Contents

David Anderson QC—Written evidence ............................................................................................. 1
Association of Chief Police Officers—Written evidence ................................................................. 5
Association of Chief Police Officers, William Hughes, Aled Williams and Mike Kennedy—
Oral evidence (QQ 229-248) ........................................................................................................... 32
Association of Chief Police Officers in Scotland—Written evidence ........................................... 51
Bar Council of England and Wales—Written evidence ............................................................... 55
Bar Council of England and Wales, Faculty of Advocates, Law Society of England and Wales
and Law Society of Scotland—Oral evidence (QQ 46-61)............................................................ 69
Bar Council of England and Wales, Council of Bars and Law Societies of Europe—Oral
evidence (QQ148-162) .................................................................................................................. 85
Bar Council of England and Wales; Law Society of England and Wales—Supplementary
written evidence .............................................................................................................................. 101
Dr Gavin Barrett—Oral evidence (QQ 249-263) .......................................................................... 109
Centre for European Reform, Fair Trials International and JUSTICE—Oral evidence (QQ
110-131) ......................................................................................................................................... 125
Council of Bars and Law Societies of Europe, Bar Council of England and Wales—Oral
evidence (QQ 148-162) ................................................................................................................ 146
Court of Justice of the European Union—Written evidence ......................................................... 147
Crown Office and Procurator Fiscal Service—Written evidence .................................................. 151
Crown Office and Procurator Fiscal Service and Frank Mulholland QC, Lord Advocate —
Oral Evidence (QQ 264-273) ......................................................................................................... 156
Eurojust—Oral Evidence (QQ 179-191) ......................................................................................... 167
<table>
<thead>
<tr>
<th>Source</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anthea McIntyre MEP and Timothy Kirkhope MEP—Written evidence</td>
<td>444</td>
</tr>
<tr>
<td>Frank Mulholland QC, Lord Advocate—Supplementary written evidence</td>
<td>446</td>
</tr>
<tr>
<td>Northern Ireland Executive—Written evidence</td>
<td>448</td>
</tr>
<tr>
<td>Dr Maria O’Neill, University of Abertay Dundee—Written evidence</td>
<td>449</td>
</tr>
<tr>
<td>Open Europe—Oral evidence (QQ 85-109)</td>
<td>456</td>
</tr>
<tr>
<td>Professor Steve Peers, University of Essex; Professor John Spencer, University of Cambridge; and Dr Alicia Hinarejos, University of Cambridge—Oral evidence (QQ 32-45)</td>
<td>478</td>
</tr>
<tr>
<td>Professor Steve Peers—Written evidence</td>
<td>479</td>
</tr>
<tr>
<td>Jean-Claude Piris—Written evidence</td>
<td>480</td>
</tr>
<tr>
<td>The Police Foundation—Written evidence</td>
<td>484</td>
</tr>
<tr>
<td>Police Service of Northern Ireland—Written evidence</td>
<td>491</td>
</tr>
<tr>
<td>Scottish Government—Written evidence</td>
<td>519</td>
</tr>
<tr>
<td>Professor John Spencer, University of Cambridge; Dr Alicia Hinarejos, University of Cambridge; and Professor Steve Peers, University of Essex—Oral evidence (QQ 32-45)</td>
<td>520</td>
</tr>
<tr>
<td>Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral evidence (QQ 209-228)</td>
<td>521</td>
</tr>
<tr>
<td>Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Supplementary written evidence</td>
<td>537</td>
</tr>
<tr>
<td>UK Government—Written evidence</td>
<td>545</td>
</tr>
<tr>
<td>UK Government—Oral evidence (QQ 274-308)</td>
<td>558</td>
</tr>
<tr>
<td>United Kingdom Independence Party—Written evidence</td>
<td>592</td>
</tr>
<tr>
<td>United Kingdom Independence Party—Supplementary written evidence</td>
<td>640</td>
</tr>
<tr>
<td>Aled Williams, Association of Chief Police Officers, William Hughes and Mike Kennedy—Oral evidence (QQ 229-248)</td>
<td>642</td>
</tr>
</tbody>
</table>
David Anderson QC—Written evidence

My interest in the opt-out decision

1. The principal statutory functions of the Independent Reviewer are to review the operation of UK anti-terrorism legislation and to produce three annual reports which are submitted to the Home Secretary (or in one case the Treasury) and laid before Parliament. I took over the role from Lord Carlile in 2011, and combine it with practice as a Q.C. from London Chambers. For some 25 years I have specialised in cases involving European Law. I have also taught EU law at King’s College London, where I remain a Visiting Professor, and sit as a Recorder of the Crown Court.

2. I cannot improve on the account of the legal background to the opt-out decision that is given by Hinarejos, Spencer and Peers in the CELS Working Paper of September 2012, with which the Committee will be familiar. Nor do I enter into the political debate as to the desirability or otherwise of repatriating powers from the EU. My concerns relating to this topic are with the legal and operational aspects of the fight against terrorism. I expect to comment in my Terrorism Acts report of summer 2013 on whether there is a risk that the exercise of the opt-out could impede the effectiveness of that fight.

3. Any such comments will be informed by the investigation and conclusions of this Committee. I do not seek to replicate or pre-empt in any way the Committee’s work. In order to inform myself more fully as to the issues, I have however discussed the possible implications of the opt-out for counter-terrorism with police, agencies and OSCT. I have also had helpful discussions in Brussels with the EU Counter-Terrorism Co-ordinator (Gilles de Kerkhove), a member of the cabinet of Commissioner Malmström, senior officials of the Commission and Council and MEPs from each of the major UK parties, and in The Hague with representatives of Eurojust and Europol.

4. Those discussions were confidential, and are unlikely in any event to have ranged beyond the scope of evidence that this Committee will itself receive at first hand from similar sources. Nonetheless, and in case it is of value to the Committee, I set out for what it may be worth some of the initial impressions that I have formed.

The UK’s leading role in EU counter-terrorism law and practice

5. I have been struck by the extent to which – contrary to the tendency of the UK media to depict the UK as a marginalised influence in European affairs – the UK is seen within the EU as a key player in the field of police and criminal justice, specifically (though not exclusively) where anti-terrorism is concerned.

6. For example:

   (a) The mandatory requirements concerning jurisdiction and terrorist offences in 2002/475/JHA, as amended by 2008/919/JHA, have the effect of requiring all
Member States to introduce laws equivalent to some of those established in the UK’s Terrorism Acts 2000 and 2006 (albeit that UK influence was in part diffused via the Council of Europe’s 2005 Convention on the Prevention of Terrorism).

(b) The EU Action Plan on combating terrorism, first drafted during the UK presidency in the second half of 2005, is closely modelled on the UK’s own CONTEST strategy. An indicator of the high degree of UK influence may be seen from the fact that the four elements of the CONTEST strategy, which governs the entirety of UK counter-terrorism policy (Pursue, Prevent, Protect, Prepare) were translated into four equivalent and only slightly less alliterative EU elements: Pursue, Prevent, Protect and Respond.

(c) The UK was described to me by the Commission as “very active” in developing EU policies for counter-radicalisation both internally and in third countries; for aviation security; and for the risk and threat analysis. I was told that if the UK supports a Commission initiative, that initiative is immediately given credibility; and that other large Member States have been won over in the EU setting to the UK approach, for example as regards the assessment of risk.

(d) It was explained to me at the Council that the UK has been exceptionally useful in managing the relationship between the USA and the EU. UK influence has been decisive in the negotiation of a number of specific measures, including the EU-US Agreements on Passenger Name Records and Terrorist Finance Tracking Provisions (TFTP). It has also enabled the EU more effectively to defend its citizens’ interests on domestic US issues such as the manner in which the National Defense Authorization Act is interpreted by the US Administration.

(e) Europol, up to 10% of whose cases concern counter-terrorism, has developed under UK leadership as an effective information hub.

7. This degree of influence of course did not happen by chance, but because of a desire on the part of the UK to encourage other Member States to take the threat of terrorism as seriously as it is taken here. While international terrorism retains a high public profile in countries affected by it in the recent past (e.g. UK, Spain, the Netherlands, Denmark), it is almost invisible as a public concern in some other countries, for example in Eastern Europe. Bilateral contacts continue, and are useful. Equally, however, it is evident that EU mechanisms have been productive both as a method of spreading UK thinking and good practice in the field of counter-terrorism across the continent and beyond, and in defending the interests of the UK and other Member States in dealings with third countries.

Measures of practical utility

8. The police will no doubt identify to the Committee those measures into which they consider it necessary or desirable to opt back in; and the Committee will test their assertions.

9. My own confidential briefings have indicated that there are a number of measures relevant to counter-terrorism that are considered by SO15 to be essential tools. These are not, of course, limited to terrorism-specific measures: provisions of a
general nature relating to such matters as joint investigation teams, information exchange and the surrender of suspects all have potential application in terrorism cases. Some are Schengen-related, with the result that unanimous consent of the Member States will be required should the UK seek to rejoin them after an opt-out.

Possible consequences of exercising the opt-out

10. The opt-out granted to the United Kingdom by Article 10(4) of Protocol 36 is of course a Treaty right, as to whose exercise the United Kingdom enjoys an absolute discretion. Everyone I spoke to in Brussels was punctilious in acknowledging this. Some were disappointed that a Member State which has played such a significant role in the development of police and criminal justice measures, especially in the counter-terrorism context, should be minded to exercise an opt-out. This was generally put down to politics. I also detected concern as to the practicalities of negotiating alternative measures (particularly to the EAW, should that not feature on the opt-in list).

11. So far as the feasibility of opting to rejoin selected measures is concerned, the picture seems a little cloudy. Not in doubt is the obligation on the EU institutions under Article 10(5) to ensure the “widest possible measure of participation” of the United Kingdom. That is, however, subject to the practical operability of the various parts of the acquis not being seriously affected, and their coherence being respected. In an apparent reference to these provisos, Commissioner Malmström was recently quoted as saying that “on each of these opt-ins, there will have to be a negotiation” and that “of these 136 laws, many are very connected”.¹ The UK could be pressurised, in other words, to rejoin some measures it disagreed with in order to retain those it considered valuable. Furthermore, in the case of Schengen measures, it was suggested to me by those experienced in Brussels politics that the requirement of unanimous consent by the Member States may result in individual Member States seeking to impose conditions as the price for their consent.

12. I cannot predict how easy or difficult the negotiations might be. Indeed it is difficult to see how anyone could do so, before the UK’s opt-in list has been prepared. A number of views were expressed to me in Brussels. One Commission official told me: “We should welcome the UK to whatever it wants to come back to. It makes a serious contribution.” A senior figure observed that “it won’t be easy for the UK, but you generally get what you want.” One referred to the supposed British tendency to “want to eat a la carte but pay the price of the menu”. Several mentioned the possible negative impact of perceived British intransigence in related or even unrelated fields:² one declared that “patience is wearing thin”. MEPs predicted what one called “a messy process”. Ultimately, as it was put to me by a Council official, “It will depend on choices that are made. Presumably British colleagues will not be stupid in those choices.”

Conclusion

¹Financial Times, 9 December 2012.
² This can be strongly felt and expressed: see Commissioner Reding’s scathing reference to the UK’s supposed “empty chair policy when it comes to justice and fundamental rights issues” in her speech to the Fundamental Rights Conference, 6 December 2012: http://europa.eu/rapid/press-release_SPEECH-12-918_en.htm?locale=en.
13. My only concerns as Independent Reviewer are that the UK should not put at risk its ability to rely on such pre-Lisbon measures as are of genuine assistance in the fight against terrorism and, more broadly, that it should not diminish the beneficial influence over other countries’ approach to counter-terrorism that it has earned through the EU over the years.

14. I look forward to assessing these risks in the future, with the assistance of the Committee’s report.

14 December 2012
1. PURPOSE / RECOMMENDATIONS

1.1 Purpose of Paper

1.1.1 This paper is written in response to the call for evidence from the House of Lords Select Committee on the European Union in consideration of the 2014 opt-out decision under Protocol 36 of the Treaty of Lisbon.

1.1.2 Many of the questions contained within the call for evidence are properly for consideration by the legislature or the judiciary; in preparing this paper, ACPO is only able to give a view on operational policing matters and how they may be affected by the opt-out decision for each of the Third Pillar Measures (TPMs).

1.1.3 As such the purpose of this paper is to determine which of the TPMs ACPO should recommend that the UK opt back into from a policing and community safety perspective. It should be noted that ACPO’s analysis has concentrated on those measures that impact directly on policing and it has not considered in full the advantages and disadvantages of opting back into measures which do not have such impact.

1.2 Recommendations

1.2.1 ACPO:

- Recommends that 13 separate TPMs are opted back into.
- Recommends that 12 TPMs should not be opted back into.
- Recommends above all else, that the EAW be opted back into under the same arrangements that are currently in place.

2. BACKGROUND

2.1 The Opt Out Decision

2.1.1 ACPO recognise that arguments pertaining to police operational efficiency and effectiveness and will be important in influencing decision-making but on their own may not be the determining factor. However it is important that appropriate weight is given the impact of changes on policing and community safety. From this stance, ACPO seek to give clarity about the relative priority attached to each of the measures affected and to proffer arguments about their importance supported by practical evidence.

2.2 Assessment Methodology

2.2.1 The assessment has been undertaken by a small team led by Commander Allan Gibson, ACPO lead for Extradition and Mutual Legal Assistance.

2.2.2 The assessment approach has comprised:
• Identifying the lead ACPO Business Area and subject matter expert for each of the TPMs impacting on UK policing.
• Circulation of a standard assessment questionnaire to subject matter experts.
• Collation and analysis of the returned questionnaires.
• Liaison and information sharing with officials partner agencies.
• Stakeholder meetings to discuss emerging findings and a draft paper involving representatives from: ACPO, NPIA, SOCA, Home Office, Ministry of Justice, CPS, CELS

3 The Third Pillar Measures (TPMs)

3.1 Categorising the TPMs

3.1.1 As of the 1st January 2012, there were 133 TPMs captured within the remit of the opt-out decision. The number has changed over the course of the year as some of the measures are repealed and this reduction will continue right up to December 2014 but for ease we will retain this as the original figure.

3.1.2 The repeal process needs to be understood as it is important for a number of measures – not least the many measures concerning mutual legal assistance (MLA). The opt-out clause only applies to measures that came into force before the signing of the Lisbon Treaty. However, since that date, EU law has not stood still and more measures have been signed. The post-Lisbon measures that HMG signed into are binding on the UK. In the cases where a post-Lisbon measure takes over from a TPM, the TPM ceases to exist. It is by the process that the 133 TPMs are being reduced in number. As such the final list is likely to end up being between 100 and 120 measures.

3.1.3 Of the 133 measures, not all are concerned with law enforcement. Some relate to judicial matters, some to legislative and some are a mix. 108 measures have been deemed to be concerned with law enforcement and have been assessed in this paper.

3.2 Prioritising the TPMs

3.2.1 Each of the 108 TPMs that relate to law enforcement have been considered in depth and the assessment of relevance to UK policing for each of them is shown at Appendix B.

3.2.2 From a UK policing perspective, the assessment has categorised the 108 into five different categories as follows:

• TPMs that it is vital that we opt back into - there are 13 of these
• TPMs that we should opt back into - there are 16 of these
• TPMs that we need not opt back into but if we did they would have no practical effect on UK policing (and as such we hold no view on them) - there are 55 of these
• TPMs that are not in the interest of UK policing to opt back into - there are 12 of these
TPMs that have been replaced by post Lisbon measures or are likely to be so before December 2014 - there are 12 of these

3.2.3 The 13 TPMs identified as vital by the assessment are:

- Convention implementing the Schengen Agreement of 1985 (SIS)
- 2002/187/JHA (Eurojust)
- 2002/465/JHA (Joint Investigation Teams)
- 2002/584/JHA (The European Arrest Warrant)
- 2007/533/JHA (SIS)
- 2008/675/JHA (Exchange of criminal records)
- 2009/315/JHA (Exchange of criminal records)
- 2009/371/JHA (Europol)
- 2009/934/JHA (Eurojust/Europol)
- 2009/935/JHA (Eurojust/Europol)
- 2009/948/JHA (Eurojust/Europol)
- 2009/968/JHA (Eurojust/Europol)
- 2008/977/JHA (Data protection)

3.2.4 Each of the 13 TPMs that have been deemed vital to UK policing will now be covered in more detail.

4 The Vital TPMs

4.1 As described ante there are 13 TPMs that UK policing feels that it is vital that we opt back into. We shall consider each of these in turn.

4.2 European Arrest Warrant

4.2.1 The assessment process has confirmed that EAW is the most important of all the measures.

4.2.2 Most of the stakeholders consulted believe that opting out of this and relying on alternative arrangements would result in fewer extraditions, longer delays, higher costs, more offenders evading justice and increased risk to public safety. That said, extradition did exist before 2004 and so it could operate without it – as it does with non-EU states.

4.2.3 The EAW has been in operation for eight years and has now become a mainstream tool. In the last year prior to the introduction of the EAW (2003), the UK received a total of 114 extradition requests worldwide and surrendered 55 individuals; in the same year the UK made 87 extradition requests to other countries across the globe and 64 people were returned. In 2010/11 the UK received 5,382 EAW requests and made 221 EAW requests to other EU states. The UK surrendered 1,149 individuals (approximately 7% of which were UK nationals, the other 93% being fugitives to the UK). The UK had 93 people surrendered to it.

4.2.4 These trends in extradition reflect the increasing international patterns of crime and offending. Open borders across Europe, free movement of EU citizens, low cost air
travel, cheap telecommunications, the internet and the expansion of criminal networks across national boundaries are all contributory factors to the growth in extradition requests. These are irreversible changes which need to be matched by increasing flexibility on the part of European law enforcement and criminal justice agencies.

4.2.5 Further evidence of these changes is to be found in data concerning arrests. Recent data gathered by the MPS in the first quarter of 2012 showed that of 61,939 people arrested in London, 8,089 were nationals from EU countries (13%) and 9,358 were foreign nationals from outside the EU (15%). The presence of fugitives from justice fleeing to the UK is a significant public safety issue. In 2011/12 the MPS received 50 EAWs for homicide, 20 for rape, and 90 for robbery. Each of these cases represents a person who is wanted for a serious crime who fled to the UK. There is strong evidence to show that foreign criminals who come to UK continue to offend when in the UK. There is a real risk that opting out of the EAW and relying on less effective extradition arrangements could have the effect of turning the UK into a ‘safe haven’ for Europe’s criminals.

4.2.6 The EAW is an efficient system, built upon mutual recognition of criminal justice systems between member states and an obligation to comply with a properly constructed warrant. Barriers which previously existed have been removed. The nationality of the person sought can no longer be a barrier to affecting an extradition request. Under the previous arrangements many European states, such as Germany, France and Poland, did not allow their nationals to be extradited to stand trial and required them to be tried in their home state. On this point, it should be noted that some non-EU states still have this rule.

4.2.7 Prior to the introduction of the EAW, extradition between European states where it did occur could, and often would, take many months in uncontested cases and many years in contested cases. EAW data from the Commission to the European Parliament show that across the EU it takes an average of 17 days to surrender a wanted person in cases with consent and 48 days in non-consensual cases.

**Pre-EAW Example:**
On 4 November 1995 Rachid Ramda, an Algerian national, was arrested in the UK in connection with a terrorist attack on the Paris transport system. France sought extradition from the UK. The legal process was protracted and it was not until 2005 that his extradition was finally completed. Throughout this time he was detained in British prisons. He was convicted in France and sentenced in March 2006 to ten years imprisonment.

**Post-EAW Example:**
Hussein Osman, a naturalised British citizen born in Ethiopia, was identified as a suspect for the failed bomb attack at Shepherd Bush Tube Station on 21 July 2005. The UK sought his extradition under the relatively new EAW arrangements. His extradition was completed in September 2005. On 9 July 2007 Hussain Osman was found guilty at Woolwich Crown Court of conspiracy to murder and sentenced to a minimum of 40 years imprisonment.
Part 2 Example
Contrast these with Abu Hamza. Fourteen years after his arrest on behalf of the USA (under legal conditions largely identical to the 1957 Treaty) he was finally extradited to the USA to face terrorism charges there.

4.2.8 These are not isolated examples – numerous others could be cited.

4.2.9 The EAW is not a perfect system and the position of ACPO has been to support proposals for change such as a proportionality clause to prevent member states seeking the extradition of individuals in relatively trivial cases. On the question of British nationals being detained for long periods in European prisons (e.g. the Andrew Symeou case, detained in Greece for 2 years in connection with a manslaughter allegation and ultimately acquitted), ACPO has supported proposals to affect change, such as the introduction of the European Supervision Order (ESO), this requires member states to create a mechanism by which their criminal justice systems can supervise each other’s suspects in their home countries whilst released on bail. The ESO is itself a TPM although a criminal justice rather than law enforcement measure. Member states were required to implement the ESO by 1 December 2012 although the UK has not achieved this. ACPO’s position has been that it would like to see improvements to the EAW system but these can be best achieved by remaining within and lobbying for change. Overall the benefits of the EAW to the UK greatly exceed the problems that are experienced in a small number of cases.

4.2.10 The EAW is a cost-efficient measure for a number of reasons. Firstly, it is a standardised system that is relatively simple and easy to operate. It has removed the previous complexity that arose from having to understand different bilateral arrangements. This has led to EAW work becoming mainstream, capable of being dealt with by non-specialist police officers and lawyers. Processes are quicker and move through the courts with less difficulty. This reduces the cost of having to detain suspects for extended periods in UK prisons at British taxpayers’ expense. In contrast, extradition to Part II countries under the Extradition Act 2003 continues to be complex, expensive and slow as was evident in the recent Abu Hamza extradition to the United States.

4.2.11 Added to all of this is the cost to the public purse. If we relied upon a 1957-type mechanism, then we would be committing ourselves to footing the legal bill for extradition processes that go on for years and cost hundreds of thousands of pounds. The public and the judiciary are frustrated that the extradition of terrorists is often delayed for years. A return to the 1957 process could make this long drawn-out process the norm. That may not have been such a problem twenty or thirty years ago when criminals rarely crossed borders. Nowadays that is routine.

