfer of sovereignty to the EU. The idea is that a formal 'loss' of sovereignty is to be avoided. For instance, when explaining in July 2010 the decision to opt-in to the draft directive on the European Investigation Order (EIO), the Home Secretary, Theresa May, insisted it was justified because it did not entail 'loss of sovereignty'.

An associated point made at the same time by Mrs May was also important to the underlying Coalition rationale offered for its approach in this area. It came with her presentation of the decision as made purely on a basis of the 'national interest'. The idea that there might be a 'European interest' worth pursuing was disregarded; and she made no suggestion that what serves one interest could also serve the other. On this evidence it would seem that in this respect too the outlook of most of the Conservative Party has overridden the more pro-EU inclinations of the Liberal Democrats (and those within the Conservative Party who might be closer to the Liberal Democrats in this regard).

However, differences can be detected within the Coalition and even between the accounts provided by Conservative ministers. When explaining the opt-in to the draft directive on the right to information in criminal proceedings in December 2010, the tone adopted by the Justice Secretary, Kenneth Clarke, was more positive than that of Mrs May. The remarks of both ministers reflected not only the nature of the proposal under discussion but also the European outlook of the person speaking: Mr. Clarke is more European-minded than Mrs May. He acknowledged to a limited extent the idea that benefits to the EU as a whole could be generally desirable both to the UK and the EU as a whole. Similarly, the immigration minister, Damian Green – who comes from Mr. Clarke's wing of the party – when describing the value of the Passenger Name Record data directive proposal in May 2011, showed greater enthusiasm about legislative measures than the usual Coalition pronouncements. As is discussed below, it is possible to detect certain distinctions between ministers in the presentation of Justice and Home Affairs policy by the Labour government as well.

But though there might be nuances within the Coalition approach, the broad philosophical justification presented leads it to be defensive about

opt-in decisions. It is revealing that, of the four occasions on which ministers have felt it necessary to make oral rather than written statements to the House about their judgements, three involved opt-ins, with the fourth involving an initial opt-out that was subsequently reversed to become an opt-in.

Yet while the language and image created may be negative regarding the EU, the actual policy that has developed does not match this impression (see below for a full list of opt-ins and opt-outs). In Justice and Home Affairs, the Coalition may be more pro-EU than it thinks – or wishes to concede – that it is. In a debate about Passenger Name Record Data, the Labour MP Shabana Mahmood MP, agreeing with the opt-in decision that had been taken, noted ‘the different approach taken by the Conservatives, now that they sit on the Government Front Bench, to EU co-operation on home affairs and justice matters. That was not something they championed in opposition, but...that is what happens when rhetoric confronts reality’. William Cash MP, a Conservative and Chair of the European Scrutiny Committee, referred to worries within the Committee about a ‘blizzard of opt-ins’. These responses by Labour and Conservative MPs suggest that the Coalition has proved more ready to opt in than some might have anticipated at the outset of the Coalition.

The reality of the Coalition’s policy has proved difficult to reconcile with the philosophical approach it has sought to present. There are problems in providing accounts of decisions that are both convincing and do not undermine the overall government narrative. For instance, when attempting to justify the EIO opt-in Mrs May appeared to suggest that the UK is able to obtain something for nothing – that is, co-operation from other states in its investigations and protection for British subjects abroad, without reciprocating in a way the Coalition deems undesirable, that is through ‘loss’ of sovereignty. On another occasion Mr. Green also sought to allay ‘concerns about sovereignty’ over Passenger Name Record data by stating: ‘this directive is not about handing over responsibility to a European institution. Rather, it is about member states collecting and processing...data’. Given that the bulk of EU-related activity across the EU is carried out by organs of member states within their own jurisdiction, and not by a ‘European institution’, Mr. Green’s remarks perhaps provide a broader defence of the European Union’s workings than he intended. It could be concluded from this statement that a more positive engagement than has often been the case with Justice and Home Affairs and the EU in general was appropriate for the Coalition, and indeed any British government.

