Why We Should Opt Out

Evidence from the Better Off Out Campaign

Tem quae. Ita quis pelenis maxim quam earum repudam, cusanda voloriae duntecuptae odist, qui sint ut iunt fugit, omnim nim core pratqui il molenime minimus modigendebis estinveUcium est aut rehentis dolecae por sima quid earunde lluptas de essi nienectias expereiunto omnis qui id quamus exces essequis volum volores tiatioriam nem as eturita dolenditia nullam est untur.

Better Off Out logo

The Freedom Association

The Hampden Trust

Title: Why We Should Opt Out
Price: £3.99
ISBN: 978-1-909698-55-0

ISBN: 978-1-909698-55-0

Why We Should Opt Out

Evidence from the Better Off Out campaign

by Jonathan Lindsell

First Published 2013

Bretwalda Books
Unit 8, Fir Tree Close, Epsom,
Surrey KT17 3LD

info@BretwaldaBooks.com

To receive an e-catalogue of our complete range of books send an email to info@BretwaldaBooks.com

ISBN 978-1-909698-55-0

QR Code

Why We Should Opt Out

Evidence from the Better Off Out campaign

by Jonathan Lindsell

Better Off Out logo

The Freedom Association

The Hampden Trust

Introduction

1. This submission is written by Jonathan Lindsell, writing as an outside consultant for the Better Off Out campaign. Better Off Out is a campaign to encourage, support and promote national debate on European Union issues. It is a subsidiary of The Freedom Association, a non-partisan libertarian centre-right pressure group which seeks to protect the freedoms of the individual and society. As such, Better Off Out seeks to challenge potential encroachments on civil liberties, individual liberty and freedom of expression. It publishes research in a number of areas related to the European Union (EU), including economics, sovereignty and law.

2. This submission seeks to examine under Protocol 36 those European Union Police and Criminal Justice Measures into which the Home Office has indicated a desire to 'opt in'. The evaluation focuses on measures with potential negative consequences for freedom, and measures which the United Kingdom would manage better outside of European Court of Justice (ECJ) auspices.

What is your view on the list of 35 measures that the Government will seek to rejoin if the opt-out is exercised? Are there in your view any measures that are not on the list that ought to be; or that are on the list but should not be?

3. In the original evidence submitted to the House of Lords EU Select Committee regarding the UK's use of the block opt-out, numerous stakeholders argued that such an opt-out was undesirable because of the great cost, both financial and diplomatic, required in achieving re-entry to those measures the Home Office desires. Now that the Home Secretary has firmly indicated her intention to exercise the opt-out, the logic follows that the UK should restrain itself to attempting to re-join only those measures absolutely vital to UK interests. Opting back in to measures already replicated in UK domestic law, or measures that operate/can operate via non-EU channels, unilateral memoranda of understanding, or informal agreement, would be a gross waste of Foreign Office resources and the resources of our fellow member states.

4. Anecdotal evidence obtained by the *Guardian* newspaper suggests that the final number of the Home Office's published opt-ins (35) are the result of crude coalition bargaining between the Liberal Democrats' desire to join 45 and the Conservatives' hope to limit the number to 29.[1] As such, several of the measures below are not considered vital for the country's interest in the eyes of the senior coalition partner, and are included merely for party political reasons. Such considerations are not suitable justification for the permanent sacrifice of parliamentary control over potentially harmful areas of legislation to the ECJ.

5. Joint Action 97/827/JHA of 5 December 1997 is a typical example of the kind of measure to which paragraphs 3-4 refer. As an evaluation mechanism for member states' international measures against organised crime, its spirit has genuine value. However, because the reports are made publicly available, and because the evaluation can be made without ECJ oversight, there is no need to re-join this measure. Indeed, this may be a measure included to 'make up the numbers' to satisfy Liberal Democrat demands, since formal EU participation will have no practical impact other than making it impossible for a future domestic government to terminate the measure (for unforeseen circumstances).

