



★ ★ ★
★ Senior
★ European
Experts

EU Police & Criminal Justice Law: The UK & the Jurisdiction of the European Court of Justice

EU Police & Criminal Justice Law: The UK & the Jurisdiction of the European Court of Justice

Introduction

From 1 December 2014 the European Court of Justice (ECJ) will have full jurisdiction over police and judicial co-operation in criminal justice measures that were adopted before the Lisbon Treaty entered into force; it already has such jurisdiction for measures that have come into force since 1 December 2009 or which were agreed before that date but were amended after it. The United Kingdom, however, can decide by the end of May 2014 that it does not wish to accept the jurisdiction of the Court in respect of unamended measures adopted before 1 December 2009. If it does so, then these measures will no longer apply to the United Kingdom.

Legislation affected by any UK decision to reject the Court's jurisdiction would include those relating to the European Arrest Warrant, the EU-wide database used in the control of borders and measures concerning terrorism. This legislation would no longer apply to the UK but equally, the UK could not use the powers that (for example) enable British police officers to issue arrest warrants for wanted British suspects living elsewhere in the EU and nor could they use arrest warrants sent to them to deport quickly criminals wanted in other Member States.

This paper explains the background to the issue, considers the legislation involved and explains the likely consequences of the UK accepting or rejecting the ECJ's jurisdiction in this narrow field.

Background

Prior to the Treaty of Lisbon justice and home affairs (JHA) measures were divided into two categories – known usually as pillars. First Pillar legislation related to visas, asylum, immigration, freedom of movement and civil justice. Except for family law measures, such legislation was adopted by qualified majority vote (QMV). However, the United Kingdom and the Republic of Ireland were not covered by First Pillar measures unless they chose to opt in. First Pillar measures came under the jurisdiction of the Court of Justice. (The Second Pillar was the Common Foreign & Security Policy).

Third Pillar legislation dealt with police and judicial co-operation in criminal matters and was agreed by unanimity; there was no opt-in procedure because the UK could block legislation to which it was opposed. The Court of Justice's jurisdiction was limited with regard to Third Pillar measures to giving preliminary rulings on the validity and interpretation of the legislation when cases were referred to it by the courts of those Member States who had

declared their acceptance of the ECJ's jurisdiction. The UK was one of several Member States who did not declare acceptance of the ECJ's jurisdiction at that time.

The Treaty of Lisbon brought to an end the pillared structure of the EU; the First and Third Pillars relating to JHA were merged and almost all such legislation is now dealt with by QMV (although with an "emergency brake" procedure involving the European Council in certain circumstances). The merger of the Pillars meant that the ECJ's jurisdiction would apply to all JHA measures from 1 December 2014 and that the Commission would be able to take infraction proceedings against a Member State that it believed had failed to correctly implement EU law in this area. For the UK this would have meant an extension of the ECJ's jurisdiction to an area of EU activity hitherto outside the scope of the Court. But the UK negotiated a wider opt-in procedure for JHA measures, enabling it to avoid participating in any proposed EU JHA measure with which it felt uncomfortable; so the ECJ's jurisdiction post-Lisbon only applies to the UK where the UK has chosen to opt-in to the relevant measure. The question was how to handle the pre-Lisbon legislation.

The British situation was addressed in Protocol 36 of the EU Treaties, which deals with transitional provisions concerning certain legislation adopted by the EU prior to the Treaty of Lisbon. In the case of police and judicial co-operation measures adopted before 1 December 2009, the UK has until the end of May 2014 to decide whether or not to accept the ECJ's jurisdiction. If it decides not to accept the ECJ's jurisdiction then the measures will cease to apply from 1 December 2014. The Protocol only permits a single "yes" or "no" to the whole body of legislation covered by it.

The Relevant Legislation

The Home Office has compiled a list of 109 Third Pillar measures to which the ECJ jurisdiction question applies. There are a further 24 measures adopted under the Schengen part of JHA legislation, *i.e.* relating to borders, which the UK opted into under the old system.

The two lists of measures can be broken down as being related to:

1. exchange of information (including Schengen Information System) – 20 measures
2. criminal offences co-operation (*e.g.* euro counterfeiting; money laundering) – 14 measures
3. judicial co-operation – 13 measures
4. borders/travel documents – 13 measures
5. co-operation in respect of illegal drugs – 11 measures
6. agreements with third countries on classified information – 9 measures
7. anti-terrorist co-operation – 7 measures
8. Europol – 6 measures
9. EU financial interests (*i.e.* anti-corruption measures) – 5 measures
10. extradition/arrest warrant – 4 measures
11. fighting organised crime – 3 measures

12. child sexual exploitation/pornography – 2 measures
13. Eurojust – 2 measures
14. human trafficking – 1 measure
15. European Evidence Warrant – 1 measure
16. customs co-operation – 1 measure
17. other – 21 measures

It is important to note that this list is not final; the Government has opted in to a number of measures which will replace or amend some of those listed above. Each time it opts in, any relevant legislation listed above is amended or repealed and so the ECJ has jurisdiction over the new legislation. For example, the Government has opted in to the European Investigation Order, which would replace the European Evidence Warrant. Further legislation is likely on Europol, the European Police College, Eurojust and on euro counterfeiting over the next year; all these proposals will require further decisions from the UK as to whether it wishes to opt in.