Tactical approach

Another means of analysing Coalition policy on Justice and Home Affairs is through considering the tactics that it deploys. The operational framework in this area provides the UK with a variety of possible approaches. As discussed above, after a measure is presented to the Council, the UK (alongside Ireland) has three months to decide whether or not to take part. If the UK chooses to participate, it is not permitted to opt out subsequently. In the words of the Ministry of Justice: 'If the measure is adopted, the UK would be bound by it, the European Court of Justice (ECJ) will have jurisdiction over the matter and the Commission will have the power to enforce in respect of any failure to implement it properly'. However, possibly, if the UK opted in to a measure but then formed part of a blocking minority during negotiations, the agreement could be concluded without it. If the UK does not opt in within three months, it still has the right to participate in negotiations, but does not have a vote. After the measure has been adopted the UK can seek to participate, subject to the approval of the Commission which can, with the Council, impose conditions.

In some areas such as the idea of a Public Prosecutor, the Coalition is completely opposed to UK participation and its position would be a straightforward one of opting-out. But when it sees potential value for the UK in a measure, it has a choice of courses of action. Sometimes the Coalition extols the value of opting in at the beginning of a process since it enables the UK to wield a more extensive influence on the outcome. Mrs May took this line when explaining UK participation in the European Investigation Order. On other occasions it is claimed that holding off from participation until it is clear what will be the outcome of negotiations is desirable. It is said that to do so enables the UK only to participate when it is clear that to do so would be in its interest. This argument was presented by Mr. Green when explaining the UK handling of the human trafficking directive in May 2011. The rationale for deciding whether or not to postpone seems to involve assessing the risk involved in measures that are also judged to be of potential value to the UK. The greater the perceived dangers involved, the higher the likelihood that the UK will not choose to participate initially.

While the Coalition has received criticism from the Labour side for this risk-based approach, it seems that at least one participant in the Labour

government had a similar outlook. In explaining to the Commons on 16 December 2009 the UK decision not to opt in to the Commission proposal on succession and wills, the Justice Secretary, Jack Straw, stated that:

The Government have concluded that the potential benefits of this proposal are outweighed by the risks and have therefore decided that the best course of action is not to opt in to the proposal and the UK will therefore not be bound by the outcome...The Government intend, however, to engage fully with the forthcoming negotiations between member states on this proposal, with the aim of removing the points that currently cause concern and to deliver further improvements for citizens with links and assets in more than one country. If that can be achieved, the Government could then decide to seek to adopt the final regulation.

Schengen non-participation

Another important theme which arises from consideration of UK participation in Justice and Home Affairs in the Coalition era is the ongoing development of those aspects of the Schengen agreement in which the UK does not participate. For instance, on 3 June 2010 the Council adopted conclusions encouraging member states to make 'more extensive use of automated border-control systems at their external borders. The UK will not participate in these automated systems, or the EU passport regulation on which the automated systems will be based, as they build on elements of the Schengen acquis in which we do not participate...' In this sense UK self-exclusion from an important part of EU activity is negatively dynamic, with participants continuing to advance co-operation while Britain remains on the outside.

It is perhaps ironic that some of the proposals discussed at the Council involving parts of the Schengen system in which the UK does not participate nonetheless meet with the approval of the UK. At the Council of 8/9 November 2010 there was a discussion of progress towards an amending regulation on FRONTEX, the EU external borders agency. Its purpose was to enhance surveillance of external borders, work more effectively with third countries, and supply more assistance to member states in returning those who do not have a right to remain within the EU. While the regulation involves parts of Schengen in which Britain does not

participate, the UK supported 'the extension of FRONTEX's remit to allow it to handle the personal data of those suspected of involvement in criminality at the border. We believe that being able to gather and share these data with other agencies, such as Europol, is vital to FRONTEX's contribution to the fight against human trafficking and smuggling...'

The UK has had occasion to object when texts on Schengen proposals have not reflected the existence of the UK's right to opt-in to them, where applicable, for instance at the Council of 8/9 November 2010 in the case of a draft regulation establishing a network of immigration liaison officers.

At the Council of 20/21 January 2011 there emerged some evidence of unease within the UK government at the consequences of self-exclusion from parts of Schengen. When the Commission stated it 'saw a need to...reform the Schengen evaluation mechanism' the UK noted that:

We were concerned about the UK's exclusion from the proposal for the Schengen evaluation mechanism.

It is notable that the self-exclusion of the UK from parts of Schengen means that in those particular areas it is less of a participant in Council activities than certain countries that are *outside* the EU. At the Council of 24/25 February 2011, there was a Mixed Committee with Norway, Iceland, Liechtenstein and Switzerland, all non-EU Schengen states. The subject being considered was the Visa Information System (VIS) regulation and its introduction in the 'first-phase region' of North Africa. The UK does not take part in the VIS.

