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Research Note 67

Britain's Justice and Home Affairs Opt Ins

At the time of both Maastricht under a Conservative government, and of the successor treaties under Labour, successive governments have promoted the establishment and retention of opt outs in Justice and Home Affairs (JHA) as a negotiating success. In this research note, the TaxPayers' Alliance reveals a list of JHA areas, obtained through a Freedom of Information request, in which the British Government has surrendered its opt out in Brussels and decided to participate:

- **53 areas** where the UK has opted into **asylum and immigration** measures¹
- **15 measures** where the UK has opted into **civil judicial** cooperation

These 68 surrenders compare with a remarkable **four areas** in which **Denmark**, another opt out state, has decided to drop its opt outs. This suggests that the British Government has been pursuing a policy of abandoning Britain's opt outs by the back door.

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¹ Figure supplied by the UK Border Agency. We can only name 51 of the 53, as the FOI response clearly had one page side blank. Cross-referencing with an older list and inserting the known new legislation, we surmise that these two missing items fall into the "Illegal Immigration" bracket. The other list can be found at <http://209.85.229.132/search?q=cache:X28wbEwY5isJ:www.parliament.uk/deposits/depositedpapers/2010/DEP2010-0154.doc+%222001/51/EC%22+%222003/343/EC%22&cd=1&hl=en&ct=clnk&gl=uk>.

Context

EU Treaty Law

The Single European Act in 1986 provided for the first 'common measures' allowing for cooperation over policing, visas, extradition and immigration. A major step towards integrating these and turning them away from the international to the supranational took place at Maastricht, with the formalisation of the "Third Pillar". Amsterdam in 1997 moved the free movement of people, asylum, immigration and judicial cooperation fully into the internal workings of the EU, for which the UK maintained an opt-in provision. Other aspects of police and judicial work remained in the international Third Pillar until the Lisbon Treaty.

Now, the whole area of JHA falls within the EU proper, predominantly with QMV applying. Mechanisms also exist for the further internal development of integrated (or federated) aspects of legal systems.²

The UK retains an opt out/opt in today.³

Importance of the Opt Out

The shift of many aspects of the Home Office's work from areas of voluntary international cooperation into an internal feature of the European Union has taken place rapidly and is highly significant. The European Court of Justice has a say, while the European Commission has the power of legal initiative.

At the time both of Maastricht for the Conservatives, and of the successor treaties under Labour, the British Government have made great play of both the retention of the veto and of the establishment of the opt out.

They are also a longstanding target for those in favour of deeper integration. A former JHA Commissioner for instance attacked them on the grounds that they "undermine burden-sharing when it comes to a common asylum policy".⁴

The Issues

The main issue is that Government is effectively dumping the UK veto by the back door, and the that the Home Office - having judged that it is itself incapable of managing the

² An historical overview of the JHA opt outs can be found at <http://www.global-vision.net/files/downloads/download374.pdf>

³ Protocol 21.

⁴ <http://www.independent.co.uk/news/uk/politics/government-pledges-to-opt-out-of-common-eu-asylum-system-535440.html>; see also <http://www.euractiv.com/en/security/european-council-agrees-jha-work-programme-2005-2010/article-132000>

problems of illegal immigration - is following the time-worn 'Mediterranean' solution of passing the buck to Brussels.⁵

Some of these agreements, particularly those that deal with systems for sharing data, those addressing multiple or repeat asylum claims, and those relating to jurisdiction, may well have appropriate objectives, even if it is a mistake to create a central authority around them. Our primary concern however lies with the larger trend that has developed.⁶

The UK could reach a number of these agreements bilaterally and without signing up within the EU system, which would allow greater leeway in the future. Instead, it is;

- Engaged in activities with a medium and long term financial liability
- Bequeathing a very sticky reverse gear to individual agreed opt outs
- Encouraging other member states to see the overall opt out of the UK as a transitory arrangement
- Needlessly going out of its way to authorise the Commission to negotiate agreements on its behalf
- Reducing its ability to issue independent, ad hoc and speedy reservations when particular circumstances may arise behind these agreements
- Endorsing future ECHR and ECJ interference, for instance in definitions over minimal standards
- Recognising of the concept of "solidarity" in managing migration
- Not keeping Parliament appropriately informed of this back door policy
- Ignoring the long term impact of legal integration with Napoleonic code systems upon aspects of the UK's Common Law tradition
- Accepting a creeping influence of the roles of Eurojust, Europol, and the European Public Prosecutor – the expanding communal criminal legal system, including the development of specific EU-level crimes
- Authorising further JHA creep through the back door; for instance not signing up to the European Public Prosecutor to operate in the UK when that next comes on the agenda would still allow that office to extradite British subjects from Britain under the existing European Arrest Warrant

⁵ That is certainly the experience that this author has gained from open and frank discussions with senior UKREP officials in Brussels in the past. But is there a subterranean civil service split on this between various departments?

