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The UK Criminal Law Opt-out: A Challenging Opportunity for Poland

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The UK's decision to exercise its block opt-out from EU laws on criminal matters poses a challenge for Polish–British relations, since it entails an agenda for the reform of the European Arrest Warrant (EAW). Poland, which issues the highest number of warrants, has proved unenthusiastic about the British idea of introducing a proportionality check to the system. The two countries are however key to the resolution of this problem on a European level, something that could bring some fresh air to their bilateral relations.

There is much to bind Poland and the UK together in the EU, from their shared position as non-Eurozone members to the fact of heavy Polish migration to the UK under EU free-movement laws. They have, however, taken different approaches to the dilemmas of membership. While Poland is trying to leverage its status as a so-called pre-in to the Eurozone, for instance, the UK is seeking influence from a position as a firm “out.” But both Warsaw and London are aware of the fact that a more coordinated approach could be conducive to their interests and, just as in the related question of the re-regulation of free-movement laws,¹ seem open to a pragmatic rapprochement on the emerging question of the UK's home affairs opt out.

The UK Opt-out: What Is Actually Involved? After a transitional period of five years, the Lisbon Treaty will extend and “normalise” the European Court of Justice's competencies in the sensitive area of criminal law cooperation, giving the CJEU powers to check on Member State implementation. The UK, arguing that it did not agree to this when signing up to past measures, has secured for itself a retrospective opt-out. This opt-out covers a bloc of around 130 EU crime-fighting measures adopted before the entry into force of the treaty and comprising tools such as the EU evidence warrant and the documents setting out Europol and Eurojust's mandates. Excluded are seven measures which have been updated following the entry into force of the Treaty and which are thus already under the purview of the Court.

Should it choose to exercise the block opt-out, the UK may subsequently apply to opt back into a smaller selection of measures. If the UK is successful in this application, these measures will however come under CJEU jurisdiction and an opt-out option will not be available again. Member States are of course obliged to include the UK in cooperation as much as possible, but this does not mean that the UK may simply cherry-pick. Commissioner Malmström has reminded London that some measures work only as part of a package of related laws. All Member States must moreover consent to the opt-in, and the Council acting on qualified majority will decide about any financial consequences for which the UK is liable.

The UK must decide whether to make use of its opt-out by June 2014, six months before the end of the transition period. This requires a large degree of domestic and European consultation. On 9 July, the Conservative Home Secretary Theresa May announced that the coalition government had indeed decided to exercise the opt-out, but would seek to rejoin around 35 of the existing measures, including the controversial European Arrest Warrant. The

¹ R. Parkes, A. Sobjak, “Reforming the Free Movement of Labour: The Scope of British–Polish Cooperation,” *Bulletin PISM*, no. 59 (512), 31 May 2013, www.pism.pl/publications/bulletin/no-59-512.

government's initial decision will be the subject of a vote in Parliament with a debate on the motion on 15 July. Then, as soon as a settlement package is agreed at EU level, a second vote in Parliament will be held.

The European Arrest Warrant. The EAW supplanted the noodle bowl of existing European extradition agreements and replaced the traditional logic of high-level executive requests based on strict conditions with an automatic system in which surrender occurs on the basis of a judicial request and unless counter-indicators apply. This measure is also key to the UK government position. The government position rests on a compromise between the Conservatives and Liberal Democrats, with the relatively pro-European Liberals making their support for the block opt-out at least partly dependent upon the UK's continued participation in the EAW.

The EAW has proved its usefulness in facilitating the transfer of numerous suspects, including Hussein Osman, one of the London 2005 bombers. Nevertheless, it has two important flaws. First, despite its origins as a tool for fighting serious crime, this potentially costly procedure is often used for minor offences. Second, it does not always secure a proper level of human rights protection, the most famous example being Andrew Symeou who was sent to Greece from the UK to face trial, only to be found innocent after months in poor conditions. These problems have been recognised by the Commission, and its call for reform is gaining momentum, with the European Parliament about to issue a legislative initiative report headed by a British Liberal.

Poland and the EAW. Since the EAW's creation, Poland has issued the highest number of warrants both overall and for the UK in particular. For several years now this has caused tensions with Britain, as London argues that too often warrants are for petty crimes committed prior to departure and place a disproportionate organisational and financial burden on the UK. The high number of warrants is partly explained by the scale of Polish migration to the UK, and the actual number has diminished after the Commission released its recommendations. Nevertheless, the tensions also reflect deeper constitutional differences between the two countries.

Whereas in the UK, a proportionality check—choosing a lesser measure if appropriate—is part of national practice, Polish authorities are bound by a principle of legalism which requires them to use every possible means to start a criminal procedure. With so many Poles residing in the UK, the EAW is often the only available tool to avoid impunity on a large scale. However, the steep drop in the number of warrants issued and the Polish government's proposal for an amended Code of Criminal Proceedings reflect an effort to solve this problem at a domestic level. This “unilateral” effort is mirrored on the UK side, where the Conservatives have indicated that they will counter the negative effects of the EAW with new domestic safeguards.

Is This about Crime or about Europe? Those Britons in favour of maximum use of the opt-out make two arguments. First, that many of the relevant measures are in fact already defunct and offer no added value to UK security. Second, that the CJEU's jurisdiction may expose the common law system to “judicial activism.” These arguments must, however, be understood in the context of a possible process of EU renegotiation and repatriation of powers announced by Prime Minister Cameron (speaking as leader of the Conservative party) in January. Exercising the opt-out offers the Prime Minister a relatively “costless” means of appealing to British eurosceptics because this option is already stipulated in the Treaty and does not require the invention of new forms of British exceptionalism.

Evidence collected by the House of Lords suggests that the eurosceptics' arguments are, however, exaggerated with a majority of experts recommending not to use the opt-out. Even if some of the 130 measures are outdated or of little importance, the report suggests there is no particular cost attached to them. Some contribute significantly to UK security. Moreover, the Lords found little evidence that the extension of the CJEU's jurisdiction will clash with the common law system. All this suggests that views on the opt-out are heavily dependent on general attitude towards EU, with the UK Independence Party recommending an opt-out without opt-in, and the Conservatives' so-called Fresh Start Project advocating bilateral operational cooperation instead of an opt-in.

Conclusions. Despite government assurances that the opt-out will not affect the UK's commitment to cooperation in criminal matters, the negative consequences for Poland of such a step are perceptible already now. The exercise of an opt-out accompanied by select opt-ins would require complicated arrangements in areas of high importance that today work rather smoothly. Moreover, these negotiations will act as something of a litmus paper for the UK's broader role in the EU reform process. This matters to Poland because increases in British exceptionalism have usually posed Warsaw with a binary choice between aligning with the core or with the British outlier, and have diminished EU efforts to deal with national diversity in an integrative manner.

There has, however, been speculation that the UK will seek to reform the EAW at the EU level, delaying the question of this specific opt-in for as long as possible. There is a rationale for this. If the UK government can reopen negotiations on the EAW, then this dossier will fall under the scope not just of the block opt-out but also the individual opt-out which the UK secured post-Lisbon. The UK will thus expand its options. Any such effort at EU-wide reform nevertheless opens a perspective for Poland to help “Europeanise” the UK's efforts to settle its relationship with the EU. Poland should therefore get behind this agenda, seeking to ensure that the eventual proportionality check would be not only clear and concrete but also flexible enough to avoid challenging the essence of the principle of legalism.