6. Council Framework Decision 2008/675/JHA, taking into account previous criminal convictions in other member states, is already implemented in the UK.[2]

---

[1] Nicholas Watt, 'Britain to keep the European Arrest Warrant but try to reform it', *Guardian*, 08/07/2013: http://www.theguardian.com/law/2013/jul/08/britain-european-arrest-warrant-reform [Accessed: 01/09/2013]

[2] In England and Wales and Northern Ireland by s.144 and Schedule 17 of the Coroners and Justice Act 2009; in Scotland by section 71 and Schedule 4 of the Criminal Justice and Licensing (Scotland) Act 2010.

To re-join the EU law is an unnecessary threat to future liberties. The decision implies that judicial systems are synonymous and of equal validity, which certain much-publicised reports of European Arrest Warrant victims undermine. US State Department reports comparing different EU justice systems underline how divergent some member states are from British standards.[3] This measure appears to be another replication, with potentially negative consequences in that re-joining the measure implies ECJ competence over UK court sentencing if the accused has convictions in other member states, with the possibility of the ECJ requiring a retrial or even demanding a different sentence if it judges an inferior national court has 'weighed' previous criminal convictions incorrectly. In the explanatory memorandum, paragraph 56, the Government '*estimates the economic impact of non-participation in this measure to be negligible*' meaning there is very little disincentive to opting out. However, re-joining risks being compelled to give longer prison sentences, which would cost the taxpayer more. Once again, Britain would be better off outside EU control in this matter.

7. Council Framework Decision 2008/909/JHA (transfer of sentenced prisoners) poses similar liberty difficulties in terms of respecting other member states' justice systems. The UK currently conforms to the decision through the Criminal Justice and Immigration Act 2008's amendments to the Repatriation of Prisoners Act 1984 - but to opt in to the measure would make the suspension of the 'dual criminality' principle immutable. The UK should remain out of this measure, with the domestic legislation in place, and operate according to the Council of Europe Convention (Transfer of Sentenced Persons, 1983) on the matter, which operates a 'request' model rather than 'command' model - thus avoiding ECJ oversight on marginal cases where the UK may wish to exercise amnesty, non-recognition of judgements, factor in proportionality and cost, or investigate further. Domestic oversight, and sensitivity to UK freedom norms, is essential - and to retain it would cost nothing.

8. Council Framework Decision 2009/299/JHA (recognition of trials *in absentia*) poses difficulties even assuming the Government dismisses the argument that judgements *in absentia* are an affront to British legal traditions and freedoms (which we would oppose). The measure is not yet fully implemented, suggesting that permanently opting out of the measure will not cause undue dislocation. However, opting in fully would give the EU the final decision in ascertaining whether a European Arrest Warrant can be denied for procedural failings - in effect, this expands ECJ power in marginal cases. This is antithetical to the spirit of the decision itself: it implies that member states should trust one another's courts to make correct judgements, but that the EU does not trust those

[3] For example: Bureau of Democracy, Human Rights and Labour, *Bulgaria*, Country Reports on Human Rights Practices for 2011, online: http://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm?dlid=186338#wrapper [Accessed 03/09/2013]

same courts. It would be far better for future civil liberties for UK courts to retain full control over such cases, however rare they may be.

9. EU measures relating to property should be rejected in favour of cooperative agreements for similar reasons. The right to property has been an important conceptual British freedom since the Civil Wars. Council Framework Decision 2003/577/JHA (freezing evidence and property), Council Framework Decision 2006/783/JHA (mutual recognition of confiscation orders) and Council Decision 2007/845/JHA (coordinating Asset Recovery Offices and reclaiming the proceeds of crime) all give scope for EU institutions to later interpret what currently seem fair rules differently, without democratic remedy. For example concerning the freezing order, the UK has only been issued four requests thus far, and executed only one - the other three were refused '*due to deficiencies in the requests received*' according to the Command Paper. Currently section 21(7) of the Crime (International Co-operation) Act 2003 allows a court to refuse an overseas freezing order, but under ECJ control, this could be struck down. Given that evidence freezing could and often is achieved worldwide through a simple letter of request, it need not become an exclusive EU domain. Similarly for confiscation orders, the UK already carries out all reasonable requests - many member states have not yet implemented the measure, with no ill effects. The only change in re-joining the measure, beyond giving the ECJ control, would be to suspend the 'dual criminality' principle in yet another respect. For asset recovery, given that SOCA's Finance Intelligence Unit already meets all the EU requirements, and that the Government memorandum shows opting out would have negligible ill effects, re-joining the law must again be seen only as a concession for the Liberal Democrat 'tally'.