⁶ It appears from conversation with Ed Davey MP that the FCO interpretation on the process of shifting the JHA from Pillar 3 to Pillar 1 (under the Stockholm Programme) may contain an unconsidered negotiating chip. It seems that each agreement must be considered and agreed individually. While this is seemingly considered more of a formality, in the absence of a UK referendum on the Lisbon Treaty this might yet prove an important tactical bargaining point with at least the result of delaying general implementation.

- Risking the unintentional introduction of untraditional policing and judicial operational practises into the UK through harmonisation processes
- Overlooking the *passerelle* clause in the Lisbon Treaty, which allows for more JHA competences to be added. The FCO would likely consent to such moves remembering the opt out, but forgetting the long term dynamic of the Council and Commission encouraging uniformity.

Denmark

The Republic of Ireland and the United Kingdom, while outside of the Schengen Zone, separately maintain an area for the free movement of individuals within the British Isles. As such, both countries tend to sign up to JHA legislation together, as the impact upon the one will generally lead to a secondary effect upon the other. Policy-making in either Dublin or London therefore nudges the other in this area.

This means that Ireland does not provide a ready statistical yardstick with which to compare the maintenance of national opt-outs.

However, Denmark has also maintained a JHA opt out, for the same original reasons (it followed the first Maastricht Referendum, and was intended as a compromise to decrease the No vote). The policy undertaken by Copenhagen does provide a distinct policy comparison as a result.

In a reply to a Danish Parliamentary Question, the Copenhagen Government has revealed what has been suspected by JHA observers for a considerable time: that the UK position is not mirrored by Denmark.⁷ Rather than opting into 68 areas, Denmark has meanwhile decided to opt in to just four;

- 343/2003, on the Dublin rule book
- 2725/2000, on Eurodac
- 44/2001, the Brussels I regulations
- 1348/2000, Service regulations

We conclude that the UK approach to its JHA opt outs is one of general and generic policy surrender, sanctioned at the highest levels, rather than informed case-by-case cooperation

⁷ <http://www.euo.dk/spsv/off/alle/parallelaftaler/>. Source: Jens-Peter Bonde.

List of United Kingdom Justice and Home Affairs Opt Ins at 18 January 2010

(a) Asylum and Immigration

Table 1: Illegal Immigration

Reference	Agreement
2001/40/EC	Council Directive on the mutual recognition of decisions on the expulsion of third country nationals
2001/51/EC	Council Directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985
2001/2424/EC	Council Regulation on the development of the second generation Schengen Information System (SIS II).
2002/90/EC	Council Directive defining the facilitation of unauthorised entry, transit and residence.
2004/82/EC	Council Directive on the obligation of carriers to communicate passenger data.
2004/191/EC	Council Decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive on the mutual recognition of decisions on the expulsion of third country nationals.
2004/377/EC	Council Regulation on the creation of an Immigration Liaison Officers' Network.
2004/573/EC	Council Decision on the organisation of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders.
2004/573/EC	Council Conclusions on assistance in cases of short term transit by land or sea through the territory of another Member States in the course of effecting a removal order adopted by a Member State against a third country national in the framework of the operational cooperation among Member States.
2005/267/EC	Council Decision establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services.

Table 2: Asylum

Reference	Agreement
2000/2725/EC	Council Regulation concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention.
2001/55/EC	Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
2001/258/EC	Council Decision concerning the conclusion of an agreement between the European Community and the Republic of Iceland and Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway.
2002/333/EC	Council Regulation on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form.
2002/334/EC	Council Regulation amending Regulation laying down a uniform format for visas.
2002/1030/EC	Council Regulation laying down a uniform format for residence permits for third country nationals.
2003/9/EC	Council Directive laying down minimum standards for the reception of asylum seekers.
2003/343/EC	Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national.
2004/83/EC	Council Directive on minimum standards for the qualification of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of protection granted.
2005/85/EC	Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.
2006/167/EC	Council Decision on the conclusion of a Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway.

Reference	Agreement
2006/188/EC	Council Decision on the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
2006/688/EC	Council Decision on the establishment of a Mutual Information Mechanism concerning Member States' measures in the areas of Asylum and Immigration.
2008/147/EC	Council Decision on the conclusion on behalf of the European Community of the Agreement between the European Community and Switzerland concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland.
EC Number not available	Council Regulation of the European Parliament and of the Council establishing a European Asylum Support Office. Regulation not yet adopted.
2009/533/EC	Establishing a joint EU Resettlement Programme (amending measure to legal instrument under Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows".