The European Court of Justice

For the first five years of the operation of the Lisbon Treaty, the jurisdiction of the European Court of Justice (ECJ) applies fully only to provisions in the area of Freedom, Security and Justice which were adopted after the Treaty came into force in 2009. After this five year period, the jurisdiction of the ECJ will be extended. It will cover all legislation in policing and criminal matters, including measures that were adopted before 2009. By 31 May 2014 the UK must decide whether to accept this extended jurisdiction of the ECJ en bloc, or to opt out completely from its jurisdiction for third pillar measures (except those third pillar measures which have, in the interim

period, been converted into first pillar measures). In theory the UK could attempt to opt back in to individual measures from which it had opted out. In January 2011 the Minister for Europe, David Lidington, issued a statement about the looming decision over the ECJ which did less to illuminate the thinking of the Coalition about the substantive issue than to illustrate its awareness that it was a potentially politically difficult matter to resolve. It offered no clue as to what the position of the Coalition might be on this issue, nor as to how it might go about forming a view. Rather Lidington simply stated that 'Parliament should have the right to give its view on a decision of such importance. The Government therefore commits to a vote in both Houses of Parliament before it makes a formal decision on whether it wishes to opt-out'. It was not clear from this statement whether the vote would be binding, whether a whip would be applied, nor indeed whether the Coalition government would make clear what it wanted (or intended) to do in advance of the vote.

UK opt-in/opt-out decisions under the Coalition

Opt-ins

To date, the Coalition Government has opted in to 15 proposals in Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU). They are:

- The Council Decision on the signature and provisional application of the EU-Korea Free Trade Agreement (Business Innovation and Skills);
- The EU-US agreement on the Terrorist Finance Tracking Programme (Treasury);
- The EU-Georgia readmission agreement (no lead department listed);
- Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing (UK did not opt in to original proposal but chose to do so after it had been adopted) (Home Office);
- The draft Directive on combating the sexual abuse, sexual exploitation of children and child pornography (Ministry of Justice);

- The draft Directive on the European Investigation Order (Home Office);
- The draft Directive on the right to Information in criminal proceedings (Ministry of Justice);
- Proposal for a Directive of the European Council and of the Parliament on attacks against information systems (Home Office);
- Proposal to recast the EURODAC Regulation concerning the comparison of fingerprints for the effective application of the Dublin Regulation (Home Office);
- Proposal to amend and replace the current EC Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Ministry of Justice);
- Proposal for a Council Decision on the signing and conclusion of the European Convention on the legal protection of services based on, or consisting of, conditional access (Department for Culture, Media and Sport);
- Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (Home Office);
- Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service (Home Office);
- Directive on establishing minimum standards on the rights, support and protection to victims of crime (Ministry of Justice);
- EU Regulation on the mutual recognition of Protection Measures in Civil Matters (Ministry of Justice).

Since 6 May 2010 the UK has participated in two measures building on parts of the Schengen *acquis* in which the UK already participates:

- The draft Regulation establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Home Office);
- An Arrangement between the EU and Iceland, Liechtenstein, Norway and Switzerland on the Schengen acquis (Home Office).

Opt-outs

There have been 12 proposals the Coalition has decided not to opt into:

- A Commission proposal for a Directive on the right to interpretation and translation in criminal proceedings (Ministry of Justice);
- The Council Decision on a proposal to amend the EU-Swiss Agreement on the free movement of workers (Department for Work and Pensions);
- The draft Directive on seasonal workers (Home Office);
- The draft Directive on intra corporate transferees (Home Office);
- Proposal for a Council Decision on the position to be taken by the European Union in EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement (Department for Work and Pensions);
- Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety (Department for Transport);
- Proposal for a Council Regulation on Jurisdiction, Applicable Law, and the Recognition and Enforcement of Decisions in the Matters of Matrimonial Property Regimes (Ministry of Justice);
- Proposal for a Council Regulation on Jurisdiction, Applicable Law, and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships (Ministry of Justice);

- Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast) (Home Office);
- Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) (Home Office);
- Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Ministry of Justice);
- Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (Ministry of Justice).