3 Does the list of measures that the Government will seek to rejoin raise any coherence issues, i.e. are some of the measures on the list connected to other measures that are not included on the list?

10. Council Decision 2002/494/JHA on a network of contact points to monitor those suspected of genocide and crimes against humanity appears a sensible measure, but poses several threats. The substance of the decision is already included in the Rome Statute of the International Criminal Court (ICC), which all member states have signed, meaning the measure is a duplication with little effect beyond extending ECJ control. This is entirely unnecessary, as the government memorandum notes that meetings are currently attended by non-EU institutions including representatives from Canada, the USA, the ICC, the Red Cross and Amnesty International. Therefore participation could easily continue without re-joining the measure. However, there is a threat that submitting to ECJ control would tie the Government's hands when dealing with foreign diplomats and those seeking asylum in the UK. For example, in 2000 Jack Straw, then Home Secretary, was able to free Chilean

dictator Augusto Pinochet from house arrest in the UK and allow him to return to Chile despite human rights charges pending from Spain, Belgium and France. Regardless of our evaluation of Straw's decision, we must bear in mind that, after re-joining the measures in question, a future Home Secretary may not be able to replicate it. The ECJ could well interpret surrender to CD 2002/494/JHA as the surrender of competence over general 'genocide and crimes against humanity' competences, and force the hand of the executive, further undermining the principle of parliamentary sovereignty. Moreover, we could read this measure as a potential 'back door' for Council Decision 2008/913/JHA concerning denial or gross trivialisation of genocide (currently not on Theresa May's opt-in list) which carries its own complications, conflicting with British Freedom of Speech tradition and threatening certain Foreign Office policies.[4]

11. There is also a coherence issue with the European Supervision Order (ESO, Council Framework Decision 2009/829/JHA), simply in that it would make no sense without the European Arrest Warrant, so the UK should remain out of both. The order is designed to dull the excesses of the EAW in long pre-trail incarcerations in foreign jurisdictions, but may well exacerbate them - without the immediacy provoked by receiving an extradited suspect and keeping them in the appellant's prison system, member states may request ESOs then leave suspects in the UK under 'provisional detention' for inexcusable lengths of time, while the appellant court deals with other cases and organises its case at leisure. This would both cost the UK taxpayer more money, and pose a high threat to liberty as the suspect is detained without trial or *prima facie* evidence. Moreover, if the ESO *is* brought in and *does* dull some of the dangers posed by the EAW, impetus for the EAW's much-needed reform could be stalled and the two piecemeal measures continue for the foreseeable future in an ungainly compromise. UK freedoms are best served by remaining outside both measures, at least until they are reformed to the public's satisfaction.

4 Do the Government's explanatory memorandums raise any issues about particular measures on which you would wish to comment?

12. The Government explains its desire to retain Council Decision 2002/348/JHA and its amendment, Council Decision 2007/412/JHA, on the basis of the UK being a world leader in international football match security, and having helped design these measures. The memorandum fears '*reputational impact*' if the UK does not '*participate*'.

[4] Jonathan Lindsell, 'We should opt out of the EU police and criminal justice measures', *Civitas - The Institute for Civil Society:* London, July 2012, p.2

However, opting out of the measures would not amount to non-participation. Domestic legislation (Spectators Act 1989, amended, Football [Disorder] Act 2000) is already in operation to maintain National Football Information Points and to curtail the movement of those subject to football banning orders. This could continue without EU oversight - the UK created it. Moreover, the fact that Russia and the Ukraine already cooperate along similar lines highlights how information sharing with other member states is very likely to continue without re-joining the measure; it would be in the interests of all host nations. Operating independently of ECJ control (through Interpol, a memorandum of understanding or wholly informally) would allow the UK to continue to be a 'world leader', going further than the EU in future if necessary, or adapting to changing circumstances without the need to go through the protracted EU amendment procedures.