4.2.12 It is not just foreign criminals who would sit for years in UK jails. UK court cases would stall for many years as we waited to get our fugitives back, robbing their victims of the chance for justice to be served. To expect witnesses to wait for long periods before a suspect could be returned to the UK to face trial would be a gigantic step backwards.
Lastly, but by no means least there is the benefit to public safety in the UK. Where there are foreign criminals in the UK who are wanted abroad, we want to extradite them as soon as possible; a burglar in France is a burglar in England: the EAW allows us to do this. Without it, we would not only have them on our soil for longer but the UK would be likely to be seen as a safe haven for EU criminals, much as Spain used to be for British fugitives.

The view therefore of ACPO is simple. The EAW works very effectively and increases the safety of the UK public. It is for this reason that ACPO strongly supports the EAW.

Schengen Information System (SIS)

Following on naturally from the EAW is SIS, which relies heavily on the EAW.

In total there are 23 TPMs that relate to the Schengen Information System – known as SIS I and SIS II for the newest version. That said, only two of these are actually vital with the rest (save for 2000/586/JHA which is in the ‘should’ group) being statements of intent, old measures or matters that do not relate to UK policing.

SIS II is an EU-wide, IT enabled, business change programme that will enable all participating States to share real-time information on persons and objects of interest to law enforcement via a series of alerts. These alerts will be made available via the national police system, in the UK’s case this will be the Police National Computer (PNC). The SIS II alert types (identified by their article number in the SIS II legal basis) are as follows:

- Article 26: Alerts for persons wanted for arrest for extradition purposes, for whom a warrant has been issued
- Article 32: Alerts for missing persons who need to be placed under police protection or in a place of safety, including minors and adults at risk
- Article 34: Alerts for witnesses, absconders, or subjects of criminal judgements to appear before the judicial authorities
- Article 36: Alerts relating to people or vehicles requiring specific checks or discreet surveillance
- Article 38: Alerts relating to objects that are misappropriated, lost, stolen and which may be sought for the purposes of seizure or for use as evidence (e.g. firearms, passports etc.)

Easy access to this information will enable the UK to exchange information across Europe in real time in order to fight cross border crime and rapidly repatriate UK criminals that have fled to other EU countries. In the course of their day-to-day duties, SIS II will aid law enforcement officers by providing them with:

- Routine and real-time information from participating countries about wanted persons, missing persons, lost and stolen ID cards, travel documents and lost and stolen vehicles. This information is shared in the form of alerts.
- Information about people and objects whose movement is of interest to foreign law enforcement officers.
• Warning markers if a person is potentially armed, violent or dangerous.
• A simple and already standard means of accessing this information via the PNC.
• A simple and standardised means of sending alert information via the PNC to other SIS II users in Member States.
• A single point of contact - the SIRENE (Supplementary Information Request at the point of National Entry) Bureau – for liaising with other participating countries and obtaining further information (sits within the Serious and Organised Crime Agency).

4.3.5 The initial benefit of joining SIS II is that for the first time it will provide UK policing agencies with real time access to information (via SIS II alerts). The UK will also have the ability to place alerts on the system, extending the reach of UK policing into Europe in a far more practical and immediate way than has ever been possible before. SIS II will deliver several key strategic benefits :-

• Reduced criminality – particularly via the ability to screen wanted criminals at border controls.
• Greater identity assurance and protection at the border.
• Improved public protection.
• Improved judicial and police cooperation across the Schengen Area.

4.3.6 In addition to the above strategic benefits, the practical day to day benefits to the UK can be summarised as follows:

• UK having direct routine access to all EAWs.
• Real-time access to over 44 million Alerts for wanted persons/property via PNC.
• Cooperation is automated and operation enshrined in legal and quasi-legal documentation.
• Member States have access to all UK Alerts and are legally required to act.
• Detection of criminals at point of entry greatly enhanced by SIS II/ e-Borders link.
• SIS II provides access to the primary EU tool for police and judicial cooperation.
• Real time access for all designated UK Agencies to all EU data.
• SIS II provides a common platform for improved information sharing. (images, fingerprints, identity documents)
• The UK becoming an operational EU partner in SIS and related activities.
• A significant and unique barrier effect which is likely to deter many EAW subjects that would otherwise see the UK as a haven and a destination of choice for criminality.

4.3.7 Millions of pounds have been spent preparing for the implementation of SIS in terms of staff committed and the IT infrastructure to support it. The work that the UK has done so far indicates how committed the UK is to SIS. With all of the above activity, the benefits for UK policing and public safety are clear.

4.4 The issue of SIS is also tied heavily to the EAW.
4.5 SIS does not require the EAW to operate. It can in theory operate with another extradition system but it would be far less effective by not having the EAW. One of the biggest benefits of SIS is that real time wanted alerts are loaded immediately onto the central database. If we did not have the EAW process in place then we would receive the information that the person stopped by police is wanted for a serious offence abroad but be unable to deal with it. Inclusion of the EAW in the SIS process is designed to allow for an instant arrest. A position not possible with any non-EAW extradition arrangements at present.

4.5.1 For all of these reasons, the view of UK policing is that SIS is a vital measure that the UK are already heavily committed to and as such it is vital that we opt back into it.

4.6 The Exchange of Criminal Records

4.6.1 Two TPMs deal with the exchange and use of criminal records within criminal justice systems of member states - 2008/675/JHA and 2009/315/JHA. These measures seek to ensure that a conviction in one state is given the same weight in all. So for instance if a person from Poland is convicted of burglary in the UK and it is discovered that he has 12 convictions across the EU for burglary, the UK courts must treat these 12 convictions as they would for UK matters when it comes to bad character and sentencing.

4.6.2 In addition, they provide a mechanism by which these convictions can be quickly obtained. Since this came into force in the UK as a result of the Coroners and Justice Act 2009, progress has been swift. At the inception of this Act, the MPS conducted three pilots into the effectiveness of this new measure3.

4.6.3 The result of these pilots have been widely circulated in both the UK and the EU and generally show that in London, around 35% of foreign nationals have convictions abroad and around 8% are wanted in their home countries. These wanted suspects are not circulated via an EAW simply because the state that wants them did not know that they were in England. It is solely by confirming their identification, through a criminal records request, that their offending history is established. It therefore allows the removal of dangerous criminals from the UK who were otherwise free to remain at large.

4.6.4 This has huge ramifications for policing in the UK in terms of bail, charging decisions, public safety, extradition, the trial, sentencing and deportation. The importance cannot be overstated.

4.6.5 Two years ago when these measures came into force, the results took around a week to obtain. Although not ideal this was a vast improvement over the many months it used to take. However, with more and more countries now coming on-line with this system, the results - while not yet instant - can certainly be obtained from some countries within a few hours. Easily quick enough to greatly assist while the suspect is under arrest and in police detention.

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3 Commonly referred to as the Harrow Pilot, the Newham pilot and the five borough pilot
4.6.6 Under the Framework Decision, member states that convict non-nationals must send information of the conviction to the home member state of the convicted person. This process is known as ‘notification’. All notified convictions of UK nationals are recorded on the Police National Computer (PNC).

4.6.7 In addition, member states must, upon request from another member state, provide up-to-date information on the convictions of one of its nationals. This process is known as ‘request’ and it is the means by which the UK obtains antecedent information about foreign nationals being investigated or prosecuted on these shores. Any offences that present a serious risk to the UK public will be recorded on the PNC.

4.6.8 The exchange of criminal antecedent information is a critical part of ensuring justice is done and that the public are protected from harmful people. Prior to this TPM, EU nationals were treated as if they were of good character by our courts absent information to the contrary. Such information is used in determining whether to grant court bail, for determining mode of trial, for bad character evidence during trial and for sentencing. Exchanging information in this way also stops criminals moving from one jurisdiction to another simply to prevent their pasts catching up with them. The information is also made available to multi-agency public protection panels, charged with the responsibility of managing the risks to communities presented by sexual and dangerous offenders. The information is also used for child protection, firearms licensing and employment vetting. Lastly, the information is made available to the UK Border Agency to facilitate decision making as to whether a person should remain in the UK or be allowed to re-enter.

4.6.9 Some case studies of the benefits of being part of the measure are given below:

**Romanian predatory rapist convicted using foreign convictions as bad character evidence**

A Romanian national ‘A’, was arrested in the UK on suspicion of raping a prostitute and a vulnerable female adult in London. A request for conviction data identified that he had a previous conviction for rape of a vulnerable adult in Romania.

Application to use the previous conviction as bad character evidence was made by the prosecuting counsel and was granted by the judge. ‘A’ was convicted of 4 counts of rape, 1 count of false imprisonment, 2 counts of assault by penetration and 1 count of actual bodily harm. An indeterminate prison sentence was imposed with a recommendation that he serve at least 11 years.

The prosecuting counsel was firmly of the view that ‘A’ would have been acquitted but for bad character evidence given the extreme vulnerability of the victims as witnesses.

**The Jasionis Brothers**

In 2010, two brothers were circulated on PNC as being wasted for a gang rape. They were eventually located and arrested. As part of the case, their fingerprints and DNA were sent to Lithuania so that their identities could be checked under the provisions of the relevant TPM. Prior to the trial, Lithuania confirmed that brother one had a conviction for murder. Brother two was wanted in Lithuania for...
another rape but not on an EAW as they did not know that he was in the UK. As a result of this, an urgent EAW was generated. The previous conviction for murder (due to the MO) was instrumental in convicting brother one of the gang rape. Brother two was acquitted but immediately arrested on the EAW. He was swiftly extradited to Lithuania (within a matter of weeks) and has since been convicted and sentenced, thus removing a dangerous offender from the UK. Although it was the EAW that removed him, it was another TPM that allowed the identification to take place in the first instance.

**UKBA deport EU nationals with serious offending history:**
Since April 2010 the UK Central Authority for the Exchange of Criminal Records (UKCA-ECR) has been sharing serious foreign conviction information with UKBA of EU nationals subject to criminal proceedings in the UK for minor offences. The UKBA are deporting EU nationals who are identified as posing the highest risk to the UK and putting in place measures to refuse them re-entry.

4.7 **Joint Investigation Teams (JIT)**

4.7.1 JITs are covered by Council Decision 2002/465/JHA. Historically these have not been extensively used by UK policing. The reason for this seems to be nothing more than a lack of knowledge around their use. This is changing though as more and more police units discover the benefits of them.

4.7.2 JITs are legal agreements between two or more states whereby a cross border crime is investigated. They are designed to speed up the investigation and reduce bureaucracy and they are very successful at doing this.

4.7.3 What the JIT does is set up an agreement between the states whereby each country investigates the crime in their own country by using their own domestic powers without having to resort to letters of request. For example, consider a murder investigation JIT between England, Germany and France. If the investigator in England decides that they need some banking evidence from France and a search to be conducted in Germany, they simply picks up the phone to their counterparts in those countries who have signed the JIT and they go and do it: no letters of requests, no unnecessary delays. The benefits for speedy investigations are immediately obvious to anyone who has had to deal with letters of requests. Decisions around prosecution can easily be made so that suspects can be indicted in the most suitable jurisdiction to ensure that court time is most effectively utilised and uses a single court process instead of many.

**Operation Veerde**
Operation Veerde was a JIT with the Czech Republic and Eurojust. It was an investigation into human trafficking, prostitution and rape of females brought to the UK by a criminal network. 33 victims were located in the Czech Republic. A JIT was agreed so that the UK and Czech police could quickly gather evidence using domestic laws. Nine suspects were indicted in England on behalf of both states; all were convicted of trafficking offences and sent to prison.

**Operation Romabank**
Current ongoing operation with Poland. 485 victims have been located in Poland and
the UK with 47 suspects located across Europe. As a result of the JIT, although the cases could be prosecuted all over the EU, Poland have taken primacy and charged and prosecuted all 47 suspects saving a huge cost across the EU.

**Operation Golf**
This is a long term JIT between the Metropolitan Police, the Romanian National Police and Europol. One part of the operation was to tackle a Romanian gang that was trafficking children into the UK and it has so far resulted in the arrest of 126 suspects for a wide range of offences. These offences have included human trafficking, benefit fraud, theft, money laundering and child neglect offences.

4.8 Eurojust and Europol

4.8.1 In total, there are five TPMs (2009/968/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/948/JHA) that are concerned with membership of Eurojust or Europol. In addition 2002/187/JHA and 2009/371/JHA deal with the setting up of Eurojust and Europol respectively.

4.9 Eurojust

4.9.1 Membership of these organisations is a pre-requisite for certain other measures. One of these is the JIT. As stated, it is a measure that we consider it vital we opt back into. In theory, we do not have to be a member of Eurojust to form a JIT however Eurojust control JIT funding. One of the many benefits of the system is that Eurojust can (and normally do) provide significant funds to run the JIT. This money includes equipment, travel, outside resources and the like.

4.9.2 As such, although membership of Eurojust is not necessary to use the JIT process, without it the process would move from being free to UK policing to becoming expensive and unworkable.

4.9.3 For these reasons it is considered that we should remain within Eurojust.

4.10 Europol

4.10.1 Europol performs many functions such as the exchange of intelligence between police, customs and security services. From 2013, they will also host the European Cyber-crime Centre – EC3. This will lead on cyber-crime co-operation and will be the first attempt at a joined up approach in this difficult area. The remit is to provide a response not only against cyber-crime but also cyber-attacks by terrorists and foreign intelligence agencies.

4.10.2 In addition, Europol are an integral part of SIS. This is a measure that the UK (and the rest of the EU) has invested considerable time and money in and to fully utilise it, we need to be a member of Europol.

4.10.3 Although other parts of Europol are underused by the UK (Europol analyst files for instance), these are growing and provide a strong benefit to international criminal investigations.
4.10.4 As a final point, both of these organisations are generally a force for good in terms of public safety and for combating crime. Crime gets more international with each passing year, making it harder for countries to act in isolation. This is recognised in the UK’s organised crime strategy, *Local to Global: Reducing the Risk from Organised Crime*, where it is recognised that the UK must work to “develop our international cooperation” to combat organised crime. In the rest of the world, such matters are dealt with under a raft of bilateral and multilateral treaties that are more complicated than the EU agreements. Much of our international crime and transient criminals come from Europe and membership of these organisations makes it far easier to target them. Removing ourselves from these measures and putting ourselves in the position of having to re-negotiate 26 treaties on each and every topic, would be a massive step back for UK policing that would benefit no one.

4.11 Data Protection

4.11.1 As mentioned in appendix B, this concerns the transfer of sensitive material about persons involved in criminal investigations. This could include suspects, witnesses, victims and police officers.

4.11.2 It deals not only with the transmission and use of the data, but also with its retention and ultimate destruction. The safe and justified retention of personal data by UK policing is always a matter of public interest. The issue around how a foreign jurisdiction deals with our data is even more vital.

4.11.3 Although these areas are met already under domestic legislation, the UK needs to remain a part of this measure. The reason is that other states may not agree to share such data with any other state under these provisions unless they remain within it. More importantly, they would not be bound to apply these safeguards to the data we sent them if the UK ceased to be a part of this measure. The lack of such a universal safeguard would be unacceptable.

5 TPMs that we should Opt back into

5.1 In addition to the 13 TPMs that it is vital that we opt back into, there are a further 16 that we should opt back into. These are listed in brief terms on Appendix B and we will cover just one of them (CEPOL) in more detail.

5.2 CEPOL

5.2.1 CEPOL is the European Police College which is located at Bramshill. It deals with exchange training of senior police officers in the EU.

5.2.2 It is not necessary to examine each course and exchange programme that CEPOL offers, instead it is more sensible to consider its net worth. Given the global nature of crime any facility that assists in training and the sharing of experiences and ideas across the EU is intrinsically a good thing and a positive force in UK policing.

5.2.3 With the college being located in England, it allows UK policing an influence on the way that policing is taught at a senior level across the EU. It also enhances the reputation of UK policing across the EU.
5.2.4 If the UK were to leave CEPOL, then under the terms of the Lisbon treaty, we may be responsible for the costs of relocating this college to another EU state. Given that this will include the cost of the land, planning permission, building the premises, installing IT and other equipment and hiring new staff, this could run into many millions of pounds.

6 **TPMs that we do not have to consider**

6.1 As mentioned in paragraph 3.2.2, there are 12 TPMs that have or will be repealed by post Lisbon measures. Most of these do not to be considered here, but those that concern MLA need to be covered because at the moment, they are vital to us.

6.2 **Mutual Legal Assistance (MLA) TPMs**

6.2.1 There are five TPMs that come under the general grouping of MLA. A full consideration of these measures would be lengthy although the importance of them cannot be understated.

6.2.2 However, all of these measures are soon to be superseded by the European Information Order (EIO). The EIO is a post Lisbon measure that the UK has signed up to and as such it is outside of the TPM considerations. As a result, when the EIO comes into force (2014), then all of these MLA measures cease to apply and as a result they need not be considered here.

7 **Conclusions**

7.1 This paper is written on the assumption that HMG will exercise its block opt out of the TPMs. The question therefore is what (if any) TPMs the UK should opt back into?

7.2 As described above in some detail, there are 13 TPMs which are deemed vital to UK policing and the reasons for this position have been given in detail ante. To repeat the position :-

- There are 13 TPMs that it is vital that we opt back into.
- There are 16 TPMs that we should opt back into.
- There are 55 TPMs that would make no difference whether we opt back into or not and as such ACPO has no view on them.
- There are 12 TPMs that we should not opt back into
- There are 12 TPMs that are due to (or have been) repealed by post-Lisbon measures

7.3 The main instrument under threat is the EAW. The position from an ACPO view is that we should opt back into the EAW. The EAW is not perfect and as stated, some areas should be considered further but negotiation should be carried out from within the system rather than outside of it.
7.4 To opt-out would adversely affect SIS implementation and would undoubtedly herald a slower, costlier and more laborious system that may also end up with the provision of some EU states not being willing to extradite their own citizens.

7.5 As such ACPO could not support such a route. Our view on this could not be clearer: withdrawing from the EAW would be a mistake and could jeopardise justice and public safety.

8 December 2012
Appendix B

TPMs that ACPO consider it vital to opt back into.

1. Convention implementing the Schengen Agreement of 1985. This is the actual SIS agreement and the UK has to be part of this measure to implement SIS.

2. 2002/187/JHA - Setting up Eurojust with a view to reinforcing the fight against serious crime. The UK is a major user of Eurojust. Membership of Eurojust is necessary for JITs and the EIO (which the UK is committed to). Given that, the question of opting back in may be irrelevant as due to our membership of the EIO, we have to be a member of Eurojust anyway.

3. 2002/465/JHA - Joint investigation teams (JITs). Although not greatly used, the provision is extremely useful for large scale multinational investigations in terms of exchanging evidence and using domestic powers to gather evidence as opposed to MLATs. Use is growing; it works well and reduces red tape in such investigations. While in theory there are other ways that JITs can exist (such as the 2nd protocol to the 1959 convention) these have not been universally adopted and as such cannot be viewed as a fall-back position. As such, this is one of the measures (along with the EAW) that we would seek to retain above all others.

4. 2002/584/JHA - European arrest warrant and the surrender procedures between Member States. This is an extremely effective policing measure and to remove it would represent a huge step backwards. See the main report for much more detail on this measure.

5. 2007/533/JHA - The establishment, operation and use of the second generation Schengen Information System (SIS II). This is the TPM that actually brings SIS2 into force.

6. 2008/675/JHA - Taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. Even though this it is already part of UK law it completely relies upon other states being able to pass this information to us outside of the MLA process. If we were no longer part of it, it may make the obtaining of conviction data protracted, taking the CJ system back many years and running the risk of serial offenders not being identified. See the main report for more details on this measure.

7. 2008/977/JHA - The protection of personal data processed in the framework of police and judicial cooperation in criminal matters. This sets up rules for the transfer of information about persons concerned in criminal investigations.

8. 2009/315/JHA - The organisation and content of the exchange of information extracted from the criminal record between Member States. This is an extremely important provision. Without it we would rely on MLATs (EIOs when they come in) to obtain criminal conviction records. See the main report for more detail on this subject.
   Membership of Europol is required and demanded by a number of other measures - not least the EIO which the UK has already signed up to. As such, the UK is obliged to remain a member of Europol so we need to opt back in.

10. **2009/934/JHA - Adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and EC3. See the main report for more information.

11. **2009/935/JHA - Determining the list of third countries with which Europol shall conclude agreements.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.

12. **2009/948/JHA - Prevention and settlement of conflicts of exercise of jurisdiction in criminal matters.** This role is filled by Eurojust which the UK use sparingly. That said, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.

13. **2009/968/JHA - Adopting the rules on the confidentiality of Europol information.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and EC3. See the main report for more information.

**TPMs that ACPO consider that we should opt back into**

1. **2000/375/JHA - Combat child pornography (CP) on the internet.** The order is merely a best practice document which the UK already exceeds. There are pluses and minuses in this TPM. On the plus side it requires member states to share information on CP matters quickly and for law enforcement in each state to process requests for information as a matter of urgency. This does not adversely affect the UK as we do this anyway, but it is useful to have as it ensures that other states do the same with our requests. If we left this then the rest of the EU would be under no obligation to treat UK requests as urgent. They may do, but the point is that they are not obliged to and where resources are scarce, if any country is going to be put to the bottom of the pile it will be the countries where there are not mandatory obligations in force. The other side is the requirement to inform Eurojust of all CP matters which is a little cumbersome but in reality it is not done in every case anyway. Another plus is that it requires close coordination of states when it comes to the removal of CP material from the internet. Again, a most useful provision given the international nature of on-line CP. Finally it makes requirements for the retention and interception of communications data for the prosecution of CP matters. This ensures a common standard that is continually updated as technology evolves. Although there are some minuses, on the whole this is a positive TPM and we should opt back into it.

2. **2000/586/JHA - Establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common**
3. **2000/641/JHA - Secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders.** This actual Decision has little effect on the UK either way. However, this measure forms a number of bodies which have far reaching powers into other TPMs - some of which we would seek to retain, most notable the SIS2 system, the EAW and the EIO which the UK are already committed to.

4. **2001/419/JHA - The transmission of samples of controlled substances.** Without it, case by case agreements would have to be in place to permit the transfer between labs and policing entities to avoid breaking various national laws around the import/export of controlled substances. This would create unnecessary additional bureaucracy.

5. **2002/348/JHA - Concerning security in connection with football matches with an international dimension.** This decision not only sets up SPOCs for football intelligence, it also mandates the exchange of information to other members. If the UK moved out of this measure then although we could choose to pass information to other EU states, there is no obligation on the other EU states to do the same for the UK. It is not that other states are not co-operating, it is simply that if we are not in it, other states may not be able (or willing) to co-operate with UK policing in the same terms.