Table 3: Negotiating Mandate and Readmission Agreements

Reference	Agreement
2004/80/EC	Council Decision concerning the signing and conclusion of an agreement between the European Community and Hong Kong (2002) on the readmission of persons residing without authorisation.
2004/424/EC	Council Decision concerning the signing and conclusion of an agreement between the European Community and Macao (2003) on the readmission of persons residing without authorisation.
2005/372/EC	Council Decision concerning the signing and conclusion of an agreement between the European Community and Sri Lanka (2003) on the readmission of persons residing without authorisation.
2005/809/EC	Council Decision concerning the conclusion of the agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation.
2007/341/EC	Council Decision on the conclusion of the agreement between the European Community and the Russian Federation on readmission.

Reference	Agreement
2007/817/EC	Council Decision on the conclusion of the Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation.
2007/818/EC	Council Decision on the conclusion of the Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation.
2007/819/EC	Council Decision on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation.
2007/820/EC	Council Decision on the conclusion of the Agreement between the European Community and Bosnia Herzegovina on the readmission of persons residing without authorisation.
2007/826/EC	Council Decision on the conclusion of the Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation.
2007/839/EC	Council Decision concerning the conclusion of the agreement between the European Community and Ukraine on readmission of persons.
EC number not available	Council Decision authorising the Commission to negotiate a readmission agreement between the European Community and Turkey.
""	Council Decision authorising the Commission to negotiate a readmission agreement between the European Community and Morocco.
""	Council Decision authorising the Commission to negotiate a readmission agreement between the European Community and Pakistan.
""	Council Decision authorising the Commission to negotiate a readmission agreement between the European Community and Algeria.
""	Council Decision authorising the Commission to negotiate a readmission agreement between the European Community and China.
""	Council Decision authorising the Commission to negotiate a readmission agreement between the European Community and Cape Verde.

Table 4: IT Systems in the Area of Freedom, Security and Justice

Reference	Agreement
EC number not yet available	Council Regulation establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. Not yet adopted. Cost, staffing level and budget not yet known.

Table 5: Funding programmes

Reference	Agreement
2004/867/EC	Council Decision on a funding programme for Borders, Visas, Asylum and Immigration Co-operation (ARGO).
2000/596/EC	Council Decision establishing a European Refugee Fund.
2004/904/EC	Council Decision establishing the European Refugee Fund for the period 2005 to 2010.
2007/435/EC	Council decision establishing the European Fund for the Integration of Third Country Nationals for the period 2007-2013 as part of the General Programme 'Solidarity and Management of Migration Flows'.
2007/573/EC	Council decision of the European Parliament and the Council establishing the European Refugee Fund for the period 2008-2013 as part of the General Programme 'Solidarity and Management of Migration Flows'.
2007/575/EC	Council decision of the European Parliament and the Council establishing the European Return Fund for the period 2007-2013 as part of the General Programme 'Solidarity and Management of Migration Flows'.
2009/533/EC	Amending Decision 2008/22/EC laying down rules for the implementation of Decision No 573/2007/EC of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows".

(b) Civil Judicial Cooperation

Table 6: Civil Judicial Cooperation

Reference	Agreement
Council Regulation (EC) 1348/2000	on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters – subsequently repealed by Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.
Council Regulation (EC) 1347/2000	on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (“Brussels II”) revised as Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (“Brussels IIa”).
Council Regulation (EC) 1346/2000	on insolvency proceedings.
Council Regulation (EC) 44/2001	on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”).
Council Regulation (EC) 1206/2001	on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
Council Decision 2001/470/EC	establishing a European Judicial Network in civil and commercial matters subsequently amended by Decision 568/2009/EC which comes into force on 1 January 2011.
Council Directive 2002/8/EC	to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.
Council Directive 2004/80/EC	relating to compensation to crime victims.
Regulation (EC) 805/2004	of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims.
Regulation (EC) 1896/2006	of the European Parliament and of the Council creating a European Order for Payment Procedure.
Regulation (EC) 861/2007	of the European Parliament and of the Council establishing a European Small Claims Procedure.
Regulation (EC) 864/2007	of the European Parliament and of the Council on the law applicable to non-contractual obligations (“Rome II”).
Directive 2008/52/EC	of the European Parliament and of the Council on certain aspects of Mediation in civil and commercial matters. Member States must comply with this Directive by 21 May 2011.

Reference	Agreement
Regulation (EC) 593/2008	of the European Parliament and the Council on the law applicable to contractual obligations ("Rome I"). The UK did not opt in at the start of negotiations but did after it was adopted. It is due to enter into force on 17 December 2009.
Council Regulation (EC) 4/2009	on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The UK did not opt in at the start of negotiations but has indicated that it wishes to now it has been adopted. It is due to enter into force on 18 June 2011.