

FAIR TRIALS INTERNATIONAL



**The UK's right to opt out of EU crime and policing laws
from December 2014**

Frequently Asked Questions

July 2012

Working for a world where
everyone's right to a fair trial
is respected, whatever their
nationality, wherever they
are accused.

Context

The debate on a possible UK opt-out of EU crime and policing laws in 2014 is set to heat up, as the UK prepares to decide on our future participation in a raft of EU laws. These include the European Arrest Warrant, a fast-track system of extradition that has revolutionised the way wanted persons are moved from state to state, removing many safeguards.

The opt-out decision will impact on how UK police, prosecutors and courts work with partners across Europe to investigate crime, extradite people, share criminal records, exchange evidence and liaise with Europol and similar EU bodies. The issues raised are complex, but important for the millions of British citizens who live, travel and work in other EU countries.

With the deadline a year before the date currently scheduled for a general election, this looks set to be a big party-political issue. Coalition tension is foreseen, with the Liberal Democrats' pro-EU stance meeting pressure from many Conservatives who demand the "repatriation of powers" from the EU and from Europe's regional courts at Strasbourg and Luxembourg. As one think-tank has observed: *"The Conservatives and Liberal Democrats have long held opposing views on the [European Arrest Warrant] that will be difficult to climb down from and will make the collective decision very tough"*.¹

The Government has not yet expressed its position on the 2014 issue, but has promised a vote in Parliament before it decides. Those seeking a full opt-out say we could opt back into laws "deemed vital".² Yet the consequences of such an approach are legally, financially and operationally unclear, as the Lord Chancellor and others have acknowledged³.

In reality, however, this is less about repatriating powers from Brussels than about degrees of future participation in a system already in place. As we explain, a total opt-out is legally impossible, leaving aside its possible merits or drawbacks. The UK should, in our view, make its future participation conditional on securing reforms to the European Arrest Warrant, a law that is currently undermining justice and wasting resources. The 2014 choice offers a narrow window of opportunity to build on the growing consensus for this reform.

This paper seeks to explain the key issues in simple terms. It concludes that the key question for the Government is: how does the UK ensure effective cooperation in the fight against crime across EU borders, without sacrificing rights and liberties in the process?

Q1 What is the opt-out decision about?

Two things: (1) how far the UK carries on participating in EU laws on crime and policing; and (2) how far it will accept the jurisdiction of the Court of Justice of the EU (**EU Court**) over how it applies those laws and how they are enforced.

The Lisbon Treaty⁴ changed the way EU laws on crime and policing are made and enforced at EU level, but some of the changes only take effect in the UK from December 2014 – a grace period that the UK wanted. Any of these EU laws the UK is participating in as at December 2014 will fall under the EU Court's jurisdiction, so the European Commission will be able to take infringement proceedings in that Court if the UK fails to apply the laws properly. The UK negotiated a protocol giving it five years to decide if it wanted this. It must

¹ Open Europe [blog post](#) 21 March 2012

² Letter to David Cameron "Repatriate powers on crime and policing" [published](#) *Telegraph* 6 February 2012

³ [Evidence](#) to Lords EU Justice and Institutions Sub-Committee 18 January 2012

⁴ (in force as of December 2009)

notify the EU of any opt-out decision by no later than 1 June 2014 and this decision would take effect from December 2014. We explain more about the EU Court's role later (Q8). We also explain why a complete opt-out of all EU crime and policing laws is not an option, as the opt-out only covers laws passed before Lisbon – for laws the UK has chosen to take part in since Lisbon, the EU Court's jurisdiction cannot be opted out of. We give examples of these under Q5 below.

Q2 What are the principles underlying EU crime and policing laws?

Free movement and open borders

In the late 1990s border controls were lifted between many EU countries and this process has continued since, with EU law now guaranteeing free movement for all EU citizens inside the EU area. Even where border controls still operate (like the UK and Ireland), EU citizens have an automatic right to enter if they show a valid passport on arrival. Police and prosecutors understandably needed new powers to co-operate across borders, so that criminals cannot exploit open borders to escape justice or commit further offences.

Mutual recognition

Terror attacks in the United States led to rapid consensus among EU countries that faster, simpler cooperation across borders was needed and the way to achieve this was through "mutual recognition" of prosecutors' and judges' decisions across the EU, without delay or red tape. So, if a judge in one EU country wanted a suspect or convict extradited there, other countries had to cooperate and extradite the person, with very little discretion to say "no" or raise questions.