6. **2003/170/JHA - Common use of liaison officers posted abroad by the law enforcement agencies of the Member States.** This is concerned with police liaison officers being posted to other countries or to the EU. In the main, this role is taken up by SOCA. The system is heavily underused when compared to other countries. If the UK left this measure, there is nothing to stop us continuing to send liaison officers to other states, although we would not be able to have any at the EU (Eurojust or Europol) which would have a knock on effect on our ability to operate in other areas. As such it should be retained.

7. **2005/222/JHA - Attacks against information systems.** Cybercrime is a growing threat to the economic wellbeing of all states and also to critical infrastructures. The rapid exchange of information and intelligence should be made available outside of other criminal matters due to the time dependant nature of such matters.

8. **2005/681/JHA - Establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA.** The college at Bramshill deals with the exchange training of EU senior police officers. A proposed post-Lisbon decision is likely to remove this from the TPM list before December 2014.

10. **2006/960/JHA** - Simplifying the exchange of information and intelligence between law enforcement authorities of the Member States. The UK would still be able to pass information to other EU states and we do not use Europol to transmit intelligence or evidence as a rule. This may change though when the EIO comes in and so it would be wise to retain this measure.


12. **2007/845/JHA** - Concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime. The UK has met its obligations by enacting the Proceeds of Crime Act 2002. The information sharing network though is useful and there is no reason to cease being a member as further intelligence sharing would require state by state agreements.

13. **2008/615/JHA** - Stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. This Decision is to do with the exchange of information, most notably DNA data. Although the word ‘terrorism’ is in the title, this measure also has wider implications for general criminal investigations. The reality of the measure is that it is impossible to implement before 2014 in any case. Despite this, from a UK policing perspective it is an important measure that we should remain a part of, even though it has not come into force as yet.

14. **2008/616/JHA** - The implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. This Decision set up the mechanisms by which Decision 2008/615/JHA would operate.

15. **2008/617/JHA** - The improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations. This allows for the deployment of rapid reaction forces to other countries. Where country A seeks the assistance of country B in a crisis, this sets up the legal framework for this to operate. It covers serious physical threats (terrorism, hostage taking etc) and not natural disasters. It would make little sense to remove this sensible provision - especially given the ongoing threat of organised crime, cybercrime, terrorism and civil unrest due. It is designed to protect the citizens of the EU from the gravest threats and as such it would be unwise to remove it. On balance this TPM is a good measure that does not need to be re-negotiated.

16. **2009/426/JHA** - The strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime. Eurojust is integral to the JIT process and will be at the
centre of the EIO (which we have signed up to post-Lisbon) and so in all likelihood we cannot opt out of this measure. Although we can operate JITs without Eurojust and there is a chance that funding for them will be moved to Europol or another agency in the future, there is no reason not to retain this TPM.

**TPMs that have no impact on UK policing whether we opt back in or not.**

**ACPO has no view on these measures**

1. **1996/610/JHA - Creation and maintenance of a Directory of specialised counter-terrorist competences.** This measure is in relation to a database of CT contacts in Member States. It is no longer used or kept up to date. As such we have established effective cooperation through our network of liaison officers abroad, other countries’ liaison officers in London and other networks. This measure is not considered essential

2. **1996/698/JHA - Cooperation between customs authorities and business organisations in combating drug trafficking.** Is merely a central database of drugs related matters. No evidence could be found of this being used by ACPO Forces so loss or retention would have no impact.

3. **1996/699/JHA - Exchange of information on the chemical profiling of drugs to combat illegal trafficking.** Information can still be exchanged. Along with other measures, it is one of the Swedish Framework Decisions and could be replicated with ease if need be.

4. **1996/750/JHA - Approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking.** The UK could maintain this position outside of this measure if it wished to and met the criteria prior to adoption in any case.

5. **1997/339/JHA - Cooperation on law and order and security.** This function is a duplication of the Interpol Green and Orange notices. Part of the Swedish Framework Decision

6. **1997/372/JHA - Refining of targeting criteria, selection methods and collection of customs and police information.** The UK could maintain this position outside of this measure if it wished to. Part of the Swedish Framework Decision.

7. **1997/827/JHA - Establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.** The UK could maintain this position outside of this measure if it wished to, it is a mechanism that sounds good but in reality has little practical effect

8. **1998/699/JHA - Money laundering, the identification, tracing, freezing, seizing and confiscation of instruments and proceeds from crime.** This TPM concerns the informal exchanging of information on financial crime and is part of the Swedish Framework Decision. If the UK opted out there would be no realistic difficulty in continuing to share information. That said, membership of this TPM does
not saddle the UK with any problematic measures and so while membership is not necessary, there is no reason to actively seek the UK’s removal from it.

9. **1998/700/JHA - Concerning the setting up of a European Image Archiving System (FADO).** This has been overtaken by technology. High speed internet connections and the routine use of email by UK policing across the EU have reduced the need for this measure. It should be noted that the UKBA use this system so their views should be sought on retention.

10. **2000/642/JHA - Arrangements between financial intelligence units of the Member States in respect of exchanging information.** It is likely that this could maintained on a police to police basis or via the Swedish Framework Decision. We share this kind of information with many other non-EU states without any problem.

11. **2001/413/JHA - Combating fraud and counterfeiting of non-cash means of payment.** This Decision places a number of legal obligations on members in terms of creating criminal offences and suitable penalties for a range of conduct and also to permit extradition for such matters (although the EAW provisions supersede these). Although it imposes legal obligations on the UK, these are already in force.

12. **2001/500/JHA - Money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.** Given the international nature of much financial crime, the ability to identify, track and seize assets (where required) is vital to effectively investigate such crimes. It may be that this eventually falls under the EIO but this is not certain at this time. In addition there is a post Lisbon measure being discussed that would take this out of the TPM area (although the UK has not made a decision on that new measure). As a result of this Decision, the UK brought in the Proceeds of Crime Act 2002. As such the UK has more than fulfilled its obligations around it and is hardly likely to repeal it. As such this is largely an irrelevant measure for the UK now.

13. **2002/494/JHA - European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.** This measure is of little impact either way. The group meets on a regular basis and attendance is paid for one (non-police) representative. The network, whilst imposing no responsibility upon Member States to cooperate, does create a mechanism by which those with responsibility for war crimes share information and best practice. It should noted however that the Crown Prosecution Service do support the continued membership of this TPM.

14. **2002/946/JHA - The strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.** This decision required that states create a large number of offences. As these are now part of UK law, if we left this measure it would have no impact on the UK as these offences would remain.

15. **2003/335/JHA - The investigation and prosecution of genocide, crimes against humanity and war crimes.** Although a serious matter, the jurisdiction
for these crimes is a matter for the UK. Agreements to determine primacy are helpful but not vital.

16. 2003/568/JHA - Combating corruption in the private sector. This decision required that states create certain offences. As these are now part of UK law (for example the Bribery Act), if we left this measure it would have no impact as these offences would remain.

17. 2004/731/EC - Concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information Agreement between Bosnia and Herzegovina and the European Union on security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

18. 2004/843/CFSP - Concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

19. 2005/069/JHA - Exchanging certain data with Interpol. Membership of this TPM is not necessary here as the UK is a member of Interpol in its own right.

20. 2005/212/JHA - Confiscation of Crime-related Proceeds, Instrumentalities and Property. The UK has already fulfilled its obligations here by enacting the Proceeds of Crime Act 2002. It is inconceivable that the Act would be repealed if we left this measure and as such it is largely irrelevant.

21. 2005/296/CFSP - Concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

22. 2005/387/JHA - The information, exchange, risk-assessment and control of new psychoactive substances. If the UK left this provision, we would still exchange intelligence with other countries. (EU or otherwise)

23. 2005/481/CFSP - Concerning the conclusion of the Agreement between the European Union and Ukraine on the security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

24. 2005/511/JHA - Protecting the Euro against counterfeiting, by designating Europol as the Central Office for combating Euro-counterfeiting. Not being part of this agreement will not affect the UK as the Euro is not our national currency. Currently Europol have primacy to combat counterfeiting of the Euro.
25. **2005/671/JHA - The exchange of information and cooperation concerning terrorist offences.** This Decision is concerned with further terrorism definitions, matters around jurisdiction, MLA requests and the use of JITs in CT matters. This creates a duty on Member States to share information with Europol, Eurojust, and other Member States. Again, when examining whether this measure is essential, it was felt that we already share information and would continue to do this, whether duty bound or not.

26. **2006/317/CFSP - Concerning the conclusion of the Agreement between the European Union and the Republic of Croatia on security procedures for the exchange of classified information.** The UK does not use this. Exchange is done directly.

27. **2006/467/CFSP - Concerning the conclusion of the Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information.** The UK does not use this. Exchange is done directly.

28. **2006/783/JHA - The application of the principle of mutual recognitions to confiscation orders.** The UK has met its obligations by enacting the Proceeds of Crime Act 2002. It is possible that this may fall under a post Lisbon measure pre-2014.

29. **2007/274/JHA - Concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information.** The UK does not use this. Exchange is done directly.

30. **2008/568/CFSP - Concerning the conclusion of the Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information.** The UK does not use this. Exchange is done directly.

31. **2008/841/JHA - The fight against organised crime.** Although this decision is largely a legislative one, it requires the proscription of matters (conspiracy) that has long been an offence in the UK anyway. There is nothing to be gained by opting back into it.

32. **2009/820/CFSP - Agreement on Extradition and MLA between the European Union and the United States of America.** The US signed this treaty with the EU in 2003 and as a result the UK signed its treaty with the USA in December 2004. The EU treaty required each member state to negotiate a treaty with the USA and the UK has done so.

33. **2009/902/JHA - Setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA.** This is in effect an EU crime prevention body. It brings together subject matter experts in the field and encourages ongoing good practice. Information from the ACPO lead confirms that this is not used by ACPO forces.
34. **2009/905/JHA - On accreditation of forensic service providers carrying out laboratory activities.** This ensures that labs in member states conform to ISO 17025. The UK is one of the leaders in the forensic world and it is inconceivable that if we left this Decision that the UK would suddenly cast aside all their minimum standards. All police computer and phone forensic labs need to meet this by 2015 and so the UK is clearly committed to this in any case. As such this ruling has little effect on the UK and arguably the UK should be free to set its own standards in line with the rest of the world and not just the EU.

35. **2009/933/CFSP - The extension, on behalf of the European Union, of the territorial scope of the Agreement on Extradition and MLA between the European Union and the United States of America.** The UK has its own extradition treaty with the USA and does not rely upon the EU-US one. As such, this measure is unnecessary.

36. **2003 Agreement on mutual legal assistance between the European Union and the United States of America.** The 2003 treaty was signed between the EU and the USA which required individual states to negotiate an MLA treaty with the USA. As such the UK signed its own treaty with the USA in December 2004 and so leaving this measure would be of little consequence.

In addition the measures above, there are a large number of SIS related measures, listed below, that ACPO does not have a view upon. Some of these are simply statements of intent, some are defunct, some are not used and some simply outside of the scope of UK policing. That does not mean that they should be discarded – their retention is simply not a matter for ACPO.

37. **2003/725/JHA - Amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.**

38. **2004/849/EC - On the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation’s association with the implementation, application and development of the Schengen Acquis.**

39. **2004/919/EC - Tackling vehicle crime with cross-border implications.**

40. **2005/211/JHA - Concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism.**

41. **2006/228/JHA - Fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism.**

42. **2006/229/JHA - Fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions**
for the Schengen Information System, including the fight against terrorism.

43. 2006/631/JHA - Fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism.

44. 2007/171/EC - Laying down the network requirements for the Schengen Information System II (third pillar).

45. 2008/149/JHA - The conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen Acquis.


47. 2008/328/EC - Amending the Decision of the Executive Committee set up by the 1990 Schengen Convention, amending the Financial Regulation on the costs of installing and operating the technical support function for the Schengen Information System (C.SIS).

48. 2009/724/JHA - Laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II).

49. SCH/Com-ex (96) declaration 6 - Declaration on Extradition and MLA.

50. SCH/Com-ex (98) 26 def - Setting up a Standing Committee on the evaluation and implementation of Schengen.

51. SCH/Com-ex (98)52 - Handbook on cross-border police cooperation

52. SCH/Com-ex (99)11 - Agreement on cooperation in proceedings for road traffic offences.

53. SCH/Com-ex (99)6 - Schengen Acquis relating to telecommunications.

54. SCH/Com-ex (99)7 - Rev 2 on liaison officers.

55. SCH/Com-ex (99)8 - Rev 2 on general principles governing the payment of informers.

TPMs that ACPO do not wish to opt back into

1. Council Act of 17 June 1998 - Convention on Driving Disqualifications (DD). This was designed to ensure that DDs are valid in each member state.
However, only the UK and Ireland have agreed the measure so in reality it is a bilateral which at this time suits the UK.

2. **1999/615/JHA - Defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties.** The UK can proscribe whatever drugs it wishes and is free to follow or ignore other states. As with the other drugs prohibition measures, it is not in the interests of the UK to be beholden to by the EU as to what should be proscribed. Although this has not caused any harm to the UK so far, in the interests of transparency it would be better for the UK to rely on the Drug Advisory Board and the emergency proscription measures that Parliament currently has in respect of drugs rather than be dictated to by an EU-wide measure.

3. **2000/383/JHA - Increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro.** In the UK, the Euro is treated the same as any other currency that is counterfeited and not as a special case.

4. **2002/188/JHA - Concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA.** See 1999/615/JHA, ante.

5. **2002/475/JHA - Combating terrorism.** This Decision relates to the adoption of common CT legislation and definitions. Most CT legislation in the UK is far stronger than other Member States and it is unlikely that any legislation agreed across the EU would be more robust than existing UK legislation. For this reason, it was advised that adoption would bring no benefit, as it may mean a potential weakening of UK legislation. In the area of proscribing terrorist organisations it is not helpful as it is not in the interests of the UK to have other states determining what organisations should be proscribed in the UK. ACPO take the view that this measure should not be adopted.

6. **2008/919/JHA - Amending Framework Decision 2002/475/JHA on combating terrorism.** This Decision only amends small parts of 2002/475/JHA so see above for details on why this TPM should be adopted.

7. **2002/996/JHA - Establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism.** This establishes a working group EU wide for the oversight of the way that CT matters are developed and to monitor expertise in various areas. There is a view that states where CT infrastructure is weaker than the UK’s could benefit from our inclusion however, the correlation between this aim and the measure is tenuous. We do not use this measure at present; it would commit us to a working group for peer evaluation on CT structures and could create a burden in terms of staff abstraction and bureaucracy.

8. **2003/847/JHA - Concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2.** See 1999/615/JHA, ante.
9. **2004/757/JHA - Laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking.** UK legislation already exceeds the issues raised in this TPM which makes it largely irrelevant.

10. **2008/206/JHA - Defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions.** See [1999/615/JHA, ante.](#)

11. **2009/936/JHA - Adopting the implementing rules for Europol analysis work files.** This is an unnecessary measure that is not required for our membership of Europol or Eurojust.

12. **2010/348/EC - Concerning the conclusion of the Agreement between the Government of the Russian Federation and the European Union on the protection of classified information.** ACPO forces have their own rules on the exchange of information with Russia. We do not use this measure and ACPO recommend against implementation as is in the interest of national security and good law and order that the various branches of UK policing decide both the general and precise ways that information is shared with Russia.

**TPMs that have been replaced by post Lisbon measures or are likely to be before December 2014**

1. **1996/747/JHA - Creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international organized crime.** This directory was closed down in February 2012.

2. **1998/427/JHA - Good practice in mutual legal assistance in criminal matters.** This measure basically required the member states to provide a statement of intent on how MLA matters would be dealt with. When the EIO comes into force at the end of 2014 (likely to be the same time as the TPMs move across) it will repeal all of the MLA TPMs. As the UK is signed up to the EIO, it makes these TPMs largely academic.

3. **2000/261/JHA - Improved exchange of information to combat counterfeit travel documents.** This is a defunct system that is no longer in use.

4. **2001/220/JHA - The standing of victims in criminal proceedings.** This Decision has been superseded by PE-CO S 37/12 and so no longer resides within the TPM.

5. **2003/577/JHA - Execution in the European Union of orders freezing property or evidence.** It is important to be able to quickly seize physical evidence and evidence although the current measures will be superseded once the EIO comes into force, removing this measure from the TPM list. As such, the issue of opting in/out is not a live one.
6. **2004/68/JHA - Combating the sexual exploitation of children and child pornography.** This Decision has been replaced by the post Lisbon measure Directive 2011/92/EU. As such it is no longer a TPM.

7. **2008/651/CFSP/JHA - The signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service.** No longer relevant. Replaced by the post-Lisbon decision on the 29th September 2011.

8. **2008/978/JHA - The European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.** Was never in force and will be replaced by the EIO.

9. **Council Act of 16 October 2001 - Establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union.** This ultimately led to the Crime (International Co-Operation) Act 2003. However, when the EIO comes into force at the end of 2014 it will repeal all of the MLA TPMs.


11. **Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security.** Without this provision, the UK would be free to continue to exchange with the US. The post-Lisbon decision OJ 2012/472/EU supersedes this measure and the UK has signed into it thus removing this TPM from the list.

12. **2008/334/JHA - Adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II).** This has been replaced by post Lisbon measures.
Association of Chief Police Officers, William Hughes, Aled Williams and Mike Kennedy—Oral evidence (QQ 229-248)

Association of Chief Police Officers, William Hughes, Aled Williams and Mike Kennedy—Oral evidence (QQ 229-248)

Evidence Session No. 14 Heard in Public. Questions 229 - 248

WEDNESDAY 6 FEBRUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Anderson of Swansea
Lord Avebury
Lord Blencathra
Lord Bowness
Viscount Bridgeman
Lord Dykes
Viscount Eccles
Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts
Lord Judd
Baroness Liddell of Coatdyke
Lord Mackenzie of Framwellgate
Baroness O’Loan
Baroness Prashar
Lord Richard
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Lord Stoneham of Droxford

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Lord Boswell of Aynho

Examination of Witnesses

Commander Allan Gibson, Association of Chief Police Officers, William Hughes, former Director General of the Serious Organised Crime Agency, Aled Williams, former President of Eurojust, and Mike Kennedy, former President of Eurojust and former Chief Operating Officer at Crown Prosecution Service.
Q229 The Chairman: Thank you very much for coming to give evidence to our inquiry into the UK’s 2014 opt-out decision. It is a very important matter, which has far-ranging implications for the UK and the EU. I will just begin, if I may, by briefly explaining the background to our inquiry. It is based on the Government’s expressed “current thinking” in favour of exercising the opt-out, but they have promised to consult Parliament before making a final decision. In order to inform the House of Lords’s deliberations, we launched an inquiry on 1 November last year, which is being conducted as a joint inquiry between the EU Sub-Committee on Justice, Institutions and Consumer Protection and the EU Sub-Committee on Home Affairs, Health and Education. We received a lot of written material before the end of the year and we are now receiving oral evidence from lawyers, academics, think tanks and NGOs, as well as serving and former police practitioners and prosecutors, such as yourselves, which will further inform our deliberations.

After the oral evidence sessions have concluded, which they do on 13 February, when the Home Secretary and the Lord Chancellor will appear before the Committees, we hope to publish our report, which I think will be just before the end of the current Parliamentary session in May. The report will cover both the merits of the opt-out decision and which measures the UK should seek to rejoin were it to be exercised. It is intended the report will inform the House’s debate and vote on the matter, which could take place before the summer.

As you know, this session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible via the Parliamentary website. A verbatim transcript will be taken of your evidence; this will be put on the Parliamentary website. A few days after this evidence session you will be sent a copy of the transcript to check it for accuracy and we would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence, or have any additional points to make, you are welcome to submit supplementary evidence to us.

Perhaps, if we could begin, you could introduce yourselves briefly. If any of you would like to make opening remarks that would be entirely acceptable to us. If, on the other hand, you would prefer to move straight into questions, that would be equally acceptable. It is entirely up to you. We have, in some cases, had written submissions from you and they are in the background briefing to the Committees and I am sure they have been carefully studied. Who would like to start?

Mike Kennedy: I am Mike Kennedy. I was the UK National Member at the very beginning of Eurojust and subsequently, in 2002, elected to be its first President. I was re-elected in 2005 and served as President until 2007. At that time I was appointed to be the Chief Operating Officer at Crown Prosecution Service, supporting the DPP in running that organisation.

The Chairman: Is that your present position?

Mike Kennedy: I retired at the end of last year.

Aled Williams: I am Aled Williams. I am retired as well. I am a solicitor. I worked as the UK liaison magistrate in Spain for several years and then I went to Eurojust. I succeeded Mike as UK National Member and was subsequently elected President. I retired last year.

Commander Allan Gibson: Good morning. My name is Allan Gibson. I am a Commander in the Metropolitan Police. I have a background in serious organised crime investigation and
I speak for the Association of Police Officers on extradition and mutual legal assistance. I have led the work to put together our response to the issues pertaining to the EU opt-out in 2014.

**William Hughes**: My name is William Hughes. I was a police officer for 35 years. I was the Director General of the National Crime Squad from 2001 until 2006, until I became the Director General of the Serious Organised Crime Agency. I retired at the end of August in 2010. I was the UK delegate on the European Police Chiefs Task Force from 2001 until I retired. I chaired the G8 Lyon-Roma Police and Terrorism Group on Policing from 2001 until 2008.

**Q230 The Chairman**: Thank you very much. We obviously have before us a wealth of experience in the fields that we are looking at. Do any of you wish to make an initial statement, or shall I lead off with the first question? Okay. The ACPO written evidence is very clear and explains that it deals with 108 measures that concern law enforcement—108 out of 133, I think, which are caught by the opt-out. I wonder if I could just clarify the scope of that evidence: should we take it that you have not assessed the various measures that deal with the definition of offences or on mutual recognition and judicial decisions, other than the European Arrest Warrant and taking account of convictions?