The UK could decline the ECJ's jurisdiction in 2014 for all the remaining pre-Lisbon legislation and apply on a case-by-case basis to opt back in to a particular item of legislation. For Schengen measures, this would require unanimous agreement in the Council; for all other measures, the Commission would decide whether the UK could opt back in.

Consequences of the Decision

Accepting Jurisdiction for Pre-Lisbon Legislation

The UK has already accepted the principle that the ECJ can have jurisdiction over EU police and criminal justice measures. The Coalition Government has shown its acceptance of this position by opting in to a number of such measures since 2010. Extending this jurisdiction to pre-Lisbon measures would probably have only limited impact, not least because many of the most significant pre-Lisbon measures had already been amended or will be in future.

The cases referred by Member States courts to the ECJ in this field have almost all related to three pieces of pre-Lisbon legislation: the framework decision on crime victims; the framework decision on the European Arrest Warrant; and the Schengen Convention rules on cross-border double-jeopardy.

There is clearly a high level of concern in Parliament and the media at present over the Extradition Act 2003 (which implemented the European Arrest Warrant and the UK-USA Extradition Treaty) but the review of that legislation by the Coalition Government involves a separate decision from the question of the ECJ's jurisdiction. The independent review of extradition laws, by Sir Scott Baker, found the claims made about the European Arrest Warrant were unsubstantiated.

Rejecting Jurisdiction for Pre-Lisbon Legislation

The immediate consequence of rejecting the ECJ's jurisdiction would be that the legal position as regards co-operation in the fields of policing and criminal justice would revert

to that before the relevant pre-Lisbon legislation came into force in the UK. For example, in respect of extradition, the relevant international agreement would be the 1959 Council of Europe Convention (and its Protocols). There are, according to Professor Steve Peers (University of Essex), at least 23 international agreements covering various aspects of criminal law to which the UK and at least some other Member States are a party.¹

UK Government's have generally implemented EU policing and criminal justice measures through primary legislation (*e.g.* in Criminal Justice Acts). Parliament would have a major job to do, repealing or amending legislation that implemented over 130 pre-Lisbon measures. This would be a complex and time-consuming task.

The effect of rejecting jurisdiction would probably be most noticeable in the field of extradition. Prior to the European Arrest Warrant, it took about a year to extradite a wanted person within the EU so it must be assumed that that situation would return in respect of the UK. It is possible that the situation would be worse than before the Arrest Warrant as the EU has enlarged in the intervening period and large numbers of East Europeans in particular have moved to the UK in search of work. Over 4,000 Arrest Warrants were sent to the UK in 2010; 1,355 suspects were arrested and 1,068 were extradited. Since the Arrest Warrant came into force in 2004 the countries to which the UK has surrendered the most suspects are Poland (1,659), Lithuania (355) and Ireland (124).² No doubt some requests for extradition for minor offences would cease but levels of extradition are unlikely to fall back to those before the Arrest Warrant – 114 in 2003 for all countries, other EU Member States included.

The situation would be further complicated by the fact that under EU law deportation of EU nationals from one Member State to their home country can only be carried out in limited circumstances. Where an EU citizen has been resident in a Member State for five or more years, the free movement directive protects them from deportation unless "the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

Most of the pre-Lisbon legislation that would be affected concerns co-operation between law enforcement agencies, including the exchange of information and the protection of such information (for example, that which is given a security classification by the originating country). Disruption in this field would be of concern to the police and security authorities in the UK because it would hamper their ability to track and trace subjects of interest across the EU, such as people smugglers and suspected terrorists.

The UK's Decision: Procedure

The Government has given an undertaking that it will hold a debate and a vote in both Houses of Parliament to accept or reject the ECJ's jurisdiction. A large number of Conservative MPs have signed a letter demanding that the Government take a negative decision and there is also pressure for the decision to be taken sooner rather than later.

¹ See Steve Peers, *The Mother of all Opt-outs? The UK's possible opt-out from prior third pillar measures in June 2014*, Statewatch Analysis, 22 January 2012

² See HM Government, *A Review of the United Kingdom's Extradition Arrangements*, 30 September 2011, p. 459 *et seq.* (hereinafter the Scott Baker report)

The Government has given no statement of its likely position in such a debate at this stage but the Minister for Europe told the European Scrutiny Committee in April 2011 that previous British Governments, whether Labour or Conservative, had decided that it was in the UK's interest to opt-in to the pre-Lisbon measures and "that point will have to be weighed against the acknowledged problems that would come by opting in, that to do so would automatically extend the jurisdiction of the European Court of Justice to those measures and our participation in them in future".

March 2012



Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

The group provides high-quality, fact based briefing materials on EU issues.

 senioreuropeanexperts.org

 info@senioreuropeanexperts.org

 [@SEE_Group](https://twitter.com/SEE_Group)