Case studies

The European Investigation Order: an opt-in

The European Investigation Order (EIO) was proposed to provide new evidence-gathering powers to EU member states. The opt-in decision was taken when the House of Commons European Scrutiny Committee had only recently been re-established in the new Parliament. Consequently the Committee was unable to exercise its normal scrutiny. In July 2010, Jago Russell, Chief Executive of Fair Trials International (FTI) stated that:

The Government has signed us up to a measure that has serious implications for stretched police forces and for civil liberties. Despite this, our elected representatives have had no opportunity to debate the proposal or the issues it raises. Unless vital new safeguards are introduced, the decision to rush into this ill thought-out measure will be regretted across Europe.

FTI held that while it:

welcomes measures that enable European countries to cooperate more effectively in combating serious cross-border crime, this must not be done at the expense of fundamental rights. The EIO contains virtually no grounds for refusal, meaning that British police would be powerless to refuse an order, even if related to activity that is not a crime in the UK. The proposals are also completely one-sided: if you are under suspicion, you will have no right to use the EIO to obtain information from other EU countries to prove your innocence.

More emotive claims about EU 'spying' and 'power grabs' have come from euro-sceptic journalists and politicians.

The Home Secretary, Theresa May, explained to the House on 27 July 2010 that the EIO was necessary because 'As people have become more mobile, so too has crime, and that has serious consequences for our ability to bring criminals to justice'. In order to deal with cross-border crime, countries entered into mutual legal assistance (MLA) agreements which 'provide a framework through which states can obtain evidence from overseas. MLA has therefore been an important tool in the fight against international crime and terrorism'. However, the MLA process was

'fragmented and confusing for the police and prosecutors, and it is too often too slow. In some cases it takes many months to obtain vital evidence'. The EIO would simplify the system, with a standardised request form and the introduction of formal deadlines for the recognition and execution of requests. The government had decided to opt in to the EIO 'because it offers practical help for the British police and prosecutors, and we are determined to do everything we can to help them cut crime and deliver justice. That is what the police say the EIO will do'.

Mrs May noted that there were concerns about the EIO. The first was 'on the question of sovereignty'. She said:

In justice and home affairs, there are many ideas coming out of Brussels, such as a common asylum policy, that would involve an unacceptable loss of sovereignty. I want to make it absolutely clear to the House that I will not sign up to those proposals, and I have made that clear to my European counterparts. However, the EIO directive does not incur a shift in sovereignty. It is a practical measure that will make it easier to see justice – British justice – done in this country.

The second concern involved 'burdens on the police'. For this reason, the UK would seek a proportionality test, to avoid police forces having to work on trivial offences, and to enable them to extend deadlines when it was not possible to meet them. Mrs May stressed: 'the EIO will not allow foreign authorities to instruct UK police officers on what operations to conduct, and it will not allow foreign officers to operate in the UK with law enforcement powers'.

Third in Mrs May's argumentation was her concern about legal safeguards. The UK government would:

seek to maintain the draft directive's requirement that evidence should be obtained by coercive means, for example through searching a premises, only where the dual criminality requirement is satisfied. Requests for evidence from foreign authorities will still require completion of the same processes as in similar domestic cases. In order to search a house, for example, police officers will still need to obtain a warrant.

The execution of the EIO also had to be compatible with the European Convention on Human Rights.

Mrs May argued that: 'By opting in to the EIO at this stage, we have the opportunity to influence its precise content. We know that the existing draft is not perfect, and we are confident that we will be able to change it in negotiations' She quoted in her support the civil liberties pressure group, Justice, stating that 'on balance it is better for the UK to engage in this area than be ousted onto the periphery of evidence in cross border cases'. The EIO would apply to 'both prosecutors and defence lawyers, which means that it can be used to prove British subjects innocent abroad, as well as to prosecute the guilty at home'. It was 'in the national interest to sign up to it'.

Right to information in criminal proceedings: an opt-in

Another proposal into which the UK opted is the draft Directive on the right to information in criminal proceedings. Its purpose is to improve the rights of suspects and accused persons. It seeks to ensure that they receive written information about their rights during the criminal process in the form of a letter of rights. It also seeks to ensure that they receive information about the nature of the accusation against them as early as possible, enabling them to prepare their defence. Commenting on the draft directive the House of Commons European Scrutiny Committee expressed in November: 'serious reservations about whether an "EU" approach to disclosure of evidence is appropriate or possible, given the national sensitivity surrounding rules of disclosure in any criminal justice system and the marked differences in approach between common and civil law jurisdictions'. Though the Committee acknowledged some of its objections had been addressed in negotiations, it recommended a debate in European Committee B. In the debate that took place on 2 December 2010 the Justice Secretary, Kenneth Clarke argued that:

this measure is extremely important and valuable, and one that the British wish to contribute to and ultimately comply with. We believe that it will have a positive impact on those who become subject to the criminal justice system of any member state of the European Union. The main benefit to us is that it will give added protection to British subjects who get themselves into trouble with the criminal law in other member states. It will also build on our

hopes of ensuring that standards in every member state are of a level that gives us confidence when it comes to enforcing and respecting judgments taken in other member states. The measure clearly fulfils, in every respect, the criteria that the coalition Government have set out for opting in to home affairs and justice matters in the European Union.

Mr. Clarke went on to explain that 'the project is part of what has become known as a road map, which has been set up to ensure that we steadily...produce a series of measures that raise the minimum standards in the criminal justice systems of other member states to the levels of the best'. The drafting of the directive had 'been heavily based on British practice...the measure would have a limited effect within the United Kingdom'. Its purpose was to help address 'the difficulties that can arise when British subjects are arrested overseas, and the measure has great support from all the interested pressure and lobby groups in this country. Fair Trials International, Liberty and Justice are wholly in favour of the measure'.

Through opting in the UK had:

been able to clear up those drafting points that might have made the original draft rather difficult to apply in a common law country. The current draft is perfectly satisfactory to us...Our opting in has enabled us to participate in discussions in a strong and positive way inside the council, and people look to us when we talk about standards of justice in criminal law. I do not think that we are a target of this particular directive; we are thought to be very helpful contributors.

Passenger Name Record data: an opt-in

After some uncertainty about its intentions, the government ultimately opted in to this directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and other serious crime. It may have been encouraged in doing so by the House of Lords European Union Home Affairs Sub-Committee F which recommended that the UK should participate early in 2011. This issue was debated in the Lords on 17 March 2011. Lord Hannay of Chiswick, chair

of Sub-Committee F, noted that 'the collection of such data involves a considerable invasion of privacy' but was in no doubt that the potential benefits outweighed this disadvantage. While the draft resolution was not perfect, Lord Hannay stressed that the issue at stake was:

whether the UK should opt in or not, and whether it should therefore participate actively in negotiating, make its influence felt and have its views taken fully into account or whether it should walk away and leave the directive to be applied to other member states but not to the UK.

The Earl of Erroll, however, raised concerns. He argued:

We have a database being built up here of sensitive information. You can easily have unintended connections made...such as guilt by association...Another question is: who will have access to this information abroad and in the future? Will it be in European countries or worldwide? I can think of certain foreign countries which I would not like to have my information under any circumstances whatever. I can think of a couple of European countries where I would not be too happy with that...We have to start worrying about this. We all treat crimes in different ways, and this measure will soon creep elsewhere. The bottom line is that if we were worried by the national identity register, why on earth are we not worried about this?

The Minister of State for the Home Office, Baroness Neville-Jones, responded to the debate by noting the existence of:

agreement that there is concrete evidence of the utility and benefits to be derived from the analysis of PNR data in terms of passengers' security.

She was however at this early stage of the procedure non-committal on whether the UK would opt in to the new arrangement. Baroness Neville-Jones informed the Lords:

further work must be done on the directive and we must do more lobbying in order to get to the place where we feel we need to be....There will be further discussion of the directive at an

important home affairs Council on 11 April...I hope that the House will accept that at this stage the Government need to maximise their negotiating leverage.

Lord Hannay responding by cautioning that:

One problem that may come up - I hope it does not, and that the Minister is right in anticipating that real progress will be made at the April council to include intra-EU flights - is that it may not be possible by the time we have to take a decision on opting in to be quite sure one way or the other. However, on one thing we can be quite certain: if we opt out, intra-EU flights will not be included.

When explaining the ultimate decision to opt in to the Commons on 10 May 2011, the Minister for Immigration, Damian Green argued that: 'The draft directive as it stands is not perfect, but it is right that we work with our European partners to get a directive that best serves Britain's interests'. He went on: 'We already have domestic legislation to underpin the collection of PNR data, but the directive will provide an unequivocal legal framework at EU level for the collection and sharing of such data'.