**Commander Allan Gibson**: That is broadly correct, Lord Chairman. We have concentrated on those that concern the judiciary or the legislature, particularly around law enforcement. We have left it to other more able bodies to comment on the other issues that you mentioned. As one addition to that, we worked on the presumption that the European Investigation Order will be introduced in 2014 and that will affect which of these instruments we can opt out of or will automatically be superseded and therefore have no effect. Our position on that is if that does not happen, the instruments that we have not considered in detail regarding Mutual Legal Assistance we think are very important and we would wish to retain them.

**The Chairman**: Thank you. If I understand correctly, what you are saying there is that you have not really considered the nearly 30 non-law enforcement measures on the list that are outside that area; your not referring to them in your written testimony has no implications either positive or negative.

**Commander Allan Gibson**: That is correct.

**Lord Bowness**: Perhaps you could tell us what preparatory work on alternative arrangements the Government has requested you to conduct in this area, on the basis that they are currently minded to exercise this opt-out?

**Commander Allan Gibson**: We have not been asked to conduct any preparatory work. It would be difficult to do that because you need to know the working hypothesis: which of the instruments we assume we are going to opt back into or not. It is also incredibly complex and we need to understand the reaction of other EU States and the issues around their law. Once we have a full understanding then you can do the impact assessment.

**Lord Bowness**: When you say that, presumably you are relying on the Government to be doing that work before they put the question to you.

**Commander Allan Gibson**: Absolutely.

**The Chairman**: So you are identifying something of a “chicken and egg” problem?

**Commander Allan Gibson**: Indeed.
Q231 Lord Sharkey: Notwithstanding that, can you tell us about how cross-border cooperation used to operate prior to the development of EU cooperation in this area? Are there any areas where, in your view, significant progress remains to be made?

William Hughes: To sum it up, it used to work very slowly beforehand and in a very convoluted and complex route. The real fundamental problem was of going through the Commission in order to ask to get into other countries to talk and investigate crime, to deal with the examining magistrates, to make a case for extradition and to try to find ways of sharing data where the mechanisms did not exist with other police agencies and law enforcement agencies. This was a very complex procedure because it was often only very serious cases that would be considered to be gone into in that way, so a lot of stuff fell by the wayside. It was a very difficult process: it is a personality issue sometimes, but it led to disagreements because there were accusations on both sides of people dragging their feet or not actually getting on with what was necessary. It was really a very convoluted and complex legal process, which I certainly would not want to go back to.

Commander Allan Gibson: What used to be the case is that all extradition work was done by the Metropolitan Police, whether it be to Europe or the wider world. With the introduction of the European Arrest Warrant, we have a standardised system that now works more easily, more quickly, is readily understood and is far less complex. The consequence of this is that the Metropolitan Police in 2009 stopped doing the work for Europe and left that to individual forces. That was partly driven by the fact that the number of cases we had to deal with was exponentially increasing year-on-year and people were using it because it was much easier to use. It is still the case that for extradition outside of the EU we have specialised officers trained to understand the complexity and other generalist police officers cannot do it. If we were to revert back to a complex system, we would have to think about how we did it and we would need specialist officers again.

Lord Sharkey: Could I just follow up briefly by asking, are you saying that under the old system there were cases which, in your view, should have been pursued, but were not?

Commander Allan Gibson: Yes.

Mike Kennedy: Can I add a little bit to this as well? Further to what Bill Hughes has said, I think that prior to these sorts of arrangements, the cooperation, and collaboration on investigation and prosecution often depended on individuals and an individual’s contact list or little black book of names and addresses of people that he or she could trust in particular countries. It was very much an individual approach and building relationships with people over a period of time, ensuring that evidence could be obtained or that legal problems could be overcome. Once that particular individual moved on to another post or retired, it meant that often those contacts were lost and that trust and confidence had to be rebuilt by their replacements.

By having Europol, by having Eurojust, we now have permanent networks into which prosecutors and investigators can plug to get information quickly and to exchange information quickly. Until these hubs or these networks were created on a permanent basis, it was very much a case of individuals within the police—certainly within the prosecution services—that had to be seen as the guru or as the person who had the contacts. It was very much a hit-and-miss arrangement. It was often very difficult if one was contacting an individual in another country to try and widen that, if you were not getting the answers that you wanted, to another person within that country it was because you did not appreciate the niceties of the relationships between the people whom you might be contacting. It was very much a hit-and-miss series of arrangements.
Aled Williams: If I could just underline what has been said about the delay aspect: there was a Cabinet Office survey back in 2000 that said on average a UK commission rogatoire letter of request going out to another European country could take something like a year and two months to be executed. That figure was only beaten by the fact that a request to the UK took even longer to be executed when it was received from a partner abroad. Things have improved, partly through, for example, the availability of direct transmission and the 2000 Convention. That has made a difference—not, I have to say, particularly so far as the UK is concerned. By direct transmission, I simply mean a judge in Madrid can send a request to a judge in Paris without passing through central authorities. That does not exist so far as the UK is concerned, but it has led to an overall improvement in cooperation.

William Hughes: All I was going to add is, of course, that the long drawn out process meant a lot of evidence was lost along the way as well. Evidence was disposed of, assets were disposed of: the game was up, basically, so it was only in certain circumstances. This led to real problems, particularly with many UK criminals domiciling themselves in Spain where they were virtually untouchable.

Q232 Lord Mackenzie of Framwellgate: I think Mr Kennedy has probably touched on one point that I was going to make, that the police service is a very resourceful and obviously progressive organisation in the sense that they will find ways of doing things. It is a “can do” organisation. In the light of that, and Mr Kennedy has mentioned it, you rely on contacts, people you meet on international courses and use that to the full. Could you not fall back on those procedures and measures if in fact we moved away from this cooperation? We have had evidence certainly from Members of Parliament—or a particular Member of Parliament—that being embroiled in this is a big disadvantage to the country. Do you think you could fall back on the old measures, or indeed the Council of Europe Conventions that were there prior to us moving to the arrangements that we are in now?

Mike Kennedy: Of course we could fall back; of course we could. We would have to, I suspect, so we would have to develop those sorts of relationships again.

Lord Mackenzie of Framwellgate: Are we not continuing to develop them? Surely police officers still contact their counterparts.

Mike Kennedy: I think they find that route one is quicker: that going to a hub where they can get clarity and, if they cannot, they can get the answer from someone across the corridor from another particular jurisdiction or series of jurisdictions. Certainly the prosecution service—which is also quite resourceful, I might say—tend to deal with lots of jurisdictions in their criminal cases. It is frequently the case that we would not just be dealing with just France or Spain, but could be dealing with an internet fraud that encompasses many jurisdictions within the European Union and outside. By going to Eurojust or Europol you can get answers to questions fairly quickly, not just to how things are done in France, Germany or Bulgaria, but also Norway, Switzerland or the United States even.

Lord Mackenzie of Framwellgate: Are you saying that these measures are absolutely critical?

Mike Kennedy: I think that speed is critical and the combined coordination and collaboration of action particularly. We heard from the Director of Public Prosecutions some time ago about the importance of, let us say, coordinated house searches or banking seizure orders or arrests at a specific time on a specific day in a number of different
Association of Chief Police Officers, William Hughes, Aled Williams and Mike Kennedy—
Oral evidence (QQ 229-248)

jurisdictions. It is vitally important that criminal networks are taken out at once in those ways.

Q233 Lord Richard: Did I understand you to say that the EAW processing is currently delegated from the Met down to individual forces?

Commander Allan Gibson: That is correct, yes.

Lord Richard: Is your experience that the way that has been handled within the different forces varies?

Commander Allan Gibson: My experience is that because it is a simple process, they are getting it right. We do interface with the CPS. It all comes to the City of Westminster Court in London. It is working. We are not having great difficulties. We do have difficulties with the variation that we get outside of Europe. We are talking about “Can it work in future?” and what we have is a single system. The idea of replacing it with a Convention system based on a 1957 agreement would need 26 different bilateral arrangements. That is why it cannot work. We cannot go back to that because, as mentioned earlier, countries have changed their law. Some of them cannot do it, legally. We also have nine countries that will not give us their nationals and some of the most populous countries in Europe—Germany, France, Poland.

It should not be underestimated how difficult it is to take your case into a foreign jurisdiction and prosecute it there: to get your evidence and get your witnesses all to attend. It is very difficult getting witnesses to give evidence in court, never mind asking them to travel across Europe. I cannot see us going backwards because crime has moved on. Crime has become far more internationalised. The figures from London suggest that up to a third of the people being arrested in London—250,000 every year—one-third of them are foreign national offenders, not British nationals. Half of those are from Europe. This is what has happened in the last 10 years. The idea of going backwards does not appeal to me. To do so would put public safety at risk. 93% of the people who are being moved on European Arrest Warrants are not British nationals; they are foreign nationals. A lot of them are fugitives from justice. The fact is that they are committing crime in the UK whilst they are here. What we are doing is using these instruments to remove them and to make the public safer. I do not think the public want us to be slowed down, to be less effective in the way we are dealing with an international problem.

William Hughes: If I may just add to that: a lot of this has been co-ordinated by SOCA and with SOCA liaison officers in Europe and around the world. You run into all sorts of problems around translation, interpretation and all the rest of it. That is why it works very closely with Eurojust. If I may just go back to Lord Mackenzie’s point, it may seem strange for an ex-cop to say this, but the last thing you want is cops running little contact networks, because that is not a professional system. The EAW gives us a professional system: it ensures that evidence is not lost; it ensures that processes are carried through properly; it ensures there is concern around the human rights of the individuals who are being looked after. It is not, dare I say it, any old boy’s network. That is the danger. We need to get away from that.

Lord Hodgson of Astley Abbotts: Did you say 80,000 out of 250,000?

Commander Allan Gibson: About a quarter of a million people a year in London are arrested.

37
Lord Hodgson of Astley Abbots: About one-third are foreign nationals; a third of arrestable crime in London is carried out by foreign nationals.

Commander Allan Gibson: I think the figure we have seen is between 28% and 32%. We have been doing that work for the last two years. We have an operation in London called Operation Nexus to identify the foreign national dimensions of crime in London. We are using immigration law to use the fact that if they are wanted elsewhere we can try and remove them from London.

Lord Rowlands: Has the European Arrest Warrant not also created injustices?

Commander Allan Gibson: Any system will create injustices. The case of Symeou: I do not want to see that. I do not want the system that I have to use being discredited by people being subject to injustice. My take on this is that it is a complex picture. It was said earlier on that if you go back to an inefficient system people will be denied justice because of the inefficiencies. It is a balance. In my professional experience, the introduction of the EAW has led to more people being brought to justice. It has been a better deal for victims.

Q234 The Chairman: Can I just ask about a point that has been made to us about the EAW by Dominic Raab, MP and Open Europe? They have stated that the high volume of EAWs received by the UK means that UK police forces bear a disproportionate cost and logistical burden relative to other Member States. Is there any basis in that?

Commander Allan Gibson: I can assist with that. Firstly, the EAW is a very cheap system compared with the alternative. Per unit cost is much, much lower. The second thing I would say is that the figures for last year, I think about 1,150 people were arrested by British police last year and taken out of the country. I did say the figures for London were a quarter of a million people a year. Compare that with 1,150 people. We are talking about a drop in the ocean. I think that that analysis is flawed, in my opinion.

Lord Avebury: Just as a postscript to that, do you think it would be possible to make any estimate of the additional foreign nationals we would have to accommodate in our prisons?

Commander Allan Gibson: I think about 15% of the prison population are foreign national offenders.

Lord Avebury: Not all of them would remain in our prison system.

Commander Allan Gibson: I can see that percentage rising because we would have to detain people for longer because the system would take longer to extradite them.

Lord Avebury: Could you give a very rough estimate of the additional number of people we would have in the prison system at any one time?

Commander Allan Gibson: I do not know; off the top of my head, we had 1,150 arrests last year so a percentage of those. I think the prison population is about 85,000, so it may add 1,000 or so to the number.

Q235 Baroness Prashar: Do you think that the UK police and our law enforcement agencies are using Europol and Eurojust as much as they could?

William Hughes: I can probably answer that. I carried out a review last year with the RAND Corporation of Europol’s working after the Lisbon Treaty to look at its governance arrangements. It did not touch on operational matters as part of that remit, but obviously that was an interest for me. Europol has moved on significantly from where it started, with
its new headquarters and particularly the new cyber crime centre. It is becoming a major player within Europe and with other agencies around the world with other third party countries. It is a very useful and constructive intelligence network; it is not an operational tool. It now provides huge intelligence support for all operations. As Allan said just now, if you are dealing with organised crime, it is invariably transnational and certainly across Europe. You need that cooperation. With Europol’s way of working they can bring all that intelligence. You get over all the problems with data protection issues between different jurisdictions. The data that is supplied through Europol is to the very highest standard, maintained and regulated and monitored to make sure it is done properly. That is a great support to UK law enforcement agencies and the police.

Baroness Prashar: What about Eurojust?

William Hughes: Eurojust has really solved a lot of problems. I am not saying that just because of these two gentlemen sitting to my right. As I said just now, the old processes were dreadful. This is my interpretation so I may be corrected on this: we had, if you remember, the issue about whether there was going to be harmonisation of law across Europe. That is never going to happen in my opinion. What it does need is magistrates and lawyers, prosecutors who can resolve issues as they arise in real time to help with operational matters in dealing with, for example, warrants, obtaining evidence, getting into other countries to search and seize evidence and to make arrests. Eurojust has, in my view, performed an excellent service in support of UK law enforcement in that regard.

Aled Williams: To mention an anecdote, it so happens that today in fact Eurojust is what we call a coordination centre that brings together prosecutors and investigators from involved Member States. They work in real time, as it were, so arrests are being planned and executed in the UK today. I think there are 36 planned in this particular case. This is something where I think the actual coordination of activity across different EU jurisdictions and in the UK would not be possible without Eurojust providing that platform there, of having people in contact with Europol’s assistance as well, their mobile office and so on. All of those things come together to ensure that there is a coordinated response to an organised crime operation.

Q236 Baroness Prashar: What about the Joint Investigation Teams? Do you think they have realised their potential or there is more to do?

Aled Williams: Increasingly, I think. There was a slow uptake, it is probably fair to say, in the early years, but that has increased fairly dramatically. Last year at Eurojust, I think 47 Joint Investigation Teams were formed. Of those, the UK participated in 14, effectively a quarter of them, which is a fairly high number. Another significant advantage is that Eurojust is there to provide funding to some extent for Joint Investigation Teams. It is a condition of any EU funding for a Joint Investigation Team that a national member at Eurojust be invited to participate in that team.

Baroness O’Loan: Can I ask you to repeat the figures you have given on the Joint Investigation Teams? I do not think they are the same as the figures we have received previously.

Aled Williams: Oh dear.

Baroness O’Loan: Perhaps you could ensure we have the up-to-date figures.

Aled Williams: Yes, of course.
Commander Allan Gibson: Can I just say something about Joint Investigation Teams? There will always be a low volume, very highly effective system. I have seen it at work in London. In our written evidence, we told you about a couple of cases. One was Operation Golf, which was a situation where we had children from Romania being trafficked into London, they were being sent to work to commit crime. They were being sold; effectively criminals were selling them to commit crime. A joint investigation led to the arrest of the network in Romania. We were arresting the people in the United Kingdom. It would not have been possible without officers in their jurisdiction using their powers, sharing the evidence. I think we have to realise when we are talking about instruments you can talk about them individually, but they are integrated: you use them together to get best effect. As we are building this system to opt in or out of them, one thing I would ask the Government to think about is how they do integrate and how you get the leverage by using them together.

Lord Mackenzie of Framwellgate: Just a final point. Dealing with this question of increased numbers of applications for extradition and increased cooperation leading to many arrests and so on: is this not a good and efficient means of getting rid of undesirables who are living in this country?

William Hughes: Absolutely, and there are enormous numbers of Italian mafia and organised crime criminals that we arrest in SOCA and the Metropolitan Police arrest and put back to Italy. After the 22 July incident in London in 2005, one of the offenders was arrested very quickly in Italy and brought back here. We also have Operation Captura running with Crimestoppers, which has brought back to this country a lot of people, including those who were on the run after murdering police officers who have been convicted and escaped from prison, but also drug dealers and paedophiles that have been living in Spain and the Netherlands. All of that would not have been possible without the increased cooperation between European police forces, coordinated by Europol and with the help of the European Arrest Warrant, which speeds up the process so dramatically.

Q237 Lord Hodgson of Astley Abbotts: I think quite a lot of this has been covered already, but as you may imagine UKIP has made clear its concerns about the nature of Europol and Eurojust. There have also been questions about effectiveness and value for money from Open Europe. I think you have spoken quite a lot about effectiveness. I would like to hear something about value for money, the costs and the returns that we get.

Mike Kennedy: From a Eurojust perspective, I know you heard evidence earlier from the Director. The input from the national Member States is simply to pay for their representatives to be there. It is effectively a salary and any accommodation costs that are incurred. It is a relatively low input. The structure of the organisation is that each of the national members, the 27, are members of the management board and so they are not paid by the European Union; they are paid by the Member States so they can make effectively independent decisions about the running of the organisation. The input from the Member States is minimal for the return. The budget of Eurojust has increased since I was there. I think that there is to be—and it is indeed going on at the moment—an evaluation of Eurojust. No doubt that will give some feedback on the effectiveness in terms of value for money. Eurojust often deals with missing trader, intra-community fraud cases, VAT fraud cases and resolves some of those cases that often involve not only EU Member States but also states outside the EU. Solving one of those cases can effectively save many millions, if not more, pounds of VAT. The input and return there is clearly value for money.
William Hughes: In relation to Europol, the effect of the Lisbon Treaty was to change it from a convention into an institution within the EU and therefore subject to MEPs in the European Parliament. As I understand it, the leader of the UKIP is an MEP so he has the opportunity to ask those questions and go through that process in a properly audited focus within the European Parliament. What we saw in the review that we were carrying out was that Europol is working very carefully under its British Director to make sure that it is providing value for money. Now, the test is in the audits that are carried out; Europol is subject to many of those.

Q238 Lord Hodgson of Astley Abbotts: You say to us that the only cost to us is the salary of our representative at Eurojust, but that is only part of the answer. What is the total operating budget of Europol and Eurojust per annum? What does it cost to put them in the field?

Aled Williams: I think the budget for Eurojust last year is something like €33 million and probably double for Europol.

William Hughes: I do not know what it is for Europol.

Lord Judd: Could I just double-check something you are saying, because the strength of your argument is that whatever it costs—and obviously you want value for money—one must as a primary discipline ask what it would cost not to have those arrangements in place. That is your point.

Mike Kennedy: Yes. That is one of my points.

Lord Elystan-Morgan: Put it another way, I suppose that there is an unquantifiable figure that would go on the other side of the balance sheet of the crimes that these persons would have committed had they not been removed from our jurisdiction.

The Chairman: Just following up on Lord Hodgson’s point, I think I am right in saying you have given some rough figures for the cost to the EU budget of Eurojust and Europol. I think I am right in saying that if we opt out the cost will be almost precisely the same and we will still be bearing it.

William Hughes: Opting out does not change the issues around the Lisbon Treaty and through the Lisbon Treaty we are committed to remaining within Europol. The question is moot.

Lord Anderson of Swansea: And the cost of course of keeping these people in prison in the meantime. What strikes me is that, analysing the evidence we have received, in one corner is the Government, UKIP, Mr Dominic Raab MP, Open Europe, but all of the practitioners appear to be speaking in another corner. How do you explain that?

Mike Kennedy: I suspect it is because we have the practical experience of dealing with these cases both before the third pillar became established and afterwards. The difference is phenomenal.

Commander Allan Gibson: Precisely that. When you see it working you see how quickly you can do something and you see the level of cooperation, how all this fits together. There is a case that was brought in yesterday when a guy from Croatia was arrested for war crimes, murdering a female during the troubles in the last decade. He has been arrested on a European Arrest Warrant and put before a court. He will be removed from the country quickly. He was working as a road sweeper in London. This is the practical effect: when
you see that type of thing coming in daily across your desk, you see how people are brought to justice, how victims are satisfied. You are then thinking, “Why would you want to do something that is going to be less effective?”

William Hughes: If I could just respond to that question. It is a very, very good question. The problem is, if there was a logical reason for what was being proposed in the opt-out, I am sure we would all subscribe to it. However, we have not seen that logical reason. It has not been put before us compared with everything we know of how it works so well now.

Lord Richard: It was very interesting hearing the last series of answers. It seems to me that your view is pretty unanimous and it is pretty clear that it is that it would be wrong to opt out of the EAW and similar measures. Have you put this to the Government? I am sure you have. I am sure they are well aware of your position. Have you had any response from them?

William Hughes: I have written to the Prime Minister and to the Deputy Prime Minister and had a response.

Lord Richard: Have you had a response from the Home Secretary and Ministry of Justice as to why it is they want to opt out of these things?

William Hughes: No.

Lord Richard: They tell you why they want to opt out, but at the same time, they say to you something like, “Well, of course we have to opt out because it is part of the mass opt-in/opt-out, but of course they can opt back into the EAW.” Have they said that to you?

William Hughes: That is the point that has been made.

Lord Richard: They have actually said that to you?

William Hughes: Yes; I find it somewhat incredulous. There are issues with those 130 items, we all know that, and they have been worked through. I do not think any of them actually harm the United Kingdom, so they can be dealt with. With one of the processes that was suggested to me, the argument put to me was, “We need to improve the EAW so we will work with our partners to improve the EAW. When we have got it right, we will opt out and then opt back in again.” My answer to this was “Why? Am I missing something here?”

Lord Richard: Did you get an answer to that question?

William Hughes: No, I am still waiting.

Q239 Lord Hodgson of Astley Abbots: Are you aware of the “iceberg” and do you agree with the iceberg? The iceberg of this is, yes, there are these cases, absolutely terrific cases about Croatia that you talked about and so on. However, there are UK citizens being extradited on the European Arrest Warrant who are held in pre-trial detention for long periods of time because they go long before it is trial-ready and in certain cases with inadequate evidence. They do not get the hearing. We hear about the great things that go so well. We do not hear about the people, the little battalions who are held in a Spanish jail for a year-and-a-half on inadequate evidence. Where are their voices going to be heard?

William Hughes: In December last year, we had the option to sign up to the European Supervision Order, which would allow people to be bailed and remanded in their own
Country of nationality while waiting. That is half the problem with Symeou. That has not been signed because of the hiatus over whether we sign up to the opt-out.

