# THE GREAT BRITISH OPT-OUT – WHAT DOES IT MEAN, WHAT MIGHT WE GAIN AND WHAT MIGHT WE LOSE?

**Institute of Advanced Legal Studies/European Criminal Law Association Event**

**Charles Clore House, 17 Russell Square, London WC1B 5DR**

**10 December 2012, 14:00 – 18:30**

**Lord Hannay’s Speaking Notes**

I have to begin with an apology. As the Chair of the House of Lords Sub-Committee for Home Affairs, which, together with the Sub-Committee for Justice, is in the very earliest stages of our joint inquiry into the Protocol 36 opt-out decision, I shall not be able to offer any definitive response to the questions you have posed in the title of this seminar. To do so would be contrary to the whole approach of conducting evidence-based inquiries. What I can do is try to set the scene from a Parliamentary perspective. And to assure you that what speakers say at this event will be of the greatest value to us in the conduct of our inquiry.

The circumstances surrounding the negotiation of the Hobson’s choice of Protocol 36 in the Treaty of Lisbon remain obscure. What we do know is that it was negotiated by the previous government; that it was ratified by Parliament and came into force in December 2009 when the Lisbon Treaty itself entered into force. And we also know, because the Home Secretary at the time of the negotiations, Charles Clarke, has testified to us on this subject, that he regretted Protocol 36 had been agreed by the last government, of which he was a member, and that he did not consider it to be necessary – politically or in terms of public opinion. The present Government must now, by the end of May in 2014 at the latest, decide whether to exercise the opt-out.

The first time the handling of the opt-out was brought to the attention of Parliament by the Coalition Government was on 20 January 2011, when the Minister for Europe, David Lidington MP, provided an undertaking – by way of a Written Ministerial Statement – that both Houses would be allowed to vote on what he termed to be a “decision of such importance” before the Government made a formal decision on whether they wished to exercise the opt-out. He also stated that they would in advance consult the relevant Parliamentary committees. These undertakings were made of the Government’s own volition and were repeated on a number of occasions in reply to Parliamentary questions.

At the end of that year, the European scrutiny committees in both Houses received a letter from the Home Secretary on 21 December 2011, which repeated these undertakings, and also provided – for the first time – a list of the 130 or so police and criminal justice measures that they considered would fall within the scope of the opt-out. We understand that this list was produced following discussion between the Government and the EU’s Council Secretariat. The list does however remain subject to change, with some possibility of reduction if the Government in the meantime decides to opt-in to a post-Lisbon proposal which repeals and replaces a pre-Lisbon measure on the list.

The current list includes mutual recognition instruments, such as the European Arrest Warrant – which I return to later; measures setting out common criminal offences and penalties; measures on criminal procedure; instruments to facilitate cooperation, in particular between police and law enforcement agencies across borders, including the exchange of information; measures establishing agencies such as Europol, Eurojust and CEPOL – the European Police College, which is located in Bramshill; agreements with third countries on information sharing, mutual legal assistance and extradition; and various Schengen-building measures. Every single one of these measures was adopted by unanimity by the EU Council, that is to say that it was deemed to be in the British national interest by the government of the day

At the beginning of 2012, a think tank called Open Europe published a report calling on the Government to exercise the block opt-out and negotiate specific opt-ins on a case-by-case basis. Shortly after that report was published, over 100 Conservative backbench MPs endorsed it in a letter to The Telegraph dated 6 February.

There was no response by the Government at this stage but the EU Committee mentioned, in a report on EU criminal procedural law published in April, that we intended to undertake an inquiry into the Protocol 36 opt-out. Since no consultations had yet been undertaken with either House of Parliament it therefore came as a complete and unwelcome surprise when the Prime Minister said, during his visit to Brazil at the end of September, at a press conference – which concentrated on wider matters concerning the UK’s relationship with Europe – that the opt-out would be exercised before the end of this year. Later that day, the Deputy Prime Minister, Nick Clegg, made it clear that a final decision had not yet been reached regarding the opt-out decision. The chairman of the Lords EU Committee, Lord Boswell, wrote to the Home Secretary on 3 October making clear his “dismay” at the lack of consultation.

A couple of weeks later, in a statement to the House of Commons on 15 October, the Home Secretary adopted a more nuanced position by saying that the Government’s “current thinking” was that the opt-out should be exercised and that it would be subject to a vote in both Houses; and undertaking (again) to consult with a wide range of Committees in both Houses before reaching a definitive position.