The underlying assumption was that, although EU countries had their own laws and procedures, they all complied with human rights, including the rights not to be tortured or treated in an inhuman or degrading way and to receive a fair trial. This assumption is, at best, optimistic: fundamental rights are not protected to acceptable standards in many parts of the EU despite all EU countries belonging to the European Convention on Human Rights.

Subsidiarity

The laws the EU can make on crime and policing are limited by the principle of "subsidiarity": laws can only be made where countries acting alone could not achieve the same result. So, for example, we have EU laws enabling judges and police to cooperate on extradition requests and laws on evidence exchange and prisoner transfers. We also have EU laws on the basic procedural rights of suspects, defendants and crime victims, introduced in belated recognition that "mutual recognition" requires a stronger foundation of rights protection.

The EU also has limited powers to make substantive (as distinct from procedural) criminal law – in other words, to outlaw certain types of conduct and lay down sanctions for very serious crime with a cross-border dimension. Under the Lisbon Treaty this covers crimes like terrorism, trafficking in human beings, cyber-crime and organised crime.

None of this stops the UK from making its own crime and policing laws. So, if the UK wants to make laws giving greater rights to crime suspects or victims than those laid down by EU law, it can. There are legal question marks over what happens when the UK makes a law that directly conflicts with an EU law. The UK would be in breach of EU law by doing so but there are currently no enforcement procedures the EU could bring to stop this.

Q3 How are EU crime and policing laws made?

Before the Lisbon Treaty, the EU used “framework decisions” to make crime and policing laws intended to have effect in all EU countries⁵. After Lisbon, laws in this area are made in the form of “directives”, using a different decision-making process.

Framework decisions and directives both require member states to achieve particular results without dictating the means of achieving them. But directives, unlike framework decisions, allow the European Commission to bring infringement proceedings against EU countries that fail to transpose them into domestic law. The other big difference is that framework decisions could only be passed by unanimous vote of all EU countries (meaning a single state could block new laws they did not want); whereas directives are decided by a qualified majority. Finally, Members of the European Parliament had no binding voting powers on framework decisions, but do vote on directives and could in theory block them.

Due to the powers the EU Court has to enforce directives and ensure EU countries apply them in accordance with their terms and with fundamental rights, the UK wanted a right to choose whether to participate at all in post-Lisbon directives on crime and policing. It therefore negotiated an individual opt-in right, for every new directive proposed⁶. The way this works is explained under Q5 and Q6.

Q4 What are the main examples of pre-Lisbon laws on crime and policing⁷?

- **European Arrest Warrant** Affects thousands each year and has generated high profile cases of injustice. In operation for 8 years, it has speeded up extradition and limited powers of refusal. It has resulted in big increases in extradition requests, with some countries⁸ using it for minor as well as serious crimes.

- **European Supervision Order** Comes into force in December 2012. Could have a huge impact by preventing thousands of people not convicted of any crime from spending months or years in prison awaiting trial, allowing them instead to be bailed back home until trial. Could be good news for many UK citizens awaiting trial in other EU states. Currently, most do not get bail, simply because they are non-nationals.

- **Prisoner transfer law** Will simplify the way countries transfer convicted prisoners who are from other EU countries back to their home state to serve remaining sentence. Premised on the need to improve rehabilitation prospects, it would allow the UK to transfer EU nationals from other states back home with minimum red tape. It would also mean UK prisoners in other EU countries could be transferred home more easily.

- **Exchange of criminal records data** ECRIS (the European Criminal Records Information System) enables the sharing of criminal records data across EU borders. Every EU country has a central authority that stores the criminal records of its citizens and sends these to other countries on request.

- **Financial penalties law** This allows fines of €70 or more, imposed in one country, to be enforced in another. Potentially a good alternative to extradition in less serious cases, but under-used.

- **Europol, Eurojust, police/prosecution cooperation** EU laws cover how the UK and other EU countries work with these bodies, sharing information on criminal records,

⁵ There were also Conventions – but these only operated when Member States accepted them.

⁶ This is separate to the 2014 opt-out – it will continue indefinitely and applies to Ireland as well as the UK.

⁷ There are over 100 such laws: a full list is contained in a letter of 21 December 2011 from the Home Secretary, available at p 24f ff of a [report](http://www.openeurope.org.uk/Content/Documents/Pdfs/JHA2014choice.pdf) by Open Europe: “An unavoidable choice” <http://www.openeurope.org.uk/Content/Documents/Pdfs/JHA2014choice.pdf>

⁸ (notably, Poland, Romania and Hungary)

transmitting extradition requests and helping coordinate complex cross-border investigations.