**Lord Hodgson of Astley Abbotts:** So the only answer is to go on further all the time?

**William Hughes:** Lord Justice Baker as I understand it did a review which led to the EAW being seen to be valuable. Yes, there are issues with it and those need to be addressed. No one is disguising that, but in Symeou’s case a lot of that was due to the poor quality of the prisons in Greece rather than any defect in relation to the European Arrest Warrant. If the European Supervision Order was in place then these numbers of UK citizens—which I have to say I do not think are that many—would have the option of being held in this country until their trial is ready in the country that is asking for their extradition and their warrant being served. There are ways to deal with this without breaking it all asunder and trying to put it back together again.

**Commander Allan Gibson:** Can I just say that ACPO have argued for a proportionality clause right from the start and we have supported everything that has been possible to do something about that, whether it be amending the codes, bilateral discussions with the Poles? It is true that the numbers are going down from the Poles. They are trying to do something about that. The European Supervision Order is part of the answer; it is not the only answer. However, is it possible to go on and solve the problem? I do think so. Can we consider things like a European summons as an alternative to an arrest? We do not arrest everybody in the United Kingdom; you can be summoned to court. There are ways you can solve these problem, but if my car is misfiring or not running properly, I do not trade it in for a moped.

**The Chairman:** I just want to check on this issue of the European Supervision Order. Have the Government given you any reason why they did not implement the European Supervision Order, given that if they had done so, those provisions would be available to British citizens arrested under a European Arrest Warrant and would have enabled them—and would be today enabling them—to be bailed in this country and only sent to the country demanding their extradition when the trial was ready. Have they given any reason for that?

**William Hughes:** I have not raised that issue with the Government. It is from reporting that I have seen and I have checked with those who are in a position to say whether this is correct. It would seem that it is because the civil servants are waiting for ministers to declare whether the opt-out procedure will go through before they enact it. That is as far as I know.

**The Chairman:** It is pretty bad luck on anyone who does not get bailed as a result.

**Q240 Lord Blencathra:** Before we leave this point: your evidence in 4.2.9. does mention the Symeou case, and presumably you are aware of the dossier of all the other cases of injustice raised by Fair Trials International, and yet you dismiss them as problems which may be solved one day. Do you think ACPO has got any credibility left in these matters? After all, ACPO supported intercepting 56 million innocent citizens’ emails in the Draft Data Communications Bill, a Bill that was shredded by a Joint Committee of these Houses. You supported 90-days detention without charge. ACPO does seem to give the impression that there is no totalitarian measure that it will not support. Why should we pay attention to what you have to say here?

**Commander Allan Gibson:** I do not think that is our position. If I can say that what I am asking the Committee and the Government to bear in mind is the fact that individual cases

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Association of Chief Police Officers, William Hughes, Aled Williams and Mike Kennedy—Oral evidence (QQ 229-248)
are very important, but public policy is made in its entirety across the piece. You have to take into account what is happening with the greater effectiveness of the systems we have now and the number of people brought to justice with greater satisfaction for victims. Justice Across Borders is an alternative organisation that has just been formed. I know they are citing cases of where the same jurisdiction in Greece where British nationals have been extradited to Greece for very serious assault where a victim got justice. I can put one case against another. I am not saying that that is the way you should make public policy. I think we should make it in the round, taking into account all the costs and benefits, all the downsides and the upsides, which in fact is what Lord Justice Scott Baker tried to do.

Lord Blencathra: I thought your maxim was better that 10 guilty men go free than one—just one—be convicted.

Commander Allan Gibson: That is not my position at all.

William Hughes: When I spoke at the Law Society recently, Fair Trials International also had a speaker there supporting the European Arrest Warrant. It is seen as a proper system. Yes, there are issues that have to be dealt with. This is not ACPO or the police supporting it; this was brought in through EU legislation supported by Parliament. We make legislation work. The other comments that were made are irrelevant to this issue and insulting.

The Chairman: Fair Trials International gave testimony to this Committee. It is on the record and it will be picked up in our report. It does not lend itself to characterisation in either direction of opting out or not opting out. They are concentrating on the problems that have arisen and the need to remedy those sort of problems. I think that is on the record. Now I have got Baroness O’Loan and Lord Elystan-Morgan.

Q241 Baroness O’Loan: My first question may be outside the remit, but you told us that the Government have not asked you to do any preparatory work in respect of the proposed minded opt-out. However, I just wondered: you have described a lacuna that will operate if they do opt out. Given that there is no automatic right to opt in—there is simply a right to apply to opt in—have you done any work or had any thoughts about what the consequences of that situation might be?

Commander Allan Gibson: It was part of our considerations. I understand that under the Lisbon Treaty arrangements there is a right to opt back in and there are arrangements by which that can be done. I also think that we have been important partners in combating international crime across Europe. We have led the way; many of the things we have suggested have been implemented. SOCA national threat assessment is now being replicated throughout Europol and we have a European Serious and Organised Crime Threat Assessment. That is one of the things that the British proposed. There is a great willingness that we should continue to make a contribution—whether it would be easy to do so. There is goodwill towards us and a desire to solve these problems because other countries also benefit.

William Hughes: While I agree with what Allan said: there is a well of goodwill, but it is being rapidly drained. I know this is personal and this is subjective, but the comments that were made to me by long-time friends concerned the response of other politicians that they worked for who were becoming a little more than irritated. It is not how you expect, as I put it in my submission, the honest broker to operate. It seems to come back to the question here—where is the logic?—and that is what they struggled with.
Baroness O’Loan: Could I also say that I thought this was an excellent submission that you made, in terms of the clarity and depth of it?

Q242 Lord Elystan-Morgan: Whether ACPO had form or not in relation to unprogressive attitudes is not really a matter within the remit of this Committee, as you appreciate. One person who has not got form is Lord Justice Scott Baker. It seems to me—I made this point earlier before you came in—what he is saying is, “Yes, there are weaknesses”. This is not unknown—in every human system there are weaknesses. The main weakness, he says, is the lack of proportionality, but he says that can be ironed out and should be ironed out. Then he applies his mind to this point: even if it is not ironed out, it is still better to have the European Arrest Warrant than not to have it. Am I summing up correctly?

Aled Williams: You are spot-on and I think it is true to say that so far as proportionality is concerned, the lawmakers in the EU have learnt of the difficulties and so far as the European Investigation Order proposal is concerned, there is express addressing of that proportionality problem.

Lord Elystan-Morgan: The Director, when the question was put to him, agreed that it may very well be that through mutual restraint and self-denying ordinance among the 27 countries, it should be possible without any new machinery to iron out the problem of proportionality. Do you agree with that?

Mike Kennedy: Yes. The important thing to remember with the Warrant is that it was agreed and implemented I think in the first week of January 2004. That was when the European Union was 15. The 12 new Member States coming in had to adopt that position in toto. There were not any negotiations so the Polish with this problem of legality brought with them the issue of proportionality that was likely to arise. Perhaps the time is ripe now almost 10 years on to re-negotiate and try and iron out some of these fairly obvious issues.

The Chairman: I think we must move on because we still have quite a list of questions and time is pressing.

Q243 Lord Avebury: Some people say that the opt-out would protect the UK from the Commission’s imagined ambitions for the development of a pan-EU criminal law code enforced by a European public prosecutor. How do you see that?

Mike Kennedy: It probably would if there was this plan for a pan-EU criminal law code, but I am not sure that there is. There has been talk, going way back to the days of proposals for the corpus juris, for there to be a pan-European criminal code. My experience, and I still sit as an expert on a consultative panel for the Commission in the EU on criminal law, is that whilst there are no doubt some individuals who are pushing in that direction, the overall view is that this is something that is not going to happen, certainly in the foreseeable future. There are plans for a European public prosecutor set out in the treaty and there are plans being put in place to find nine Member States, the requisite number, to push ahead with that. The plans appear to be that this will be a European public prosecutor who will operate within the domestic criminal legal systems applying the domestic criminal law. It has not been decided finally yet, but that seems to be the direction of travel. Clearly the UK does not have to be part of a European public prosecutor. We have preserved our right not to be part of it. The Government, and indeed previous Governments, have made it very clear that the UK will not be part of a European public prosecutor. I do not think that the opt-out, whilst it might add something further to the belts and braces we already have, adds anything.
The Chairman: I think I am right in saying that Britain's position with regard to the public prosecutor is covered by a completely different provision in Protocol 36, a provision that is absolutely watertight and makes it clear that if we do not wish to participate in it, we will not participate in it. So the issue of Protocol 36 is frankly irrelevant to that because that is a completely different opt-out. I think that is right, is it not?

Mike Kennedy: That is right.

Q244 Lord Rowlands: Mr Kennedy, in your evidence on page 5 you discussed the reason for the opt-out decision. You gave two reasons, the second of which is the avowed intention across the European Union to create a criminal justice jurisdiction. You then go on to say that this point, however, can be blocked in ways far less damaging to the UK than invoking an opt-out, particularly with the opt-backs. Tell me which are the ways in which this thing can be blocked. What do you mean by that phrase in your evidence?

Mike Kennedy: Could you just remind me what section?

Lord Rowlands: It is on page 5. It is under the section “The Reason for the Opt Out Decision”, the last sentence. “The second point might be a desire in the minds of a small number of committed Europhiles but it is a desire that can be blocked in ways far less damaging to the UK than invoking an opt-out.” What are the blocking ways?

Mike Kennedy: We have an option not to engage in the European public prosecutor.

Lord Rowlands: Is that the only point you are making? You do not have any other ways?

Mike Kennedy: We can negotiate. Our voice is generally very strong and we usually find a number of allies once we take a position. “Block” is perhaps too strong a word in terms of individually blocking but we are extremely influential and I do not think we use that influence sufficiently to deal with some of the challenges that we are facing at the moment. An opt-out is a nuclear response. There are other ways of dealing with these things.

Q245 Lord Dykes: I suppose looking back over the last 20 years, we can be very proud of the contribution made by senior police officials and PCJ experts from Britain in the development of an historic record of police and justice cooperation across borders and having a major role in that. In a general sense then, what would the standing of the UK be if it suddenly pulls out of all that and says “We do not want to know anymore”?

William Hughes: After 10 years with the European Police Chiefs Task Force, which is now part of COSI, the security committee that has been formed afterwards, the general view was always that—this is not a personal issue—the UK was listened to because we were seen as straightforward, we had some good ideas and we led by example, particularly with JITs, the Joint Investigation Teams. Many times we were asked to lead them even though we had a limited locus in relation to the matters that were being dealt with simply because we were seen as the trusted partner. I said in my written submission that, whilst in this day and age people may say that is all hooey, it is not relevant or important, in my view it is because when the chips are down and you need to get going pretty quickly, the relationship where the UK is trusted is a good one. The Metropolitan Police and other forces have benefited from the fact that they can talk straight away with their colleagues in Europe through Europol and with Eurojust support in a way that did not happen before. As I said, in the discussions with colleagues, they are very unhappy to lose that. They are disappointed with the attitude that is being taken now. I do not think it will be the case that will it translate
into bloody-mindedness or that sort of problem; these are professionals. It is a sad place for the UK to be, though.

**Lord Judd:** Can I ask a supplementary on that? You are talking about a critical area of operations and the influence we have on improving performance and all the rest. You also have mentioned your sense of increasing frustration and irritation on the part of others by Britain’s role. Do you think that what happens at your level plays back into the policy forums of the Council itself? For example, what would the effect be on the Standing Committee on Internal Security? Would it increase our influence or decrease it?

**William Hughes:** Well, that is COSI as I referred to just now. That is the Standing Committee on Internal Security. It is not for us or me in my previous role as a practitioner to dictate Government policy. There is no way of doing that. What I am concerned about, which is not irritation and frustration, is at the level where you have been trying for 10 years to really get things working effectively and across Europe it seems, sometimes, it would be nice if somebody asked us what the effect of some of this might be. That is one of the issues where there is a bit of concern really. It is not about being a prima donna, but there are results and consequences if you take certain actions and would it not be nice to ask people who know about it?

**Lord Judd:** Do you think it is conceivable that all of these issues would arise where you are working without playing into the more major policy-making bodies as well?

**William Hughes:** I would like to think that there is a route by which those things would be fed back in. I am sure that is happening; I would like to think it is happening. I wait to see a firm result.

**Lord Judd:** Can I ask one other question? Some of you have been intimately involved, career-wise, in the police. When you are dealing in other spheres with what could be described as a crime—I am not using that word in this particular context—it is quite important to look for a motive. Having grappled with the consequences of Government policy for a certain time, what do you think the motive is?

**William Hughes:** I do not know. I would like somebody to tell me.

**The Chairman:** I think you are asking our witnesses today to answer questions that are a bit beyond their area of responsibility and so if you do not mind I think we will drop that kind of question.

**Lord Judd:** Lord Chairman, I accept your ruling naturally, but I do not happen to believe there is an absolute dividing line between the two.

**The Chairman:** No, but I have to say that on 13 February you will have an excellent opportunity to ask the Home Secretary and the Justice Secretary what has motivated their decision to be minded to opt out and we will all be listening to their reply with some considerable interest.

**Q246 Viscount Bridgeman:** The implications of our withdrawal from bodies such as Europol, Eurojust and CEPOL have been addressed in a very positive and, dare I say it, very unequivocal way. Are there any additional implications respecting Northern Ireland and the Republic of Ireland?

**Commander Allan Gibson:** I have had a think about that. They are the only part of the UK that has a land border with another EU state so I think they have particular concerns.
think also with the peace process that has been going on for a whole lifetime, there are issues around balance and the need for even greater and more effective cross-border cooperation. I think it was mentioned earlier—I was listening into the DPP’s evidence—that the change of law in the Republic of Ireland means that they could not give effect to a fallback position around the European Arrest Warrant. So, trying to manage the tensions in Ireland—North, South—without the ability to extradite effectively seems to me very difficult.

Baroness Liddell of Coatdyke: I am actually lodging a distillation of what has gone before, basically a comparison. Could you give us some idea how the United Kingdom’s cooperation with non-EU countries on issues like cross-border crime and extradition compares with Member States in terms of speed and effectiveness?

Commander Allan Gibson: I will answer that. I think there is a bigger difference around extradition than there is around Mutual Legal Assistance. The EAW system is so much more efficient now and we can do things so much more quickly and cheaply and with greater certainty. It is far easier to extradite to and from Europe. With regards to Mutual Legal Assistance, it depends on the quality of bilateral arrangements. We have Mutual Legal Assistance treaties with most of the developed countries in the world. We do not differentiate when it comes to a Mutual Legal Assistance application between Europe and other parts of the world. They tend to be treated in a very similar way. We have not yet developed within Europe a European Investigation Order to the extent where we have that uplift in efficiency. We are pretty much still at the same level. If we do achieve that, we might get the benefit of the greater cooperation, but at the moment there is not much difference between Mutual Legal Assistance within Europe and good partners developed in countries outside of Europe.

Aled Williams: It is probably important to distinguish between partners outside Europe in various categories. The relationship with Norway, for example, is going to be very different to the relationship with Afghanistan or Somalia. I think that has been partly addressed within EU institutions. There would be, I think, a considerable practical difficulty for the UK if we, for example, lost the ability of the Europol liaison network and also if we were not in a position to take advantage of Eurojust’s proposal to have liaison magistrates sent from Eurojust to third countries—places outside the EU.

William Hughes: Europol does have representatives of third parties, whether the United States, Australia, Canada or other countries not within the EU, so there is a much better process by which it is marshalled and co-ordinated in terms of data flow and information flow to other agencies. But you also deal with other countries that are not within the range of normal mutual legal support; to give one example, there was a treaty made with Colombia in the 19th century enabling extradition. Until around three years ago no-one had ever been extradited because it was so complex. We did that through SOCA with a drug trafficker, but it is a very complex process. It just highlights the problems.

Mike Kennedy: I think the immediacy of the structures we have allows investigators and prosecutors to come together very quickly to do real time tracking of drugs that might be moving across Europe in a controlled way or people trafficking networks. Organising similar arrangements, let us say, with the United States and Canada, or with African countries, would be very difficult. However, if the UK was outside Eurojust, it could not use Eurojust to bring those countries in because Eurojust and Europol—as we have heard—do bring countries in from outside the EU to help with their investigations if they are a legitimate part of the criminality and are investigating it. Part of the advantage of these structures is that
information that is held in different parts of the European Union can be shared. Often, it is not shared. It might be a group involved in tracking people trafficking in, say Greece, suddenly find they have telephone numbers of those attending a meeting, a chart comes up on the wall showing telephone numbers of people in the UK or Sweden and they can suddenly say “We know what these telephone numbers are now; we did not know they were linked to Sweden”. It is this immediacy that we would be opting out of and depriving ourselves of an opportunity for some very straightforward investigation to be done in collaboration with others.

Q247 The Chairman: Can I just try and understand one part of your written testimony? You listed in a particular place, I think, 12 policing and justice measures that you thought it was not in the UK’s interest to opt back into. I am not clear in my mind whether you came to that conclusion because you thought they were damaging to the UK or merely that they were not of great interest to the UK, but were completely neutral. Would any of them create problems if the UK did not exercise the opt-out.

Commander Allan Gibson: No. We are not saying that they are problems major now. Our judgment is based on the type of instrument. For instance, we do not need Europe to tell us which drugs are harmful or proscribed drugs. We do that quite effectively ourselves. Some of the ones we have said we would not have to opt back into are around counter-terrorism and are so far behind where we are in terms of our counter-terrorism legislation that there is no point. We do not have a problem with them; we just cannot see a need to opt back into them, but if we did it would not cause us any problems.

Lord Rowlands: The biggest impression left on me from our meetings in Brussels last week was that Commission officials laid huge emphasis on what they called coherence in any attempt to opt back in. It is actually part of the treaty obligation. They have an obligation to respond to us positively as long as we are “coherent”. So that means, does it not, that we cannot say, “Yes, we want to join Europol but not Eurojust”? I think that would certainly offend the principle of coherence. How interconnected do you believe the PCJ measures are? In other words, could you devise for us the “block” we would have to opt in for in order to qualify us for this criterion of coherence?

Commander Allan Gibson: We have tried to argue that in our paper and say these things are interconnected. If you start from a need to investigate an offence and then build a case, put it through a prosecution and then give effects to hold the perpetrator to account, we are using a whole range of tools. We heard earlier on from the DPP about how we use criminal information. What was not said, for instance, is that when we get information about people’s convictions—often UK nationals abroad—we get that back, it comes to the United Kingdom, and they are subject to sex offender registration and sex offender management. We use the same information for similar fact evidence in court and there are people convicted of rape because they have raped another woman in another country on another occasion when the facts were compellingly similar. So what we are saying is that we are using these things—if you take the cradle to grave from an investigation through to making someone serve their sentence—and if you take one out, you are actually weakening the system.

Q248 The Chairman: So you are basically saying, I think, that this issue of coherence between some of these measures is a real issue, not just a piece of imagination. The Commission spoke to us at some length about it when we were taking evidence in Brussels. They also pointed out that they could not analyse the issue of coherence until the
Government could tell them which matters they want to rejoin in specific terms. You are really confirming the view that there could be a serious problem here in some cases.

Commander Allan Gibson: Yes.

Mike Kennedy: I have two quick, practical examples. On the European Arrest Warrant, Articles 16 and 17 places two requirements on Member States. One is for them to consider referring competing warrants—warrants issued to the same person for different offences—to Eurojust to seek advice. So there is a linkage there between the warrant and Eurojust. There is also a second linkage in that Member States who fail to meet the time limit imposed by the European Arrest Warrant should report that failure to Eurojust. Eurojust has, in its annual report, reported these figures. So there is a linkage in that way, and there are lots of other linkages. There is a decision that Member States should supply copies of letters of request in cases where two or more Member States are involved in serious and organised crime so that information can be collated and other Member States might be more easily aware of investigations that are going on in one jurisdiction that might be linked. Frequently with people trafficking, drug trafficking and internet crime, separate investigations are going on in different groups of countries around the European Union, often quite independent of one another, when they could benefit from collaboration. That links Europol and Eurojust together.

Lord Rowlands: I think you have listed 29 central measures. Your proposal for the Government is that if they are going to opt in, they would have to opt into 29? Is that right?

Commander Allan Gibson: I am just checking the number. 13 are vital and there are 16 that we should opt into.

Lord Rowlands: Yes. That is your bit as it were.

The Chairman: Thank you very much indeed for having come along this morning and given us so much of your time and your experience, which is all valuable to us and which we will no doubt make good use of in our report. That is why we are grateful to you for that.
With regard to you Call for Evidence concerning the above and your request for comment, the Association of Chief Police Officers Scotland (ACPOS) would like to submit this response.

There are currently 133 measures which would be removed under opt-out, the most impactful of which being the European Arrest Warrant (EAW), Europol, Schengen Information System II (SIS II) and Joint Investigation Teams (JIT). These measures provide efficient processes and clear communicative lines, allowing Scottish Law Enforcement to carry out investigations effectively, both within the confines of our jurisdiction and that of fellow Member States. Opt out will mean these measures will become unavailable to UK Law Enforcement.

With the transient nature of criminals in today's society, incidents involving Foreign Nationals are now a daily occurrence. It is assessed that should there be opt out, removing access to the measures referred to, officers within Scotland would be disadvantaged and would experience bureaucratic processes, effectively removing them from front line duties for prolonged periods. In recognition of this issue, Scotland has announced the establishment of their first dedicated Fugitive and Extradition Unit.

On 15 October 2012, UK Government announced that their current thinking was to Opt-out of all Pre-Lisbon measures and to negotiate to opt back into a selection of Pre-Lisbon measures, which they consider to be in the UK’s interests. It is not clear if the EU would agree to selective opt-in at a later stage. There is, therefore, the risk that all measures would be permanently unavailable.

Consultation between Scottish Forces has resulted in an informed consensus that opting out would leave the UK vulnerable, seriously impacting on our ability to tackle criminality committed by Foreign Nationals, especially as this relates to Serious Organised Criminality.

Detail

Background

Forces throughout Scotland have come to expect a degree of efficiency when dealing with investigations in the international arena. Recent enquiries have proven the need for cooperation with primarily European partners, and with the current mechanisms in place matters can be dealt with in an efficient and effective manner. Reverting to the processes previously utilised would be cumbersome and unwieldy; effectively, a retrograde step in modern policing.