13. Following revelations regarding the UK's part in internet surveillance through the 'Tempora' programme, all relevant EU information-sharing measures gain a new question: must the UK share intelligence gleaned through measures which are, if not illegal, then dependent on the Regulation of Investigatory Powers Act (2000) and Intelligence Powers Act (1994), both of which were written without the internet's current size and use in mind? If information (such as the suspicion that a football fan will be violent) arises from internet surveillance using a 'certificate' rather than a warrant (granting GCHQ to sweep huge volumes of data without ministerial oversight) then the accountability of such EU measures must be called into question. With respect to the ongoing debate raised by Edward Snowden's whistleblowing regarding personal privacy, this issue must be clarified before re-joining (if re-join we must).

6 Are the Government's proposed reforms to the European Arrest Warrant at the domestic level consistent with their desire to rejoin this measure, including the UK's obligations under the Framework Decision and the EU Treaties?

14. The Government has not communicated its intentions to reform the EAW in appropriate detail for full scrutiny. It is unclear, for example, whether the EU will accept proposed alterations to the Extradition Act (2003) via the proposed Anti-Social Behaviour, Crime and Policing Bill. Neither has the Government begun formal negotiations with the Commission in pursuit of the Home Secretary's proposed reforms.

15. In proposing her reforms (see Hansard) the Home Secretary emphasised the importance of co-operation, often in informal circumstances, to ameliorate the EAW's excesses. An example of this is her suggestion that, rather than operate the EAW, '*I plan either to allow the temporary transfer of a consenting person so that they can be interviewed by the issuing state's authorities or to allow them to do this through means*

such as video-conferencing in the UK'. This welcome innovation demonstrates the superiority of flexibility, of *ad hoc* cooperation, rather than centralised authority. The Home Secretary assured the House that this, and her other proposals, would not be challenged by the ECJ since other states (Germany, France and The Netherlands) all operate with greater safeguards than Britain does, without such challenge. However, the Home Secretary fails to appreciate the absolute and perpetual nature of ECJ control - whilst the current body of judges finds no fault in Dutch or German safeguards, a future 'test case' may well see them ruled illegal, and those states will have to follow ECJ rulings and strike down their own protections. It is imperative that all the Government's domestic reforms be passed before formally opting in, and if possible, that the Commission be consulted to promise to respect such safeguards.

16. Better, though, would be to operate and extradition system similar to the EAW without actually re-joining the measure, thus allowing parliament to design a system appropriate to the UK. For example, (conscious of the need for ECJ approval) the Home Secretary's reform proposals do not include full provision for dual criminality - her fourth proposal merely entails the ability of judges to reject EAWs if the charges therein relate to an act committed both in Britain and abroad, which is legal in Britain. Likewise, her proposals do not include augmented provision for British judges to test mistaken identity and/or *prima facie* evidence of guilt, meaning UK citizens could still be extradited for the flimsiest of cases. A 'UKAW' could solve such problems. Given the number of extraditions requested from the UK, it is highly likely that fellow member states will agree to a near-identical system, based on bilateral agreements, with minimal delay. This is reinforced by the detail of the Dutch system - the Dutch *Overleveringswet* (Surrender Act) treats extradition requests from any EU member state as an EAW, even if that member state has not yet created an EAW framework.[5] Even the pro-European group 'Centre for European Legal Studies', in their assessment of the EAW, conceded that it would continue to operate as normal if the UK failed to re-join the EU measure.[6] This would leave Parliament free to reform it at will, with appropriate judicial and executive oversight providing a remedy for the EAW's current threat to British freedoms.

[5] T.M.C. Asser Instituut - Centre for International and European Law, 'Country Report for: The Netherlands - National law implementing the framework decision', part 2.4.2. Online at: http://www.asser.nl/EAW/countryreports.aspx?chap=2&country_ID=161 [Accessed 02/09/2013] Notably the Dutch system also has provision for a reversion to Interpol arrangements for states not participating in the EAW [4.2.1.5-6] and protections concerning double jeopardy and dual criminality [5.1.2-3]

[6] Alicia Hinarejos, J.R.Spencer and Steve Peers, 'Opting Out of EU Criminal Law: What is Actually Involved?', *Centre for European Legal Studies Working Paper*, New Series: 1, September 2012, paragraph 95. Online at: http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf [Accessed: 02/09/2013]