Q5 What about crime and policing laws made since Lisbon?

- **Defence rights** Two directives have been adopted in this area and two more are planned. The first will ensure that anyone facing charges in an EU country gets access to interpretation and translation if needed. The second guarantees that suspects receive information about their basic legal rights and the charges against them. They come into force in 2013 and 2014. Further laws on the right to legal advice and protections for vulnerable suspects (like children or disabled people) are under discussion.

- **European Investigation Order (EIO)** Likely to be adopted in late 2012, the EIO will introduce major changes to the system by which evidence is obtained and shared between EU countries in criminal cases. "Requests" for evidence or investigations will become "orders" that other EU countries must comply with, by fixed deadlines.

Q6 What approach has the UK taken to EU crime and justice laws?

Essentially, a pick-and-choose one. Pre-Lisbon, the UK voted in favour of law enforcement measures like the European Arrest Warrant but, along with a few other countries, vetoed a law protecting defence rights. Post-Lisbon, there is no longer a veto, but a protocol to the Lisbon Treaty now lets the UK (and Ireland) choose whether to opt in or stay out of new proposed EU laws, on a case-by-case basis. Any new EU law proposed can be opted into within 3 months of being proposed⁹: once "in", the UK can negotiate on the text, but has no right to opt out once the measure is adopted. So far, it has decided as follows¹⁰:

- **Defence rights:** The UK opted into the two directives on defence rights in recognition that, though it complied with them already, many EU countries did not. More recently, the UK has chosen not to opt into a proposed law guaranteeing suspects the right to legal advice and representation and the right to contact consular officials and family members on arrest, stating that the measure goes further than necessary. It has signalled that it might choose to participate *after* the directive has been adopted into EU law – an option also available under the special UK (and Irish) protocols.

- **European Investigation Order (EIO):** The Home Secretary told Parliament in 2010 that the UK would opt into this law and would benefit from its more streamlined system for cross-border evidence sharing. She warned that if we did not opt in, our own evidence requests would be sidelined, once other EU countries were using the EIO.

Q7 In 2014, can we opt out of laws we have opted into since the Lisbon Treaty?

No. Even if we opt out of all EU laws adopted pre-Lisbon, there is no way we can opt out of laws we have opted into since. This means we stay in the EIO (assuming it gets adopted) and the defence rights laws (above) even if we opt out of all pre-Lisbon laws and do not opt into any more EU laws.

⁹ Alternatively, even if the UK does not opt in during these first three months, it can notify the Commission **after** the law's adoption that it wants to participate.

¹⁰ The UK has also opted into new Directives on child sex abuse and on people-trafficking; as well as a proposed Directive on the rights of crime victims.

Q8 What is the Court of Justice of the EU?

There is confusion in some quarters about the EU Court. Based in Luxembourg, it is the EU's highest court. National courts refer questions to it on the validity and interpretation of EU laws. Its rulings help to ensure laws are applied consistently in all EU countries. The Court's role has evolved as EU countries have conferred more powers onto the EU. It originally dealt with laws on trade, agriculture and the internal market. Now it also deals with social policy, environment, judicial cooperation and other areas. The UK and 8 other countries have blocked national courts from referring questions on pre-Lisbon EU crime and policing laws, at least until 2014.

The EU Court also enforces EU law, by ruling on infringement actions brought against EU countries by the European Commission for failure to implement EU laws or apply them consistently with fundamental rights like free movement and non-discrimination and general principles of EU law such as proportionality. A key role is thus to ensure fundamental rights are observed in areas that fall within its jurisdiction. Its decisions are binding on all EU member states.

The EU Court's role in the area of EU crime and policing laws will expand when changes brought in by the Lisbon Treaty take effect. From December 2014, its jurisdiction to take references and to rule on infringements will apply to all EU countries uniformly: countries can no longer stop their courts making references and all will be subject to potential infringement proceedings. The only exception will be for the UK and Ireland, for those EU laws that they have chosen not to participate in, or (in the UK's case) opted out of in December 2014 and not opted back into after that.

The EU Court is different to the European Court of Human Rights, which is based in Strasbourg and has jurisdiction over all 47 Council of Europe countries, not just the 27 EU countries. The Strasbourg Court hears complaints about violations of the rights enshrined in the European Convention on Human Rights. It can award compensation to individuals whose human rights have been infringed, whereas the EU Court has no similar power.