Whilst there are approximately 133 Directives incorporated in this discussion, there are a number of key measures which would significantly impact on the daily business of front line officers.
Issues

European Arrest Warrant

The European Arrest Warrant (EAW) is perhaps the most important of the measures that fall within the 2014 decision. For the past eight years it has been an effective tool in policing, which enables us to deal with transnational crime and criminals more effectively. It is a simpler, faster, cheaper and more reliable system than those that pre-dated its introduction.

Within Scotland we have seen an increase of 35% in EAWs issued from 2011 to 2012. Whilst this only represents an increase of 11 warrants, it indicates the increase in awareness of the transient nature of our criminals.

One of the major reasons why it would be undesirable to return to the 1957 European Convention on Extradition is the changing nature of crime within the UK. Organised Criminality does not respect geographical boundaries and with the ease of travel throughout Europe, the trans-national criminal is far more prevalent than ever before.

Forces across Scotland have welcomed the reduction in bureaucracy through the introduction of the EAW process. An Opt out of the current agreement would significantly increase bureaucracy, operational inefficiency, the time taken to extradite a suspect and ultimately cost to the public purse.

Europol/JITs

Current Europol’s role allows for a timeous exchange of intelligence, information allowing investigators to work collaboratively across jurisdictions.

Recently Forces have obtained electronic access to the European Intelligence System which allows individuals to be checked and an indication obtained as to which member states hold information about that individual. This is an invaluable tool to law enforcement. Again it would not be beneficial if the UK Government were to opt-out of this measure as it would frustrate the ability of UK law enforcement to effectively tackle organised trans-national crime.

Under the Europol arrangements we have seen the emergence and growth of Joint Investigation Teams (JITs) to tackle specific cross border crimes or organised crime groups affecting member states. These working arrangements have proved effective and successful. JITs, by bringing together investigators from different countries who retain their powers in their jurisdictions and their access to information and systems, are able to work more quickly and efficiently. Things that previously would have required international letters of request to get done can now be undertaken using investigators and prosecutors from within the JIT.

Opting out en bloc could mean an end to the UK’s ability to access Europol’s policing databases and prohibit the exchange of police information in the way that we see now.
The European Criminal Record Information System (ECRIS)

ECRIS enables the UK to notify other member states of an individual’s previous conviction. This is a reciprocal process. Its operation is underpinned by pre-Lisbon measure which requires courts within a member state to take into consideration any previous convictions the offender has obtained in another member state. It is clearly logical that the UK’s courts should be fully sighted on an offender’s criminal past when dealing with them.

Opting out of this measure would severely impact on the ability of UK law enforcement to fully assess the risks and criminal history of foreign nationals residing in the UK.

Schengen Information System II (SIS II)

SIS II will go live in October 2014. SIS II is an EU-wide, IT enabled, business change Programme that will enable all participating States to share real-time information on persons and objects of interest to law enforcement via a series of “Alerts”. These “Alerts” will be made available via the national police system, in the UK’s case this will be the PNC.

There are five types of alerts that law enforcement officers can either create or respond to depending on the circumstances and policy:

- Persons wanted for extradition to another member state (i.e. for whom and EAW has been issued)
- Missing persons
- Requests for a locate report on witnesses and people for court appearances
- Request information reports on major criminals and linked vehicles
- Stolen vehicles, trailers, firearms, identity documents and registered banknotes

The UK has been planning for the implementation of SIS II for a number of years and has invested millions of pounds in the project. To opt out now would not make any sense financially or operationally given the importance attached to protecting our borders and our problems with foreign national offenders.

Prüm Convention

Although this measure has not yet been implemented due to financial pressures, given the cross-border nature of organised crime and open border policing within the European Union, the ability to share DNA, fingerprint and vehicle information on a hit or no hit basis would be extremely advantageous in the investigation of crime and the protection of national security.

The impact of opting out of Prüm will need to be assessed by Forensic specialists. However, given that the Convention has not been implemented in the UK the detriments to policing associated with an opt-out may not be so great.
Conclusion

ACPOS believe that opting out would leave the UK vulnerable to an increased risk of foreign criminals and criminality. In doing so, Scottish officers will encounter complex and protracted processes when dealing with offenders effectively both within the Scottish and European Criminal Justice process and partner agencies.

This could effectively isolate the UK in respect of serious and organised cross border crime, thus providing a refuge for foreign criminals within our borders.

9 January 2013
Bar Council of England and Wales—Written evidence

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the House of Lords’ Select Committee on the European Union, Sub-Committee E (Justice, Institutions and Consumer Protection) Sub-Committee F (Home Affairs, Health and Education) Call for Evidence on the UK’s 2014 Opt out decision (Protocol 36).

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The Bar Council’s EU Law Committee held a debate on the issue of the UK 2014 opt-out decision, as part of its workshop at the Annual Bar Conference in November 2012. The decision to devote the majority of the workshop to the opt-out decision was taken many months ago, and reflects the Bar’s concern that any opt-out decision should be taken on an informed basis. To that end, we are among the stakeholders that have called for a full public consultation to be undertaken prior to the Government’s decision on the opt-out, and any possible consequent decisions to opt-back in.

5. We thus welcome the initiative taken by this Committee to issue a call for evidence, and are delighted to contribute to the debate by means of written and oral evidence. In the interests of exploring thoroughly the issues within the Bar’s expertise and experience, this paper is slightly longer than requested. If we may, rather than add further to its length, we refer you to our answer to question 1 below, which serves also as a summary of our views.

6. In preparing this response, the Bar Council has benefited from attendance at conferences on the topic throughout 2012, and from reference to various papers. We would wish to highlight in particular the authoritative paper produced in September 2012 by the Centre for European Legal Studies in Cambridge, entitled “Opting out of EU Criminal law: What is actually involved?”4. The Bar expressly endorses that paper.

The 2014 opt-out decision

Question 1: Should the Government exercise its block opt-out?

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4 [http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf](http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf)
7. Emphatically no. The Bar Council has considered carefully the arguments that have been raised both in support of exercising the block opt-out and against it. The only rational legal (as opposed to political) reason in favour of exercising the block opt-out is that it would ‘clear the undergrowth’ of measures that are obsolete, either because they were never implemented or because they have been superseded. By contrast there are many reasons not to exercise the block opt-out which are explored in more detail below. They include protection of our citizens at home and abroad, efficient court processes, effective police and judicial co-operation, promotion of the rule of law and the protection of human rights, and the importance of maintaining the UK’s good name and influence in Europe. It is our considered view that the interests of the UK are best served by not exercising the block opt-out.

8. It should be recognised at the outset that the opt-out affects only 130 odd measures (the precise number varies, because any measure which is amended before 2014 falls out of the frame). Of those, it seems that 60 are recognised by all parties as useful, and thus as measures that the UK would need to opt back into (see Dominic Raab’s Open Europe report ‘Cooperation not Control: the Case for Britain Retaining Democratic Control over EU Crime and Policing Policy’ October 2012). In addition, there exists a substantial number of measures that the UK has either signed up to in the Lisbon Treaty, or specifically opted into since 2009. If the Government is truly concerned to sever relations with Europe in the criminal justice field, it would need a far more wide-reaching decision than this, which is in our view partial, cosmetic, and liable to lead to legal chaos.

9. All 130 measures are ones which required unanimity among the Member States at the time of adoption. They were thus measures which the UK considered to be required at the time, or they would have vetoed them. The measures concerned now fall into two general categories: those that remain relevant and operational, and those that have become redundant.

10. We see no merit in opting out of measures that are relevant and operational. It is however, common ground that some require considerable improvement, either through a revision of the underlying EU text, or by focusing on their application and enforcement in the Member States. The European Arrest Warrant is in this category (as to which, see further below). The Bar Council’s view is that the UK’s interests are best served by continuing its long tradition of playing a full, leading role in negotiations to improve the texts, implementation and/or operation of those measures, and doing so not from the side-lines, but as a signatory to the measures. By contrast, placing ourselves outside the decision-making process will put the UK at a distinct negotiating disadvantage, both in the practical sense of day to day involvement in amendments, and in the more amorphous loss of influence and indeed creation of antipathetic feeling.

11. As regards measures that have become redundant, they have either never been implemented or have been superseded. But if they are redundant they are also harmless. Withdrawing from measures that are just gathering dust may have a certain legal neatness, but should be undertaken with caution given the negative implications that seem likely to follow.

12. In addition, the Bar Council takes the view that withdrawing from these measures is likely to have disproportionately negative legal, political and financial implications for the UK,
which we explore further in answer to relevant questions below. Some of the consequences were not necessarily inherent in the block-opt-out decision per se, but rather flow from the high profile that this decision has been given in recent months, and the manner in which it has been politicised. The Bar Council’s Brussels Office has been well placed to monitor the upsurge in irritation, exasperation and bewildered incomprehension with which the UK Government’s recent pronouncements have been met by other Member States, and on occasion, EU institutions; and to note also the effect on the UK’s negotiations in wholly different areas of legal policy.

**Question 2: What are the likely financial consequences of exercising the opt-out?**

13. The Bar Council believes that there are several different ways in which the opt-out could have negative financial consequences for the UK, some out of all proportion to the potential gains.

14. In general terms, the potential loss of status and negotiating strength is likely to have a knock-on effect on UK – EU relations in other areas, some of which may be critical to the UK in economic terms. There is already some evidence for this in Brussels. Such risk is difficult to quantify, but should not be ignored. We will return to this later.

15. More specifically, there are two ways in which exercising the opt-out is likely to have direct financial consequences for the UK. First, Article 10(4) para 3 of Protocol 36 makes specific provision for the UK to be made liable for the consequential costs of its decision to other Member States:

16. “The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.”

17. There is of course no precedent to assist in defining the scope of “direct financial consequences”; nor “necessarily and unavoidably incurred” in this context. One can expect that the Commission will apply these terms in a manner which is straightforward, but certainly shows the UK no favours.

18. On the contrary, there is likely to be at least argument and quite possibly litigation, as to the scope of those phrases. For some Member States, the UK’s exit from these measures will require amendment to treaties and/or to domestic law (especially in monist states); and quite possibly amendment also to their Constitutions.

19. The Council will (by Art 10 (4) para 2) “determine the necessary consequential and transitional arrangements” of the opt-out – the UK is expressly excluded from participating in that determination. So far as the Bar Council is aware, no draft provisions are yet available.

20. Furthermore, any transitional provisions may have to take account of a request by the UK to opt back in to particular measures and this is likely to carry further costs. Is an amendment consequent on a request to opt back in, a “direct financial consequence… necessarily and unavoidably incurred” in the opt out?
21. Alternatively, if for instance the UK accepts that extradition arrangements are essential but does not achieve the amendments it seeks to the EAW; and thus wishes either to fall back on the 1957 European Convention on Extradition, or negotiate fresh bilateral or multilateral arrangements, are the costs to other Member States of those arrangements, a “direct financial consequence...necessarily and unavoidably incurred” in the opt-out?

22. Second there is the issue of costs incurred within any transitional period, both in Member States and domestically. The Bar Council understands that there are differing legal views as to when the UK may notify the Council of a desire to opt back in to specific measures; and further that there may be practical issues with how soon that desire could be accommodated. Article 10(5) of Protocol 36 provides that:

22.1 “The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph [the exercise of the block opt-out].”

23. On one interpretation, the UK could notify a desire to opt back in to particular measures immediately upon notification of a desire to exercise the block opt out; and thus at any time between now and 1 June 2014. However, the wording allows notification of a wish to participate in acts “which have ceased to apply to it pursuant to paragraph 4”; and by paragraph 4 acts cease to apply to the UK only “as from the date of expiry of the transitional period”, on 1 December 2014.

24. Even if the former interpretation is correct, a question arises as to when the Government will reach agreement as to each and every measure it wishes to opt back into; and whether it will be able to notify the Council of all measures at one time. It is at least foreseeable that agreement may be difficult to achieve politically, and there will be staggered notifications.

25. Whatever the date or dates when the UK notifies a desire to opt back in, its wishes are not automatically granted. It seems inevitable that there will be a period or periods of legal limbo between the opt-out taking effect and either the opt in being negotiated and/or formally concluded; or the alternative arrangements with each of the 26 other Member States being finalised.

26. That would lead to:

- Legal uncertainty for lawyers and clients alike. In financial terms, that would mean that the bill for legal advice and representation would rise
- In cases where extraditions are delayed due to the absence/temporary abeyance of the EAW, there are likely to be increased applications for release on bail or for writs of habeas corpus; alternatively actions for damages for wrongful imprisonment, or for outright release where time limits are missed
- There will be costs consequent upon the delay to domestic trials of mutual assistance measures being suspended/interrupted
- There will be a cost to the public purse in the time and resources of government staff required to negotiate the terms of the individual opt-ins; and the diversion of government resources to those negotiations when other, possibly more urgent matters are on the table
Similarly, there are cost implications of negotiating bilateral or multilateral agreements to replace measures such as the EAW, with individual Member States or groups of Member States, for those measures into which we do not opt-back in, and

There is the question of the waste of costs already incurred, such as in preparation for the long-planned SISII, in which the UK is said to have invested upwards of £39 million to date.

27. Another important area is police cooperation. Europol was set up under a Convention which came into force in 1998, in order to improve cooperation between Member States seeking to combat serious transnational crime. It has a British Director. It is currently supporting 700 investigations into organised crime and terrorist networks in Europe; and the UK is actively involved in over 200 of those 700. The European Police College has been established at Bramshill.

28. Eurojust has had two British Directors to date. It operates to liaise between Member States often at very short notice, and in the most practical manner - such as the obtaining, overnight, of a certificate of conviction from a Member State, translated and in a form admissible in the UK, where the previous conviction is relevant to bail, or to a bad character application, or to sentence; or even to negate a defence of accident or mistaken ID.

29. Further, the opt-out would potentially block the swift access currently enjoyed by UK police forces to information systems (both obtaining information and posting alerts for wanted people); and prevent them from taking part in Joint Investigation Teams such as that which is currently investigating the murders of a British family near Annecy and the serious injury to one of the daughters.

30. We are not in a position to quantify the cost, in financial terms, were the other Member States to insist that the Police College should be moved, or were the British police to have to fall back on mutual assistance measures in place of the more efficient systems just described, but it is clear that they could be considerable. There would furthermore be an effect on the efficient administration of trials. These measures were all brought into effect on the basis that they were more effective than what was previously available. It is true that plans are afoot to replace some of these key cooperation measures with directives in the coming years, but there is no guarantee that the new measures will be in place in time to prevent the block-opt-out from affecting, even temporarily, these important operational systems.

**Question 3: What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?**

31. The UK is the third most populous Member State in the EU and has been at the forefront of the development and implementation of international criminal law since the Nuremberg Trials. Against that background, we believe that the opt-out would have practical and diplomatic consequences for the UK, as well as a loss of influence.

32. It is important to bear in mind that legal professionals in other Member States regard UK precedents, and instruments such as the Police and Criminal Evidence Act 1984, as the benchmark in terms of securing defence rights. Lawyers abroad are sometimes surprisingly well-informed of UK court decisions. UK lawyers have a very real influence in raising standards by contributing to training programmes, by participating in exchanges and
disseminating information abroad. UK justice acts as a touchstone to many states on the periphery of the Union, not because it is isolationist and exclusionary; but because it is seen as an ideal at the heart of and co-existing with EU ideals of fair trial and basic human rights.

33. It should not be forgotten that while UK influence abroad assists in upholding the rule of law, equally there are domestic advantages. Queen’s Counsel in particular benefit from the recognition abroad (and not just in the Commonwealth) of the excellence but also the universality of British justice.

34. UK decisions not to opt in to individual criminal justice measures in recent years (for example, Measure C on access to a lawyer for suspects and defendants, currently in protracted negotiations), have been greeted with concerned surprise by other Member States, precisely because of our preeminence in the field. The UK may choose to opt-in at the end of negotiations, but it is relying on its ability to influence the debate during the negotiations, to ensure that the text allows it to take part at the end. Exercising the block opt-out risks further undermining such influence.

35. The Bar Council is also concerned about other potential knock-on effects. There is a tendency among many in the UK to view the opt-out debate in isolation, but that is not the case in Europe, where it is seen in the wider context of the UK’s other opt-outs from the EU project. The UK cannot make a decision in one area and expect it not to have an impact in other areas, especially in the current political and financial climate, and in light of recent opt-out decisions on individual files (also in the civil law field) where the UK’s stance was not welcomed in Brussels.

36. Thus, we should be aware that this decision could disproportionally undermine the UK’s ability to influence EU negotiations on legislative and other measures. Apart from the field of criminal justice, there are several important negotiations that are ongoing or soon to be launched, and on which the UK will need and want to have a strong voice – including financial regulation and its impact on the Internal Market; review of data protection rules; public procurement and the Common European Sales law to name but a few. Even in the criminal justice field, there are key proposals in the offing, including one on legal aid due out next year (which is unlikely to be limited to cross-border cases only); and one on the creation of the European Public Prosecutor’s office. The UK will want to be able to influence the outcome on all these files, whatever their legal basis.

37. There are many possible ways in which a wider loss of status could manifest itself, some more concrete and significant than others. To take just one example, the Lisbon Treaty significantly increased the role of the European Parliament (“EP”) in the adoption of measures in the Justice area, including in criminal justice. There have been signs that it is becoming harder for UK MEPs to play a leading role within the Parliamentary committees that develop the EP’s resolutions on individual files, in particular as rapporteurs responsible for the drafting of reports and opinions. This shift has occurred merely in the context of decisions to opt-in or not to individual negotiations. We are concerned that such pressure will be increased if the block opt-out is exercised.

The UK’s current participation in PCJ measures
Question 4: Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

38. The Bar Council wishes to adopt the analysis provided in the CELS September 2012 report, linked to this paper at footnote 1 above.

39. In particular, we would highlight the EAW; the European Supervision Order (due to be implemented by Member States by 1.12.12 but which the UK has (uncharacteristically) not yet implemented due to question marks over the opt-out decision; the measures concerning mutual assistance, including the tracing freezing and confiscation of assets; the measures establishing Eurojust, those concerning previous convictions in Member States and transfer of prisoners; and the CEPOL, JIT and other police cooperation measures set out in paras 22-24 above.

40. Many of the measures under consideration have not been in force (or not been implemented) for long enough for their full value to be felt. Many members of the Bar are, for instance, unaware of the assistance that can be sought from Eurojust. The benefits of the measures are increased cooperation and thus trust between Member States, leading to the real advantages of swift administrative and evidential assistance. In each case the measures either filled a lacuna or replaced a measure that was felt to be inefficient or inadequate.

41. The Bar Council is unaware of any significant disadvantage resulting from the UK’s participation in any measure. There must presumably be some cost to assisting other states, but it is likely to be outweighed by the advantages received in return.

Question 5: In her 15 October statement the Home Secretary stated that “… some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

42. Again, the Bar Council wishes to adopt the analysis provided in the CELS September 2012 report, linked to this paper at footnote 1 above.

Question 6: How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?

43. See answer to Q 10 below.

Question 7: Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

44. The UK has not implemented the European Supervision Order for the reasons set out above at paragraph 34, nor the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. However, the UK is unlikely to fall foul of the CJEU as it has already implemented almost all of the measures in question, and done so satisfactorily.
Question 8: What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

45. The Bar would like to take the opportunity afforded by this question to clarify the CJEU’s role in such cases. We are among many stakeholders who view recent political and press statements on this particular aspect of the debate as misleading, in particular in overstating the role that the CJEU can play.

46. The Lisbon Treaty, which entered into force in December 2009, introduced for the first time in the area of judicial cooperation, the possibility for all national courts to apply to the CJEU for preliminary rulings on interpretation of a piece of EU law. This was entirely new for criminal justice measures, owing to the new Union competence in the field, and extended from courts of final appeal only, for civil justice measures. It may be helpful here to refer to the Court’s own guidance5 to national courts:

i. “1. The preliminary ruling system is a fundamental mechanism of EU law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States.”….

and

ii. “The role of the Court of Justice in the preliminary ruling procedure

iii. 7. Under the preliminary ruling procedure, the Court’s role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

47. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by not applying the rule of national law in question.”

48. Thus, the CJEU does not deliver final rulings on the case before the national court, either in fact or in law, but merely interprets the applicable EU law provisions. Moreover, in the field of judicial cooperation in criminal matters it has been careful to act within clearly specified EU competence. See, for example, Case C-27/11 Vinkov v Nachalnik Administrativno-nakazatelna deynost (7th June 2012) (unreported) where the failure in Bulgarian law to provide an appeal from the imposition of penalty points for administrative driving matters was not considered admissible by the CJEU, despite the right to a hearing enshrined in Article 47 of the Charter of Fundamental Rights (CFR). This is because EU competence currently only extends to mutual recognition of decisions in another Member State. Further, Case C-507/10 Criminal proceedings against X (21 December 2011)

where an application for special measures could not be enforced, despite provision in the Council Framework Decision on the standing of victims and the right to a hearing in article 47 CFR, where the prosecution had decided to discontinue proceedings.

49. It is also important to note here, that the CJEU already has such jurisdiction on all measures adopted in the criminal justice field since the Lisbon Treaty entered into force. That competence extends to the UK for all those measures into which it has opted. As at the time of writing, this includes, but is not limited to, Measures A and B of the Roadmap of measures on criminal defence rights (the right to interpretation and the right to information); the recently-adopted directive on minimum rights for victims; the directive on combating the sexual abuse and sexual exploitation of children; the European Protection Order and the European Investigation Order (arguably more procedurally invasive than the EAW) which is still in negotiations, but into which the UK has already opted.

50. The UK government decided to opt-into each of these post-Lisbon measures even knowing that the decision would trigger the application of the extended competence of the CJEU to these measures, and within its own jurisdiction. For the sake of completeness, though it is not entirely central to the present debate, we also note that the government could have availed of, but did not, the procedure applying the emergency brake (Articles 82(3) and 83(3) TFEU) or Protocol 1 on the role of the national parliaments, which provides the possibility to send a reasoned opinion objecting to a proposal on the grounds of breach of the principle of subsidiarity, to try to stop it from advancing further.

51. It does not, therefore, seem that the Government recognised the extension of the CJEU competence in the criminal justice field, as the potent threat to the independence of the UK common law that some involved in this debate would have us believe. If it had, it would presumably have used one of the three Treaty-based devices in relation to existing post-Lisbon measures.