Mr. Green also sought to allay 'concerns about sovereignty':

Let me be clear: this directive is not about handing over responsibility to a European institution. Rather, it is about member states collecting and processing PNR data on travel under an agreed legal framework to help protect citizens from harm. The draft proposals are based on each member state collecting and analysing the data, and we will vigorously stand by that way of operating.

Responding for the Labour Party, Shabana Mahmood MP supported the government decision to opt in to the directive, then remarked:

We note the different approach taken by the Conservatives, now that they sit on the Government Front Bench, to EU co-operation on home affairs and justice matters. That was not something they championed in opposition, but, as we have seen with their change of heart on the extension of the European arrest warrant

and their position on PNR data today, that is what happens when rhetoric confronts reality. It is a shame that the Minister took such a long time to sign the directive on human trafficking, where the reality is so shocking.

William Cash MP, a Conservative and Chair of the European Scrutiny Committee referred to worries within the Committee about a 'blizzard of opt-ins and the fact that the negotiations on a number of very important matters are still going on. There is therefore some concern about the possibility of our opting in on the hoof...we are extremely concerned...that as there are these important continuing negotiations it is not good enough simply to say, "We will accept it in principle and then discuss it all afterwards"?'

Human trafficking: a delayed opt-in

Controversy surrounded the initial Coalition decision not to opt in the draft human trafficking directive. The campaign group 'Anti Slavery' has argued that:

If incorporated into British law the Directive would create extra provisions to protect victims of trafficking, including witness protection. It would also make it easier to convict traffickers via the creation of a common EU definition which is broadened to include people forced into begging, alongside enabling EU member states to prosecute perpetrators of trafficking offences carried out in other member states...

The proposed EU law would enhance much needed protection for victims of trafficking and increase prosecutions of traffickers across the 27 European Union member states...

By choosing not to opt in to the directive, the Government is not only failing in its own efforts to combat this cross-border crime but is actively undermining EU-wide efforts as well.

A Home Office press release in August explained the decision not to opt in to the draft directive to combat human trafficking. It stated that the government intended to review its stance when the legislation was

finalised; and that the UK already complied with much of the draft directive. A Home Office spokesperson said:

While the draft directive will help improve the way other EU states combat trafficking, it will make very little difference to the way the UK tackles the problem as there are no further operational co-operation measures which we will benefit from. Opting in now would also require us to make mandatory the provisions which are currently discretionary in UK law. These steps would reduce the scope for professional discretion and flexibility and might divert already limited resources...By not opting in now but reviewing our position when the directive is agreed, we can choose to benefit from being part of a directive that is helpful, but avoid being bound by measures that are against our interests.

In January 2011 the government described how, on the one hand, it would:

continue to negotiate a number of Directives to which we have already opted in, with the aim of securing the best possible result for UK interests. One such measure is the European Investigation Order.

Yet, on the other hand,

negotiations continue on a number of proposals where, although the UK did not opt in at the start, it remains the Government's objective to amend the text in such a way that will allow UK participation after adoption...We expect the Human Trafficking Directive, to which the UK did not opt in, to be adopted early in 2011. The Government will then consider whether the final text meets UK objectives, and whether seeking a post-adoption opt in would be appropriate.

Ultimately, the UK decided it wanted to participate in the human trafficking directive; and Damian Green explained to the Commons on 9 May 2011 that:

we chose not to opt in to the directive when it was initially put on the table last summer, because the draft text had to go through an extensive period of negotiation between the European Council and the European Parliament. We wanted to be absolutely sure

that the text would not change during those negotiations in a way that would be detrimental to the integrity of the UK's criminal justice system. We wanted to consider a final text that had no risks attached and which would not fundamentally change the UK's already strong position in the fight against human trafficking.

In a Commons debate the following day on the decision to opt in to the Passenger Name Record data directive discussed above, the Labour MP Emma Reynolds asked Damian Green 'does the Minister agree that it is important for the UK to opt in to such directives at the start of the process, so that we can be at the forefront of negotiating the finer detail of the proposals? We did not have the chance to do that with the European human trafficking directive'. Mr. Green's response was:

I do not agree that we should take a blanket decision always to opt in at the beginning. With some directives, of which this is one, we are clearly leading a majority of European countries towards a position that would be extremely desirable, and without which the directive would be much less powerful. As for the human trafficking directive that we agreed to opt in to last night, in that case there was more of a threat than a promise during the negotiation procedure, and we needed to know that when we reached the end of the procedure the directive would still be entirely safe for Britain. As the hon. Lady will know, one difficulty is that if we opt in at the beginning there is no chance of opting out at the end if we discover that the negotiations have gone wrong. This is a question of taking every case on its merits, and that is what we seek to do.