Q9 Can the UK avoid the EU Court's jurisdiction by using the bloc opt-out?

Not completely. The UK cannot opt out of those EU laws on crime and policing adopted since the Lisbon Treaty that it has chosen to participate in. So, the EU Court will be able to rule on infringement cases brought by the European Commission in relation to these laws where, for example, the UK fails to implement a directive properly or apply it in accordance with EU principles or fundamental rights. This could happen either when an individual brings infringements to the Commission's attention or when the Commission acts on its own initiative. UK Courts will also be free to refer interpretation questions to the EU Court on these post-Lisbon laws, as soon as they are in force.

This contrasts with the position on pre-Lisbon laws like the European Arrest Warrant: the EU Court will only have jurisdiction over how the UK applies these laws after the transition period ends in December 2014, assuming we stay in them (or opt back into them, after an opt-out in December 2014).

Q10 Could the EU Court interfere in UK police operations?

The Lisbon Treaty says the EU Court cannot review the "validity or proportionality" of operations by national police or other law enforcement bodies, or the actions they take to maintain law and order and safeguard national security. So, if the Met Police decided to arrest everyone at a demonstration, the EU Court could not rule against the UK and hold that the police acted illegally or excessively.

Q11 Must we accept a European Public Prosecutor, if we do not opt out en bloc?

No. Under the Lisbon Treaty, establishing this office would need unanimity among all EU states. Failing unanimity, if nine states or more want it, it could operate just among those. Even if this happened, the UK could never be forced to relinquish any power to a European Public Prosecutor¹¹. No legislative proposal for this office exists as yet. The role is intended for prosecuting serious frauds on the EU institutions, but could be expanded by agreement.

Q12 So, what happens if we opt out of all the measures we *can* opt out of?

The UK will still have to pass domestic laws enacting the EU measures it has opted into post-Lisbon, plus any future laws it opts into. The UK will be under the jurisdiction of the EU Court in any infringement case brought by the European Commission concerning those laws, once adopted. UK Courts will no longer be barred from referring interpretation questions on these laws to the EU Court. (UK Courts already do this in other areas of law.)

Q13 Can we opt out, then selectively opt back into the laws we want?

Yes, but only if the European Commission (or for some laws, the European Council) agrees: conditions can be attached and there could be financial consequences. The detail would need approval and this could take several months. The UK might not get its own way on everything. James Brokenshire, Minister for Crime and Security, has stated: *“We believe that the Commission would attach conditions, for instance, they might only allow us to join groups of related measures, some of which we might like and others we might not.”*

Q14 How does all this affect the European Arrest Warrant?

At Fair Trials International we have highlighted many [cases](#) where people have been extradited under this system, despite serious risks of rights violations. Yet it would be wrong to say that these problems can only be solved by leaving the Arrest Warrant system. Opting out would mean going back to the system of extradition in use before the EAW (and still used by other non EU countries in Europe). EU countries, when dealing with the UK on extradition, would have to apply a different system to the one they use for other EU states. Senior police officers say this would cause delays and could risk the UK’s own extradition requests going to the bottom of the pile when other EU countries are operating the fast-track Arrest Warrant system with its strict deadlines.

An alternative is to fix the EAW’s defects. There have now been three inquiries into our extradition laws and concrete reforms to the Arrest Warrant have been recommended, some of which need law changes at EU level – changes the UK could not influence unless it remained “in”. The European Commission and many MEPs have also acknowledged that there is room for improvement in this law¹². One obvious solution is for the UK to condition its future participation on EAW reform in key areas recommended by review bodies and other experts. Building in a proportionality test to stop the misuse of the Arrest Warrant for trivial cases is one area where consensus should be possible¹³.

¹¹ The European Union Act 2011 in fact says the UK cannot join the European Public Prosecutor project without a referendum and an Act of Parliament.

¹² The Commission saw the key problem as disproportionate use of EAWs for minor crime. It inserted a clearer proportionality guideline in the (non-binding) Handbook for issuing EAWs applicable to countries wishing to issue EAWs. The Commission has said it does not rule out legislative change if this does not solve the problem.

¹³ Fair Trials International has prepared a [briefing](#) on necessary amendments to the EAW framework decision.

Q15 Would opting out “repatriate powers” to the UK?