52. It is also informative to note that of the remaining 26 Member States, most have chosen to override the transitional provisions, and have the extended competence of the CJEU apply to pre-Lisbon Treaty measures. Far from discouraging recourse to the CJEU on these measures, there have been many calls, including from UK stakeholders, for national courts in these Member States to apply for more preliminary rulings, particularly on the application and interpretation of those existing Framework Decisions which are in use, but whose use by certain Member States is causing difficulties. A case in point is the EAW, on which there are increasing calls for clarification of the application of the principle of proportionality thereto.

53. On the subject of the EAW, the CJEU has to date had a beneficial effect. Inevitably some decisions attract criticism, but others can assist greatly in the proper, proportionate and fair implementation of the measure. In October 2012 AG Sharpston QC rendered an opinion in the case of Radu, and judgment is awaited. If the Court follows the opinion of the Advocate General, many commentators believe that the operation of the EAW will improve significantly, to the benefit of all including the UK, and without the need to amend the measure itself.

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6 Case C-396/11 Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu

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Question 9: If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

54. As stated in response to question 7 above, the UK is among the Member States that has been the most assiduous in implementing the measures, fully and in a timely manner. To all intents and purposes, we see no effect arising from the UK becoming subject to the Commission’s enforcement powers as regards these measures. Some of them are redundant in any event, and no interest would be served in the Commission spending further time and resources on those.

55. As regards the jurisdiction of the CJEU, it is true to say that there have been concerns voiced about the ability of the Court to cope with the increase in the number of cases that will be referred to it as a result of the widening of its jurisdiction, with the inevitable delays that would result. Since there is a fast-track procedure for parties in custody, if applications in the criminal field increase, there will be a knock-on effect in other areas; unless further resources can be found at the CJEU. Commentators also note the general lack in experience of criminal law among CJEU judges.

56. However, efforts are already being made across the board to deal with these concerns, whether it be through the revision of the procedural rules and practice of the CJEU; or through judicial training of judges at national level. The Judicial College is rolling out a programme of training Crown Court Judges and Recorders in EU Criminal Law. The legal profession will also need training on how to recognise a ‘Euro-point’ and how and when to take it. The Bar Council has been involved in such training in the recent past, and has plans to expand that training as far as resources permit. The Bar Council is supporting a new system of senior or silk level pupillage between a European law and a criminal law set, to improve awareness on both sides. We call on the UK to continue to play as full a role as possible in these areas, the beneficial effects of which will be felt across the range of EU law, and not only in the criminal justice field.

57. A further practical observation would be that, by the end of 2014 when the full competence of the CJEU will apply to these measures in the UK (unless the government exercises the block opt-out), there will have been a number of other post-Lisbon Treaty criminal justice measures adopted and applicable to the UK, such that the possibility of a few more preliminary rulings on the remaining operational pre-Lisbon measures is unlikely materially to change matters.

The potential consequences of exercising the opt-out

Question 10: The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

58. In our view, there is a strong case for saying that the European Arrest Warrant (“EAW”) is the most important provision which would be caught by the block opt-out. The EAW owes its life to a Framework Decision of 2002. The UK implemented its provisions by means of Part 1 of the Extradition Act 2003. Put briefly, it allows a speedy return of those wanted for trial or to serve a sentence in any of the 27 Member States. There is one single
form to fill in, no requirement for prima facie evidence (that had been largely abolished anyway within Europe, under the 1957 Convention), and limited grounds for non-execution. The Executive no longer plays any part in the decision.

59. It is difficult to see why the EAW is viewed as a centralist federalist measure when its purpose is to return a suspect to a national court, thus facilitating the exercise of national sovereignty over crimes within that nation’s jurisdiction. The EAW was declared a success by the European Commission in 2007. The statistics available reveal its growing application amongst the member states.7 It was the subject of careful and detailed review in the Scott Baker Report of 2011. In 2009 the UK received some 4000 EAW requests; in 2010 that number rose to 4578. Note too that, contrary to some of the statements being made about its abuse, it is our understanding that only a relatively small number of cases requesting extradition from the UK involved UK nationals.

60. There is broad agreement among practitioners, the Member States and the EU institutions that the EAW could and should be improved. The lack of a de minimis rule means that Courts in this country have seen requests for the return of fugitives over such minor crimes as theft of a chicken (or in one case a piglet; in another a wheelbarrow), or failure to pay the last Hire Purchase installment on a second hand vacuum cleaner. Clearly it may be thought inappropriate to use the panoply of international law in such cases. In addition, the implementation of proper cross border bail provisions (the European Supervision Order already referred to) would alleviate what can amount to real hardship. There are also calls for the inclusion of a requirement of legal representation of the suspect or defendant in both the issuing and executing state8, and for the possibility of costs orders to discourage issuing states from frivolous use of the measure. The EAW is not perfect, but there are moves afoot to improve it.

61. The EAW however replaced a much more cumbersome structure. It has substantially cut down the average time an extradition request takes, while increasing the numbers of fugitives returned. The earlier arrangements were, by definition, acknowledged to be imperfect when they were replaced by the EAW. It would be a retrograde step to revert to them and (particularly as regards Executive involvement) out of keeping with current extradition thought.

62. If the EAW were unavailable, the UK would need to rely on pre-EAW extradition arrangements, in so far as they still exist; and if not, create new ones between the Member States. In the first instance, that would mean falling back on the Council of Europe’s 1957 Convention on Extradition. However, although the UK may be able to rely upon it, other Member States (particularly monist states) are likely to have repealed the Convention following the adoption of the EAW Framework Decision. Therefore, the opt out may require the UK to conclude bilateral or multilateral agreements with each Member State.

Question 11: What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out?

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Would there be any consequences for other Member States in their efforts to combat cross-border crime?

63. This question is not within our area of expertise.

Question 12: Which, if any, PCJ measures should the Government seek to opt back in to?

64. Once again, the Bar Council relies on the analysis provided in the CELS September 2012 report, linked to this paper at footnote 1 above. The important measures are those highlighted in answer to Q4 above – together perhaps with the ne bis in idem (Schengen) and conflict of jurisdiction measures.

Question 13: How straightforward would it be for the Government to opt back in to specific PCJ measures on a case-by-case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?

65. Article 10(5) of Protocol 36 governs the terms on which the UK can seek to opt-back-in. It refers to two other protocols which may apply:

"the relevant provisions of the Protocol on the Schengen acquis integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply."

66. Thus reference is to separate protocols to find out how participation will be arranged, and those protocols refer to relevant sections of the Treaties. In brief therefore, for Schengen, the Council decides on our participation (protocol 19(4)); and for anything falling under Title V of the TFEU, the Commission can impose conditions. If we cannot agree or do not comply, the Council will decide how to proceed. (protocol 21(4) which refers to article 331(1) TFEU which provides for enhanced cooperation arrangements).

67. Article 4 of the Protocol on the Schengen acquis provides that the UK may opt-in to a Schengen measure, but it needs the unanimous support of the Member States that are signatories. We have already seen examples of that support not being given when the UK applied to join Frontex, the EU’s border agency, and the Visa Information System, a database of Schengen visa records. We would not expect the exercise of the block opt-out to endear the UK to the other Schengen Member States.

68. There is however an important rider in Protocol 36, that ties the hands of the EU institutions and other Member States when responding to a UK request to opt-back in. The relevant part of Article 10(5), reads as follows:

68.1 “When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof; while

69. In practice therefore, the UK’s participation is likely to be facilitated save where the opt-in decisions appear inconsistent or lacking in coherence.

**Question 14: What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?**

70. The Bar Council refers again to the comprehensive analysis of the possible options available to the UK set out in the CELs paper, referred to elsewhere in this paper and linked to footnote I above. We would thus wish to add only a few summary comments.

71. For reasons already stated, the Bar Council takes the view that it would be neither practical nor desirable for the UK to rely upon alternative international agreements. The starting point is a simple one – if those agreements had been sufficient, there would have been no need to adopt the EU measures replacing them in the first place.

72. Bilateral provisions are cumbersome, subject to local variation, and often inconsistent; all of which inevitably causes delay and confusion. The great advantage of the EU-wide measures (and this is an advantage that should become ever more apparent as the measures become familiar) is that they provide a single framework governing all 27 Member States. All parties (and this is especially true for accession states) can become accustomed to a single document, or a single procedure, and set of time limits and apply them across the board. The result is an infinitely more efficient system.

73. It is worth remembering that the EU’s increasing competence in the justice area was intended to meet the needs of an EU population that increasingly exercises its Internal Market freedoms, through cross-border travel for work or pleasure; cross-border purchasing of goods and services etc. That the EU’s borders have become porous to criminals as well as to law-abiding citizens is a reality that the UK is better able to face in cooperation with its EU partners, than alone. Equally, citizens who are caught up in the criminal justice system of another Member State, whether through fault of their own or otherwise, reasonably expect to be able to rely on certain minimum rights and minimum levels of protection. It is our view that alternative international agreements, which bind other states that are not EU Member States, cannot deliver the level of mutual recognition and cooperation that is necessary if UK citizens are to avail of all the benefits of EU membership.

**Question 15: Is Article 276 TFEU, which states that the Court of Justice has no jurisdiction to review the validity or proportionality of operations regarding the maintenance of law and order and the safeguarding of internal security, relevant to the decision on the opt-out?**

74. This provision should give considerable reassurance to those concerned by the role of CJEU in criminal justice. It provides express legal force to some of the points already made in answer to Question 8. It merely reflects the current exception to EU competence in article 72 TFEU, contained within part V TFEU on the area of freedom, security and
justice, where the competence for judicial and police cooperation in criminal matters is found, and which provides:

“This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

**Question 16: If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area?**

75. There would no doubt be considerable impact upon the Republic of Ireland, but this is a topic that is probably better addressed by others.

*21 December 2012*
Q46 The Chairman: I apologise for keeping you waiting, but it is not always possible to make all evidence sessions run on time. We are very grateful to you for coming to give evidence to our inquiry into the UK’s 2014 opt-out decision. The Committee considers this to be a very important matter that may have far-ranging implications for the UK and the EU. I would like to begin by briefly explaining the background to the inquiry.
The Government’s current thinking, as we know from their communications to us, is in favour of exercising the opt-out, but they have promised to consult Parliament before making a final decision. In order to inform the House of Lords deliberations—and this is of course a Committee of the House of Lords—we launched an inquiry on 1 November 2012, which is being conducted as a joint inquiry between two sub-committees who you see before you now—the Sub-Committee on Justice, Institutions and Consumer Protection, and the Sub-Committee on Home Affairs, Health and Education. We received a great deal of written evidence before the end of last year and we are now receiving oral evidence from lawyers, academics, think tanks, NGOs, as well as serving and former police practitioners and prosecutors that will further inform our deliberations.

After the oral evidence sessions are concluded on 13 February, which is the date when we are taking evidence from the Home Secretary and the Lord Chancellor, we hope to publish our report just before the end of the current parliamentary session in May. The report will cover both the merits of the opt-out decision and which measures the UK might seek to rejoin were that opt-out to be exercised. It is intended the report will inform the House’s debate and vote on the matter, which is likely to take place—but not certain—before the summer.

As you know, the session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible on the parliamentary website. A verbatim transcript will be taken of your evidence. This will be put on the parliamentary website. A few days after this evidence session you will be sent a copy of the transcript to check for accuracy, and we would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence, or have any additional points to make, you are welcome to submit supplementary evidence to us. Now, perhaps if I could ask you to introduce yourselves, that would be very helpful to the Committee. If you wish to make any opening statement, that would be fine, but if you would prefer to go straight into questions that would be entirely acceptable. Can I ask you to start with introducing yourselves, please?

**Professor Chalmers:** I am James Chalmers. I am a Professor of Law at the University of Glasgow and a member of the Criminal Law Committee of the Law Society of Scotland. I do not wish to make an opening statement.

**Helen Malcolm:** My name is Helen Malcolm. I am a practitioner and Queen’s Counsel in 3 Raymond Buildings. I am vice-chair of the Bar’s EU Law Committee, and was responsible for drafting a major part of the Bar’s submission. I do not wish to make an opening statement.

**The Chairman:** All right. I am sure you will be able to fit them into some of the questions we ask. Yes.

**James Wolffe:** My name is James Wolffe. I am a Queen’s Counsel at the Scottish Bar. I am Convenor of the Faculty of Advocates Law Reform Committee. I am quite content to proceed directly to questions.

**Richard Atkinson:** I am Richard Atkinson. I am a defence practitioner-solicitor. I am chair of the Law Society of England and Wales Criminal Law Committee, and I am happy to move to questions. I have no opening statement.
Q47 **The Chairman:** Thank you very much. If I could start then with the first question, and begin by declaring an interest myself as a member of the advisory board of the Centre for European Reform and a member of the Future of Europe Forum. I wonder if you could give us your views on whether you believe the Government should exercise the opt-out; if they do do so, what you believe their grounds are for exercising it; and how extensive a list of the measures covered by the opt-out would you feel the Government should try to opt back into? How would exercising the opt-out affect the UK’s relationships with other Member States on other police and criminal justice matters other than those covered by the pre-Lisbon opt-out decision under Protocol 36?

**Professor Chalmers:** I can simply restate what the Law Society of Scotland said in its written evidence. We do not believe that the UK should exercise the opt-out. It has been said, and you have already heard evidence, Lord Chairman, that there are a number of measures that are unnecessary and redundant, but those are not something that we see as problematic. They may not be measures that we would opt into now, given the choice, but neither do they amount to a reason for opting out at this stage. There do need to be effective measures, given the extent of free movement within the European Union, to facilitate prosecutors dealing with cross-border crime, and we would be very concerned at the loss of these measures.

**Helen Malcolm:** On behalf of the Bar Council, I agree emphatically we should not exercise the opt-out, and we have made that clear in the written submissions. The grounds in favour of exercising it appear to be threefold. The first is political, sending a message, which is, it seems to me, not directly for me as a lawyer or on behalf of the Bar Council to answer. All I would say is, if that is the vehicle we choose, it is legally a very messy vehicle by which to send a message, and it will only be partial anyway, because so many of these measures have been superseded and we have opted into the superseded version.

The second reason is because we do not like the CJEU and we fear their expansionist policies, if such there are. You have heard a certain amount of evidence that they do not have an expansionist policy. This is one of the points that have occurred to me most recently, having heard Martin Howe QC’s evidence online. I wonder whether at some stage it is worthwhile for the Committee to investigate whether he is right to assume, even if there is an expansionist policy in existing civil and trade law, that will inevitably translate criminal law jurisdiction.

The reason I say that is this: it seems to me that the EU was set up—I am not an EU lawyer and I do not pretend to have huge experience of the European Court in Luxembourg—as a trade area. It now operates very largely to facilitate and uphold an internal single market. It seems to me that if you create that and you then create a supranational court to litigate disputes between parties in that context, it is not surprising that you may end up with a court that is mildly in favour of an integrationist approach in that sphere. I do not see that that carries over into any form of integrationist policy in the criminal law field, which is an entirely new jurisdiction for the Court.

My own personal experience of trying to negotiate criminal law measures in Brussels—it is only one element that I was involved in, what has now become the European Supervision Order—was that Member States, all of them, jealously guard their criminal jurisdiction. It is not something that is specific to the UK. That is why Jack Straw’s suggestion of mutual recognition, mutual trust and mutual facilitation, ironing out co-operation difficulties at the borders, both actual borders and so-to-speak legal borders, found favour with the Union, as opposed to a pan-European criminal code of procedure, which might have been an alternative. I do wonder whether it is worth a further investigation as to what evidence if
any there is that the Court might have some integrationist agenda as far as criminal law is concerned.

The third and final reason for exercising the opt-out has been that it might give us a stronger negotiating position to change those measures that we feel strongly about. In a sense that is also political, but at face value that does not seem to me to be sensible. It is basic psychology that you influence the behaviour of the gang by being a member of the gang, and preferably a cool member of the gang, in teenage speak. We seem to be neither cool nor indeed very keen to be members. That does not seem to me the best negotiating position to be in, but as I say, that is a political issue.

As against that, the fallout in policing terms, in co-operation terms, and in diplomatic and influential terms in Brussels is enormous. It is already being felt. There is, as I understand it, something between bewilderment and real irritation being felt in Brussels at the UK’s position at the moment. That is having an effect, not just within the criminal justice sphere but on civil law matters that are being negotiated, including the succession regulation, all sorts of things. It is also having a political effect. British MEPs who wish to be rapporteurs on particular issues are finding it more difficult. All of this, I am sure, is something that you will take further evidence about from better-informed people in Brussels; but this is not something that can be regarded in isolation.

As to how we go back in, Professor Peers has given you a very detailed answer as to the complications. It seems to me that—and we will come back to that, I am sure—the exercise of any opt-out and the transitional provisions are hugely complicated legally and have all sorts of practical ramifications.

Q48 The Chairman: Thank you. The second point you raised is indeed something that the previous group of witnesses gave us some evidence on. I am sure we will hear it from others.

James Wolffe: The short answer to the first part of your question is “No”. In a world where people and capital can move freely across borders, it is essential that there are good and sound measures for co-operation in the operation of the criminal justice system. It is worth recalling that in the United Kingdom we have had a common market for a little over 300 years, and with that has come the necessity for close mutual co-operation between the various criminal justice jurisdictions of the United Kingdom in the investigation and prosecution of crime. It seems to me the one comes with the other. The short point is that the United Kingdom should not be a safe haven for criminals.

The second part of your question raises initially - perhaps largely - a political question. I suspect that what one could say, in relation to the measures that the Government should try to opt back into, is this: that it is likely to be desirable to try to opt back into every measure that is not redundant or superseded. I say that because the United Kingdom chose to opt into all of those measures when they were first enacted. So far as the final part of the question is concerned - “How would exercising the opt-out affect the UK’s relationship with Member States on other police and criminal justice matters?” - I do not think there is anything I would like to add to the observations that Helen Malcolm has said on that aspect of the matter.

Richard Atkinson: My Lord Chairman, I agree with the comments in relation to the impact on other Member States. What I would say in relation to your first question, on whether I believe the Government should exercise its opt-out, is that the Law Society’s view is that it definitely should not. The division of analysis of the measures seems to fall into three
categories, some of which you have heard mention of in evidence earlier today, which I was present for, none of which says any of the measures are harmful to the United Kingdom. They are either redundant, not very useful, or positively useful measures. That means that there is no case, in our opinion, for opting out. However, we are aware that the framework for opting back in again, of which you have heard much this morning, is not without financial cost to the United Kingdom.

As I understand it, the United Kingdom would be liable to the additional costs that might be borne by our having to seek to opt back in to some of these measures. At a time when there is such considerable restraint on public funds, it is hard to see, particularly with the justice system being subject to considerable cuts, how it can be justified to opt out of measures that are at worst redundant, and to opt back into those measures at considerable cost to the public purse and the United Kingdom taxpayers.

The Chairman: Thank you. That is very helpful to have your answers to the first question. Perhaps I could suggest that in subsequent questions, please do not all feel you have to answer the same ones, because we are under a bit of time pressure. But equally, do not feel inhibited at all; it has been very useful to have your four views on that main question.

Q49 Lord Bowness: I am afraid this probably is directed to all four of the witnesses. Can you tell the Committee whether you were aware of any consultation that took place between the Government and legal practitioners about the opt-out decision before the Prime Minister made it somewhere in Brazil in September and the Home Secretary’s announcement on 15 October? If you were, were any representations made to the Government before they were made? I should declare an interest as a solicitor and as a notary public.

Professor Chalmers: I can answer briefly. No and no.

Helen Malcolm: I am aware that there was discussion between the Brussels office of the Bar Council and the MoJ, and also UKRep, as far back as 2011, with the Bar Council saying that they were concerned that this should not be a foregone conclusion and that it is a very important decision. There was further informal discussion last year, when we were setting up a workshop at the Bar Conference. So it began in the spring of last year. All of those were informal discussions. I was also one of those who were present by invitation at the conference in Cambridge in May of last year that Professor Spencer has already told you about, and I know that there were Government representatives there, in the sense of civil service lawyers, although they did not take part. Beyond that, no.

The Chairman: But on consultation, the answer is no?

Helen Malcolm: On formal consultation: no.

James Wolffe: So far as I am aware, the answer is “No” and “No”.

Richard Atkinson: The same for the Law Society.

Q50 Lord Sharkey: I would like to pursue some of the matters raised by Ms Malcolm to do with the CJEU. We have seen evidence that considers the Court to be a political court of poor quality, and evidence that is concerned about its “judicial activism”. The Government has referred to the risk of expansive interpretation and unexpected judgments. What concerns do you have about the exercise of the Court’s jurisdiction in the police and criminal justice field, including its role in delivering preliminary references?
Helen Malcolm: There are well publicised aspects of the Court that could be improved. I am aware this Committee looked at the workload of the Court in 2011. It is overworked, and there are a number of suggestions that are current as to how that could be improved, each country having its own Advocate General, and so forth. So there is an issue of delay.

There is an issue of, if I can say it in the most respectful sense, competence at the judicial level in the criminal field. They are enormously competent, enormously intelligent people, but with the single shining example of Yves Bot, who is the French Advocate General, there is nobody there who has been a prosecutor or a defence lawyer in his home state. They tend to be public lawyers or to come from a Foreign Office background, or something of that sort. So there is an issue as to whether there will need to be perhaps training or additional members appointed who are more familiar with the day-to-day criminal judicial process. Both of those issues seem to me entirely solvable.

The issue of the quality of the Court is not something I feel competent to answer. I know there are issues about the fact that it gives a consensus judgment, that you do not get a dissenting opinion. Sometimes the Advocate General's opinion stands as a dissent, and that in itself is helpful. Equally, you get what has been described to me as canonical text, where a number of states have agreed to a text and it is then repeated in case after case because they have reached agreement. There is then sometimes undue significance given to very minor departures—undue significance given by lawyers, no doubt, principally—from the canonical text. Those are all features of the type of court it is. It is different from our Supreme Court. It does not seem to me that that is better or worse. It is just different.

The judicial activism or the expansionist political side is an entirely different thing. It does not seem to me that anybody would wish to appoint judges who have a political agenda, in this country or anywhere else. You are likely, I suppose, to have people applying for the job who want to go and live in Luxembourg and who are enthusiastic about garlic. If you never wish to leave Hull, then you are unlikely to apply to go and work and live in Luxembourg with your family for 10 years. I suppose there is a certain self-selecting issue, but that does not mean to say that they have any political agenda. One would abhor the idea that they were promoting a political agenda.