In order to provide a solid basis for the House of Lords’ consideration of this important matter its EU Select Committee launched an inquiry on 1 November by issuing a Call for Evidence. This will, rather unusually, be a joint inquiry by two of the EU sub-committees. I chair the sub-committee that considers home affairs matters and my colleague, Lord Bowness, chairs the sub-committee that considers justice matters. Both sub-committees regularly scrutinise – and sometimes conduct inquiries into and produce reports on – individual EU measures including those to which the UK opt-in applies, or to which a decision not to opt-out applies in the case of Schengen measures. So both sub-committees have an obvious interest in the block opt-out decision as well as a considerable amount of expertise about the various issues that arise. It seemed sensible to us not to split the inquiry into two parts on the basis of the different responsibilities of the two sub-committees but to conduct a single, joint inquiry and that is what we are now doing.

The deadline for the receipt of written evidence is this Friday (14 December) and we intend to take oral evidence from a number of witnesses in the New Year – including, I’m pleased to say, from all those sitting on this panel. We then hope to publish our report in the spring of 2013 before the end of the current Parliamentary session in good time for the debates and votes in both Houses.

I believe that all of us with an interest in this inquiry consider this matter to be one of the utmost importance, which has far ranging implications not only for us and our EU partners’ national security but also for the influence that the UK has so far managed to achieve in the shaping of EU legislation in the field of Justice and Home Affairs.

We hope that the questions included in our Call for Evidence identify some of the main issues that need to be considered and debated before any decision is taken. These include whether the opt-out should be exercised at all. We have asked what the benefits and drawbacks could be in the event of the opt-out not being exercised and the UK becoming subject to the European Court of Justice’s jurisdiction and the Commission’s enforcement powers under the Treaty. In the event of the opt-out being exercised we have asked what the consequences could be – financially, in terms of practical cooperation between law enforcement agencies and in terms of the UK’s wider relations with the EU. And we will wish to consider which measures, if any, the UK should seek to opt back in to and how straightforward this may or may not prove to be, with reference to the role of the Commission and the other Member States in this process. So far the Government has given no indication of its thinking on this latter point. And yet it is hard to see how Parliament can be asked to take a considered view on the merits of the opt-out without having any idea of the Government’s thinking on what measures they intend to try to opt back in to.

We will try to gauge what benefits and disadvantages may have resulted to the UK from its own participation in the 130 measures so far, including how much it has been affected by the reciprocal operation of these measures by other Member States.

When the House of Lords conducts inquiries on EU matters its invariable practice is to try and ensure that its recommendations are evidence-based. It is with that objective in mind that we have sought evidence regarding the Home Secretary’s suggestion in her October statement that – to use her words – “… some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. This categorisation goes to the heart of our inquiry. And the defunct category can presumably be simply left outside any consideration of whether the opt-out should be exercised. So far, when pressed – through letters from the European Committees of both Houses and Parliamentary questions – to clarify which of the Home Secretary’s categories each measure fell into, the Government has, bizarrely, said that, as their analysis of each of the measures has not yet been completed they are not in a position to reply to this question. I say, bizarrely, because it is surely a little odd that the Prime Minister and the Home Secretary should have spoken as they did at a moment when the analysis of the measures had not been completed.

The European Arrest Warrant has already achieved some prominence in the public debate – perhaps to the detriment of other important measures – but undoubtedly because it is an important, if sometimes controversial instrument, in the toolbox of cross-border cooperation against crime. We intend to examine the implications if the UK were to withdraw from that measure, for our domestic capacity to extradite those who we are seeking to bring to justice, including the practicalities of relying upon alternative instruments such as the Council of Europe Convention on Extradition or bilateral memoranda of understanding. The alternative approach of remaining bound by the EAW and pressing for its reform will also be considered. On a related note, some advocates of the block opt-out have suggested that the use of memoranda of understanding more generally would be a preferable alternative to EU measures that are subject to the oversight of the European Court of Justice. The practicalities of this, including the likelihood that other Member States would be able or willing to cooperate with such an approach, will also be considered during our inquiry.

In January we will begin taking oral evidence from a range of witnesses including academics and think-tanks; we will visit Brussels at the end of that month to discuss the opt-out with the Commission, with MEPs and with Europol and Eurojust. In February we will hear from retired and serving police officers, prosecutors and law enforcement agencies about the operational implications of the decision on the opt-out, before finishing in the middle of that month with an evidence session with, we hope, the Home Secretary and the Lord Chancellor.

As I mentioned earlier, the deadline for written responses is this Friday so if any of those present would like to make a submission I would encourage you to do so. I thank all of you who have already done so and can assure you that all views will be taken into account during the preparation of our report to the House. Further information, including the written evidence we have received so far, can be found on our website.

This is going to be an important and politically sensitive debate. I therefore welcome the opportunity to participate in this panel and I look forward to hearing the views of the other speakers and doing my best to respond to questions from the floor.