Seasonal workers: an opt-out

Circumstances leading to the decision not to opt out of the draft Directive on seasonal workers suggest that the UK Parliament may be able to wield some influence. The European Scrutiny Committee had stated it was not 'certain that the measure respects the principle of subsidiarity...it is not apparent that the objectives of the draft Directive are of sufficient magnitude to justify EU action.' If the government had decided to opt into the draft Directive, the Scrutiny Committee would have recommended it for

a debate in the European Committee; and requested more information about the cost implications. The fear of this discussion and scrutiny may have been decisive for the government.

Conclusions

The special position of the UK with regard to Justice and Home Affairs, negotiated by the previous Labour government, is suggestive of a country which is and sees itself as something less than a full member of the European Union. For many of the UK's partners, co-operation over asylum, immigration, civil and criminal law is not an end in itself but rather a necessary development arising from the establishment of an internal market. But the UK approach involves a separation of the objectives of, on the one hand, free trade and, on the other hand, fuller integration with respect to justice and home affairs. The measures which emerge from Justice and Home Affairs are treated as something that can be taken or left as suits the UK. The objective is to reap any benefits that may be on offer, but avoid perceived undesirable outcomes such as a threat to the common law legal system of the UK. If a proposal seems defective in some way, the fall-back position of the UK is not to be involved, rather than seek to secure improvements to it.

Clearly the EU could not function if all – or even a significant minority – of its members shared this outlook. Moreover, how far this approach serves the national interest of the UK is debatable. It means that the UK is willing to allow an organisation of which it is a member to adopt flawed measures, possibly undermining its effectiveness. Even when the approach taken by the UK towards the EU creates tendencies with which the UK is uncomfortable, such as its lack of influence over Schengen, there seems, however, little reason to believe that this outcome will lead the current British government to re-evaluate its overall stance towards the EU.

As only a limited participant in the EU, the ability of the UK to wield influence over its business is often dependent upon other member states wishing to accommodate its sensitivities, in the hope of inducing it to participate more fully at a later stage. This pattern is illustrated well by the calculations involved in decisions about when to opt in to Justice and Home Affairs measures. At present the UK seems able to make its presence felt without necessarily opting in at first. It has the right to attend negotiations in such circumstances, but the impact it makes is dependent to a substantial extent not upon legal entitlement, but upon goodwill towards the UK amongst member states – which it cannot be assumed will always persist in its required form. If the UK decides to opt out of the extended jurisdiction of the European Court of Justice in 2014, it may find

that it does not meet with the level of co-operation to which it is accustomed when a response to this decision is devised.

In depicting its approach to Justice and Home Affairs, the Coalition has stressed the looseness of the links between the UK and the EU even more than previous governments. There is an emphasis on preventing the loss of 'sovereignty' and the unvarnished preservation of the 'national interest'. The idea of a possible congruence between national and European interests is neglected. Repeatedly increased practical co-operation is said to be preferable to new legislation. The risk assessments that underpin tactical decisions about opting in early or waiting to see how events develop involve characterising the EU at least partly as a threat to be guarded against. All of these outlooks are more Conservative than Liberal Democrat in flavour, though there are unavowed differences of opinion over Justice and Home Affairs within the Conservative Party component of the Coalition itself. But regardless of its claimed position, the Coalition is in practice opting in to more measures than its official stance might suggest is likely, and than was anticipated – perhaps even by some government ministers at the outset of the present administration. In this sense the Coalition is in a rhetorical trap it has created for itself. It has come to find the legislative measures it has stigmatised desirable for the UK.

Ironically, there is an obvious potential presentational approach which fits the reality of UK involvement in Justice and Home Affairs better. Rather than portraying its decisions as grounded solely in the 'national interest' and resistance to 'loss of sovereignty', the Coalition could propose that gains can be made both for the EU as a whole and the member states comprising it, through the pooling of sovereignty. Participation in new legislation could be justified on such grounds. Some parts of this potential alternative case could be drawn from arguments already advanced by Coalition ministers. Mrs May's extolling of the value of opting in at the beginning of a process as a means of influencing the outcome more extensively, in relation to the European Investigation Order, is a potential component of such a new rationale. Equally, Mr. Green's argument about European measures which are largely implemented by national authorities rather than European institutions could be developed in to a more general rebuttal of imagery of a centralised bureaucracy.