By its very nature, cross-border crime requires a coordinated system where all countries work to the same rules. Similarly, the EU is an area where 27 countries have different legal systems, but the same obligations to safeguard rights. So it makes sense that EU countries “pool” their sovereignty, making decisions collectively through the EU institutions, on areas like extradition, prisoner transfer, bail decisions between EU states and exchanging criminal records data. This is an area where EU laws meet the “subsidiarity” test discussed earlier. So, whilst a full opt-out of pre-Lisbon laws would leave the UK free of obligations to comply with these, other systems would have to be introduced to take their place, where necessary to enable the authorities to tackle crime and cooperate with other EU countries properly in cases with a cross-border element.

Whether we choose a bloc opt-out or not, for any future proposals on EU crime and policing laws, the UK government will always have the right to choose whether to participate (opt in) (see above, Q6). This does not change in 2014. If the UK opts into a new law, it can take part in EU level negotiations on what the law says. The UK’s elected MEPs will also have the right to debate and vote on the laws. Finally, the UK will have the right to vote in the European Council, on whether to adopt the final text. Under Lisbon rules, no country has the power of veto. A 2014 opt-out would not change this.

Finally as discussed above, we cannot opt out in 2014 of the laws we have chosen to take part in, since Lisbon. So the issue is less about repatriation of powers than about degrees of future participation in an EU-wide legal system already in place. Under this system, the UK and other EU countries have pooled their collective sovereignty, to make and enforce laws on cross-border crime and policing together at EU level. The real question is whether continuing to take part in that system serves our national interest better than going it alone (to the extent that that is possible).

Q16 What is Fair Trials International’s position?

Our work involves helping people who are facing charges in other countries to protect their fair trial rights. We use the lessons learned from hundreds of cases, many involving British citizens, to analyse the wider issues, both domestically and at EU level. We look at every EU law in the field of crime and policing from this standpoint. Where EU laws undermine fair trial rights, we lobby for reform. Where EU laws can improve the protection of UK citizens facing charges elsewhere in Europe, we support their adoption. We have criticised some EU justice measures for failing to protect fundamental rights and for blindly trusting all EU countries to uphold rights. For example, we have highlighted flaws in the European Arrest Warrant and the proposed European Investigation Order.

We have welcomed and promoted EU laws designed to protect basic defence rights like access to a lawyer and an interpreter and alternatives to lengthy pre-trial detention. These laws should help British people – millions of whom live, work and holiday in other EU countries every year – to feel confident that they are not leaving their rights at home when they travel. But in practice, this will only happen if the standards laid down in EU laws are actually complied with by all EU countries, in line with human rights standards. The EU Court has an important role here. In addition to its enforcement powers, a further advantage would be that the UK would be free to seek rulings that an EU law goes beyond the proper legal remit of EU law-making as agreed by treaty. This is an important safeguard of national sovereignty and the subsidiarity principle.

Conclusion

- The UK cannot “go it alone” on crime and justice. In a Europe without borders, millions of Britons will continue travelling for business, study or pleasure, long after 2014. The need for law enforcers to cooperate across borders will not change. The UK could benefit from continuing to take part in EU criminal justice cooperation while also building stronger safeguards for defence rights. This would help strengthen the rights of British citizens facing extradition to, or trial in, another EU country.
- The UK is not the only member state to have concerns over the European Arrest Warrant, the proposed Investigation Order, and the insufficient protection for fair trial rights and civil liberties in much of the EU today. Other countries like Germany, the Netherlands and Ireland are also suffering the effects of a flawed extradition system with no proportionality test and have seen public concern about the effects of appalling pre-trial detention conditions endured by their citizens, following extradition. The UK should work with like-minded states to build a consensus for reform, using the momentum of its 2014 deadline to push this agenda forward.
- Whatever decision is taken, the UK will remain subject to the rulings of the EU Court on the EU crime and policing laws we cannot opt out of. In the worst of all worlds, the UK will opt out *en bloc* from those measures it can opt out of, then opt back in, but only to prosecution measures like the European Arrest Warrant and not other measures that could lessen its worst effects: measures like the European Supervision Order. This would be a wasted opportunity. Instead the UK should now work with the rest of the EU to fix what is not working, most importantly, the European Arrest Warrant. It should also use its influence to push for better standards on fair trial rights and pre-trial detention, promoting alternatives to remand in custody in suitable cases. The emphasis should be on ensuring effective cooperation, without sacrificing rights and liberties in the process.