However, it may well be that, in the prevailing eurosceptic environment, such lines of argument are not considered politically viable. The tone of

Coalition portrayals of Justice and Home Affairs policy is apparently adopted to a large extent because of pressure from backbench Conservative MPs; and similar views emanating from sections of the media, which in turn are echoed by public opinion. When the UK participates in a measure, it is always considered necessary to justify such action as not amounting to an unacceptable transgression of certain principles, rather than simply explaining its positive value.

This kind of defensive advocacy is part of a broader approach to presenting UK participation in the EU which has a lineage predating the present government. It has been adopted by ministers of different parties who find engagement with the EU useful in practice, but are reluctant publicly to embrace the European cause because they feel to do so will meet with political hostility. However, there are signs that this tactic, which was never entirely successful, is proving increasingly less effective in neutralising eurosceptic opinion. Conservative backbenchers are more willing than ever to press for a radical disengagement with the EU; and recently they achieved dramatic influence on government policy when Mr. Cameron vetoed the signing of an EU-wide treaty on 'fiscal union'. The Prime Minister may hope that he has by this means bought some goodwill which might afford him more discretion in future. Euroseptic Conservatives, on the other hand, may understandably feel they are in the ascendant and wish to push for more.

Against this developing background the British government will have to decide whether to accept the extended jurisdiction of the ECJ in mid-2014 (assuming more dramatic events involving the EU and the status of the UK within it do not render this matter redundant beforehand). The ECJ issue will be controversial within the Conservative Party. Opponents of the EU will be resistant to the extension of the scope of the ECJ, while Conservative members of the government may be reluctant to avoid the complications attendant upon opting out. There is also likely to be Coalition tension between the Liberal Democrats – in principle less hostile towards the ECJ – and the Conservatives; and to some extent possibly amongst Conservative ministers. It will not be possible for Mr. Cameron to present the Liberal Democrats with a *fait accompli* as he could over the treaty on 'fiscal union'. The battle lines can be drawn well in advance. A campaign in parts of the media against the ECJ is presumably inevitable. The decision falls to be taken a year before the scheduled date of the next General Election, a proximity likely to have some bearing upon the political

calculations surrounding it. For instance, the Liberal Democrats may decide they have little to lose by fighting harder over this issue than they might have done earlier in the Parliament; while the Conservatives may be reluctant to enter a General Election shortly after agreeing to the new jurisdiction of the ECJ.

As this analysis suggests, it seems unlikely that the merits of the case will be decisive over the European Court issue. Political considerations will seemingly predominate. This circumstance is problematic from the perspective of the national interest, since the decision is of substantial importance to the UK. If the UK opted-out of full ECJ jurisdiction for third pillar measures the outcome would be more than an inconvenience. It would entail a spectrum of legal uncertainty relating to European law produced over a period of 16 years from 1993. If, faced with this prospect, the government did in 2014 decide it preferred in principle to accept the full authority of the Court, it might find that its traditional rhetoric deprives it of a positive narrative about Justice and Home Affairs – and the EU in general – that would help support its case. But if the Prime Minister allows party political calculations to take precedence, the Liberal Democrats might regard the issue and timing as apt for withdrawal from the Coalition. In this case the divergence over European issues which proved surprisingly unproblematic when the government was being formed might ultimately serve to bring it to an end.

Appendix

JHA Opt-ins and opt-outs under Labour

From 1 December 2009, when the present arrangements for opting in and out came into force, and when the Labour government left office in May 2010, the UK opted in on six occasions, to the following measures:

Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings (Ministry of Justice);

Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Home Office);

Agreement for a simplified extradition arrangement between Member States of the European Union (EU) and Iceland and Norway (Home Office);

Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto (Home Office);

Agreement between the European Union and Japan on the mutual legal assistance in criminal matters (Home Office);

Initiative for a Directive of the European Parliament and of the Council on the European Protection Order (Ministry of Justice);

The UK did not participate in three measures:

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions

and authentic instruments in matters of succession and the creation of a European Certificate of Succession (Ministry of Justice);

Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Home Office);

Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Home Office).

The Labour government participated in – or to be precise did not opt out of – one Schengen measure:

Proposal for a Council Regulation amending Decision 2008/839/JHA on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (Home Office).

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