On the broader scope, I go back to what I said before. I cannot see why, in the criminal sphere, anyone would want a pan-European code.

James Wolffe: There are perhaps three issues in relation to the Court on which the Faculty has said something in its written submission. The first is the question of competence in criminal law, and I do not think I would want to add anything much to what Helen Malcolm has said on that. The second is a concern about the knowledge and appreciation the Court will have about individual national legal systems. The third is the question of delay and preliminary references, and I wonder if I could come back to that in just a moment.

I would like to put those written remarks into a certain context if I may, and perhaps I can start by saying this: that the rule of law in the European Union requires that there be a court that can lay down authoritatively the correct interpretation of European law. In a sense, the Court of Justice's jurisdiction in areas of EU law is a necessary part of the rule of law in Europe.

Insofar as the issue of competence is concerned, in addition to the question of appointments to the bench, no doubt, over time, as the Court develops — and it will develop under the post-Lisbon measures, as well as the current measures — a criminal jurisprudence, it will become more familiar with dealing with matters of a criminal nature. The Court must be used to dealing with different national systems and, insofar as there are specialties of national
systems that the Court needs to know about, it is incumbent perhaps on the parties, and in particular the national authorities, to bring those matters to the attention of the Court. One would hope, for example, that the United Kingdom, in submissions to the Court, would make sure that the Court would be aware of any particular features of all the legal systems in the United Kingdom that it might be relevant for the Court to know about.

That then takes me to the issue of preliminary references, and that is an issue of some interest to us in Scotland, because one of the jewels in our criminal justice crown is the time limits that we impose for criminal procedures. So for serious solemn cases, if the accused is in custody, the statute requires him or her to be brought to trial within 140 days\(^1\), and for summary cases 40 days\(^2\). It is a feature of our system that we hold dear. But again, I think it is perhaps right that I put any anxieties about that into the proper context. The first is that these time limits may require to be extended for a variety of reasons in individual cases\(^3\). If, for example, the Lord Advocate were to choose to require the court to make a devolution reference in advance of trial to the UK Supreme Court\(^4\) then that might have an impact on the statutory time limits.

The second point is that a judge considering a proposal for a preliminary reference in advance of trial will not be obliged to make a reference. He may if he considers it right to do so. In deciding whether it is right to do so, no doubt individual judges will decide where the balance lies between making a reference in advance of trial and letting the trial go ahead - and the reference be made later if necessary. If the accused is in custody that will be a significant factor weighing in the exercise of the judge’s discretion.

The third point I should make to put those remarks into the right context is to recognise that that Court of Justice does have, as I understand it, an urgent procedure. I have to confess it is not something I personally have any experience of operating, but my understanding is that that procedure, if the Court is persuaded it should be invoked, produces a decision on average 66 days after the reference\(^5\).

It may be that that is the point that one needs to focus on in relation to the issue of delay - that the procedures of the Court and the way the Court approaches delay need to be mindful of the particular interests in speedy decision-making in criminal cases. I invite the Committee to be mindful of the importance, particularly in Scotland, of that issue, but I also wish to acknowledge that has to be seen in its proper context, which is the context I lay before you.

Richard Atkinson: One brief point, if I may. I do not wish to comment upon the Court itself; my colleagues have made ample comment about that. But one matter within the context of this debate about the opt-out is of course that, were we to exercise the opt-out, it would not remove the jurisdiction of the CJEU from English criminal law matters, because post-Lisbon matters are subject to the jurisdiction of the Court. So within the context of the debate of the opt-out, it should not be forgotten that to exercise the opt-out would not remove the Court’s influence on our criminal law.

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\(^1\) Criminal Procedure (Scotland) Act 1995, s. 65(4)(aa), applicable to cases prosecuted on indictment in the High Court. The period for cases indicted in the sheriff court is 110 days: s. 65(4)(b). If the trial is not commenced within that period (or any extension of it) the accused is entitled to be admitted to bail.

\(^2\) Criminal Procedure (Scotland) Act 1995, s. 147(1). If the trial is not commenced within that period (or any extension of it) the accused shall be liberated forthwith and is free from further prosecution for the offence.

\(^3\) Criminal Procedure (Scotland) Act 1995, ss. 65(5), 147(2). In each case, the statutory test is “cause shown”.

\(^4\) Scotland Act 1998, Schedule 6, para. 33. When section 35 of the Scotland Act 2012 comes into force, this power will be replaced by a power to require the court to refer a compatibility issue which arises in the proceedings.

The Chairman: No. That is why some of the people who are giving evidence to us, are asking that the Government should repatriate the measures to which they have opted in since Lisbon.

Q51 Lord Mackenzie of Framwellgate: We have had some powerful evidence submitted, not least from yourselves and others—the police—of the importance of remaining inside the tent, if you like, of the criminal justice measures in the fight against serious crime, terrorism. In the light of that, and I suspect I know the answer, have there been any negative implications for either Scots or English and Welsh law by adopting the measures in the first place?

Helen Malcolm: No.

Richard Atkinson: I will be brief, and say not that I am aware of.

James Wolffe: Likewise.

Professor Chalmers: Likewise.

Q52 Lord Dykes: I come back to the difficult matter that we have already considered a little bit, this question of legal uncertainty that could arise during the negotiation of any Commission or Council decisions regarding the measures that the UK will rejoin, as well as any transitional provisions to cover the period between the opt-out taking effect and the point at which the UK opts back in, particularly if there was a considerable period of time in question. Is that a serious anxiety held by lawyers?

Professor Chalmers: I think generally, the problem that we all have is that we simply do not know what will happen. You have heard evidence already from Professor Peers about the uncertainty of just how the opt-in procedure might be managed and the time at which that negotiation might take place. So that would create considerable uncertainty in respect of any cases that straddled that temporal boundary. If a European Arrest Warrant was issued before the opt-out exercise but failed to be executed until afterwards, there would be uncertainty about how that might be applied, and that would be mirrored in respect of other instruments.

Helen Malcolm: If I can add to that, I have enormous concerns about the uncertainty. First of all, I think it is legally uncertain. Assuming we opt out and wish to opt back into, for instance, the European Arrest Warrant, simply on the reading of Protocol 36 I think it is enormously difficult to work out when we notify the decision we want to opt back in. I myself have difficulty with identifying which scheme will regulate the process of our coming back in. Professor Peers was kind enough to send me an email before the weekend about those matters that will go to the Council and those that will go to the Commission, and he has given further evidence about it.

I think there is an issue as to whether we could exercise an appeal right, if we have an appeal right and, if so, where. I did briefly contemplate the prospect of a brief before the Court of Justice arguing that although we do not like them and we have opted out because of them, we nonetheless wish to invoke their jurisdiction to grant us an appeal against the Commission’s refusal to let us opt back in. It is not a brief I would relish. I think it might not perhaps be the easiest argument, although it might be very interesting.

There is an issue as to whether there are going to be different transitional provisions for those things that we wish to opt out of and stay out of, and those things that we want to opt back into potentially. I query there whether we maintain the status quo, or move to the new system but acknowledge the possibility that cases that are going through, may have to be
unpicked, or whether we have one or probably two entirely different interim procedures. You then look at it in a practical context: every search warrant, every extradition request that is current as at 1 December 2014 will presumably have to be put on hold until all of this is sorted out. Then please put yourselves in my position and imagine explaining all this to a client who is currently held in Brixton Prison, who may be Algerian, so through an Arabic interpreter, as I try to explain what I think the Commission may or may not do in Brussels, and all of this is in the context of time limits of sometimes 14 days, under the UK Extradition Act. Or alternatively, you ask a police officer in Cardiff to explain to his opposite number in Romania, without the assistance and intervention of the interpretation of Eurojust, because Eurojust has fallen out of the picture, what he would like the Romanians to do about some potentially very serious criminal who is there, and whom we want back for trial. I do not think I need to say anything further. I think it is horrendous.

**Lord Dykes:** In other words, a disturbing muddle, because of the British Government’s attitude rather than the CJEU’s.

**Helen Malcolm:** I would have to say yes, if that does not sound disrespectful, because we will have walked into that position.

**Lord Dykes:** Yes, thank you.

**James Wolffe:** I concur.

**Q53 Lord Avebury:** How much impact does specialising in criminal EU law currently rely on any of the measures that are subject to the opt-out decision? You have already partially answered this question but is there a risk of confusion if the opt-out is exercised, and will further training be required in this regard? I am conscious of what Helen Malcolm has just said about the Algerian in Brixton and how practitioners will be able to deal with these matters.

**Helen Malcolm:** Perhaps I had better take the lead on this one. As far as the field of extradition and some of the specialist proceeds of crime/-asset-forfeiture specialists are concerned, we use this law all the time, every day of our working lives, and we are aware that we do. I suspect there are large numbers of barristers across England and Wales who are using these provisions without knowing it. That is to say, they are relying on the immediate interface of the domestic statute without having any reason necessarily to know that that is premised on a European convention underlying it. In a particular case I am thinking of, Bradford Crown Court used witnesses from Bremen by video link. As it happened, the video link all went horribly wrong and it was sorted out by Eurojust. The barrister may or may not have known, I think did in fact know, that it was Eurojust’s intervention that had sorted the whole thing out but normally it would be the Crown Prosecution Service who are in touch with Eurojust and who sort these things out. That is what I mean by the person who is presenting the case may not know they are relying on these measures, but in fact they are.

You are going to have to train the Crown Prosecution Service and the police, if there are new measures. You are going to have to train them in transitional provisions. To an extent there will be a need for judicial training as well. The Judicial College is already rolling out a process of European criminal law training but it is going to be the immediate practitioner, that is to say the CPS and the police, who are going to need the most training.

**Lord Avebury:** Any other views?
James Wolffe: In my experience it is the European Arrest Warrant that is relied on by practitioners in the Scottish courts but again I suspect, like Helen Malcolm, there is a lot of use made of relevant provisions that people are not aware of behind the scenes.

Lord Avebury: It might be very helpful if apart from the case of the Eurojust intervention that was mentioned by Helen Malcolm, you could let us have any other examples, not now but later on.

James Wolffe: I have just a very brief example. A colleague has said that in the course of a trial he wanted to get a full list of foreign previous convictions of a particular witness, and the Crown Office – the prosecutor in Scotland – was able to produce that pretty much immediately. I suspect that lying behind that was a system of co-operation that depends on measures here.

Q54 Lord Hodgson of Astley Abbotts: Before I ask my question I need to declare an interest. I am a trustee of Fair Trials International, which has given evidence to this Committee although I had no part in the preparation of it. Would the witnesses like to comment on the way the UK might secure improvements to the EAW? Would this best be achieved by opting out or could these better be achieved by negotiation, and what also would be achieved by the early accreditation of the European Supervision Order?

James Wolffe: Can I perhaps offer the first remark on that? The question of whether desired improvements to the European Arrest Warrant system are better achieved by one political approach or another is not perhaps something I should enter into, but perhaps I might make this observation, which is that a certain amount of development of the law can be achieved through the judicial system. Last June the UK Supreme Court gave a decision in a case, H(H)16 and associated cases, a series of extradition appeals which were heard together — I appeared in a Scottish appeal — and the question was: what should be done in a case where the rights of children and therefore Article 8 rights are engaged? The Supreme Court held that extradition is of course subject to Convention rights and in one of the appeals, the case of F-K, which was a European Arrest Warrant case, the Court took the view that by reason of the fact that the alleged offences, while not trivial, were not particularly grave, and by reason of the impact on the family life of the accused, it would be disproportionate for that accused to be extradited. In effect, by virtue of that judgment, where the right to family life is engaged, there is a proportionality issue already to be addressed by the Court. If one takes that to the Court of Justice level there is a case pending before the Court of Justice, the case of Radu17, where the question is whether a state may decline to implement the European Arrest Warrant on grounds of breach of convention rights.

The distinguished United Kingdom Advocate General, Eleanor Sharpston QC, has given an opinion in which she said emphatically “Yes”, if there is a breach of convention rights — and it is a very detailed judgment that the Committee might be interested to read. But, again, if the Court follows the same line, and given the importance of the Charter of Fundamental Rights it might be surprising if it did not, then in a sense one will have a moderation of at least one of the problematic issues with the European Arrest Warrant system through the proper operation of courts supplying fundamental rights jurisprudence.

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17 Case C-396/11 Ministerul Public-Parchetul de pe langa Curtea de Apel Constanta v. Ciprian Vasile Radu
The Chairman: I think I am right in saying then that we are likely to be aware of the judgment of the Court before our inquiry is complete so that will be a useful input to our work.

Helen Malcolm: It is due on 29 January, so any moment now. If I can add to that a little bit. The European Arrest Warrant does have problems—I think that is widely acknowledged. That is probably inevitable since it is the most important, the most used and the first of the measures of its type. On the whole, however, it has worked remarkably well and I think the enormous number of EAWs coming into this country is a reflection of that, and the time limits of the extradition process have dramatically fallen since 2003 when the new provisions were brought in domestically.

Whether we can better influence from within or without, I have already given my views on that. It seems to me clear that it is much easier to say, “Look, we are all in this together, we have a problem, how do we get it right?”, rather than saying, “You are not doing it right and I am not prepared to play ball until you mend your ways”. That is not a particularly attractive approach, I would have thought. The two principal problems are proportionality and the question of lengthy periods in custody pending a trial that may not be ready.

Lord Hodgson of Astley Abbots: What about forum?

Helen Malcolm: There are provisions within the Framework Decision that relate to forum. That is something that has particularly resonated in the press and particularly in the US context. As a practitioner that is not something I would highlight as a real issue. There are guidelines that deal with cross border cases. Otherwise we tend not to exercise jurisdiction, except in the case of murder, over a British citizen who has done anything else abroad and it would be quite a radical change for us to start prosecuting somebody for shoplifting a pint of milk in Romania or something of that nature. And equally there would be concomitant political fall-out if we said to the Romanians, “We are not prepared to do that”. I would not have thought that is an issue that is paramount in terms of reform.

As far as proportionality is concerned, the Radu opinion\(^\text{18}\) assists in an authoritative fashion. If that is taken up by the Court that may help enormously. Then there is the question of peer pressure generally across the Member States, which, as I say, I think is better operated from within than from without. There is also the question of judicial training across Europe. The English judges are just beginning a training programme for European judges across Europe in the EAW. Ironically, that is funded by the Commission, and it is going to be particularly ironic if we have pulled out by the time that training is delivered. But anyway, there it is.

The Commission produces guidance in a handbook form. Interestingly it is not my experience that the judges in this country, at City of Westminster, are aware of the guidance or particularly informed by it, but then there are very authoritative text books that they use. I think that may be different elsewhere in Europe where they use the handbook rather more. As far as the European Supervision Order is concerned, yes, certainly, it would have enormously ameliorated things. We have been trying to organise some form of ‘Eurobail’ as it is called informally, for years and years and years, it was almost my first involvement in any form of European negotiation. Now it is finally there and able to be implemented, and it is one that the UK has at the moment chosen not to implement, although we should have done so by 1 December last year.

\(^{18}\) Case C 399/12
Q55 Lord Hodgson of Astley Abbots: I understand you are giving us your views on the law and less on the process of the means whereby it is achieved but you have clearly said before “a cool member of the gang” was your preferred approach. I understand that but that is not the only approach and sometimes one does need to think about other ways. If one comes to get advice from the Bar you will be told sometimes, “This is a case for an emollient member of your profession, at other times you want a bruiser” and we should not allow that to go by default, would you not agree? There may be cases where we need to be very, very clear. In some aspects of the European Arrest Warrants, some performance by some countries, being emollient will get us nowhere but bruising might.

Helen Malcolm: I entirely agree. The question is the context in which you do your bruising and how public you make it. It seems to me there are very real points to be made. One of my concerns about all of this is that the UK has been in the forefront of the protection of procedural and defence rights for at least a century, long before I was interested in law. I think we are at risk of losing that influence. People look at us as the benchmark. I have done training for the Council of Europe outside the EU in Turkey, and I have been met with the answers, “You have reduced your protections, this, that and the other, why should we not?” In other words, we act as a benchmark if we reduce our standards we are having an effect not just across Europe but it seems to me across the world, without sounding too pompous about it. Yes, we should be bruisers in some regards; but whether we should go to the lengths of saying, “We are going to pull out until you mend your ways”, it seems to me that we would have cut off our noses to spite our faces. I think that is going too far and there will be a political trade-off undoubtedly in Brussels, just as there will if we opt out and ask to opt back in, I suspect.

In fact I am already being told from Brussels that there may be a price to be paid for people’s votes as to whether we can opt back in. That is in a sense another question but that is something else that has to be borne in mind.

Professor Chalmers: If I could add very briefly, the Committee has received very compelling written evidence about the extent to which the United Kingdom is an influential player in this area and has driven many of the developments. It seems that there may well be a case in some circumstances for walking out if that is necessary to make your voice heard but all the evidence suggests that we have very little difficulty making our voice heard already.

Q56 Lord Elystan-Morgan: I was going to ask you a question about the European Supervision Order but I think that has been dealt with and it seems that the Government has no published intentions at all in that direction.

The Chairman: To be fair the Government, as I understand it, have said that they are not prepared to implement it pending the outcome of all these complex matters we are discussing. I do not think they have said that they do not intend to implement it later. I am sorry to correct you but I think it is important to—

Lord Elystan-Morgan: I am most grateful. That means, I take it, that even at a later date we could still exercise that option.

The Chairman: Yes.

Lord Elystan-Morgan: I would like to ask a very general question, which is this. Here we are, the third most populous country in the EU. We have shown immense leadership at international level in relation to the development and indeed the whole question of criminal international law. No country, possibly since the Second World War, has shown such
Bar Council of England and Wales, Faculty of Advocates, Law Society of England and Wales and Law Society of Scotland—Oral evidence (QQ 46-61)

leadership and primacy in Europe. Is there the danger now that if we opt out that whereas the immediate effect would be financial loss and frustrating difficulties as to exactly what is going to happen and massive dubieties, the longer-term loss would be the loss of that leadership and primacy?

The Chairman: Can I just ask Lord Rowlands, you wanted to ask a supplementary question.

Lord Rowlands: It does not relate to this.

The Chairman: It does not but I still think it would be better if we dealt with everything under this question.

Q57 Lord Rowlands: I would like to query the Bar Council’s evidence in paragraph 34 on this whole issue of if you opt in or opt out whether you exercise influence or lose influence, particularly as the Bar Council quotes measure C on the access to lawyers as an example. This Committee strongly supported the Government’s position not to opt in on this measure because we thought it was fatally flawed and we received a lot of evidence from Scotland on that matter, but as I understand it the Government has exercised considerable influence on the law, not opted in to the changes that are likely to occur to this particular measure, so this example does not prove the point that by opting out or by not opting in that you somehow lose influence.

Helen Malcolm: May I deal with all those in turn? As far as the European Supervision Order is concerned, my understanding is that the Home Office is at an advanced stage of drafting and dealing with the practicalities of that but for very understandable reasons the matter is on hold until the opt-out is decided.

The Chairman: Understandable but regrettable, yes.

Helen Malcolm: Yes, but there is very little point in bringing it in and pulling out two months later, I suppose. As far as the loss of leadership and primacy is concerned, yes, it does cause me real concern. Ever since Nuremberg we have been in the forefront of all this. We invented mutual recognition based on the English-Scottish-Irish experience. We have had, I think, a very salutary effect. I do not include myself in any of this but the legal profession in general has had a very salutary effect. The reason that so many retired judges are wanted as international arbitrators across the world is that they are undeniably honest—sea-green incorruptible. All of that feeds into a view that British justice is a good thing and that British justice within a European context is, it seems to me, a good thing.

As far as the specific matter of measure C is concerned, my understanding is that we were involved up until the very last moment and held, so to speak, the threat of walking out until the end, but then we did, to everybody’s consternation, after a number of matters had been amended. I think you are going to Brussels and you may very likely get a great deal more detailed information about it there.

Lord Rowlands: Since we have opted out there have been significant proposals and changes to that warrant, consistent with the line and argument that the United Kingdom Government is making on it.

Helen Malcolm: I cannot answer that, I just do not have the facts, I am afraid.

The Chairman: If I could just give you a comment from our Committee’s experience on asset recovery. Our Committee took the view that the Government should opt in. The Government decided not to opt-in. They did not decide to opt out; they decided not to opt in in the period they had. They are now influencing the negotiations and they can opt in at
the adoption point. I think you are making an entirely valid point but I am not sure it applies very directly to this block opt-out situation we are looking at.

**Lord Rowlands:** I agree with that because the Bar Council quoted this as a particular example and I think it is a rather weak one.

**Helen Malcolm:** What we were trying to point out was that the decision was greeted with surprise and dismay given that we had been so involved up until that point. If you are saying that the decision has had a beneficial effect I can only bow to your experience on that and I will have to go away and do my homework and find out more about it.

**Q58 Viscount Bridgeman:** This is very much against the background of the uncertainty that has been voiced by all four of you. We have been told that the Government has chosen not to implement approximately 14 of the PCJ measures pending the opt-out decision being made. What is the panel’s view on that?

**Helen Malcolm:** I would sum it up as unsurprising but regrettable, or regrettable but unsurprising. Practically speaking, I think it was probably inevitable given the current state of uncertainty. It might be preferable to jumping in, pulling out and all of the concomitant problems that is going to cause. It is ironic that it is the first time, or certainly amongst the first times, that we have failed to implement something by the due date. The European Arrest Warrant we had implemented long before many other Member States but there we are.

**The Chairman:** Although I think I coined the phrase that it was understandable but regrettable, nevertheless there will be individuals who will be impacted unfavourably by the delay in implementing these measures. There will be British citizens who might have benefited from some of these measures who will not benefit from them for the period that we fail to implement after the deadline. Is that correct?

**Helen Malcolm:** Most certainly, and I am aware anecdotally of people who are awaiting extradition and who are allowed bail but only within the country where they currently are. They are not allowed bail to return home and continue their ordinary daily lives because the ESO is not in place.

**Q59 Lord Rowlands:** How feasible would it be for the United Kingdom to rely on other international instruments like the Council of Europe convention, or bilateral agreements as an alternative to opting in if we have opted out?

**Helen Malcolm:** In the first place I would have to say that the reason we signed up to the EAW was because it was better, quicker, simpler, cheaper and involved one single document that every police officer around Europe would recognise and would fill in, subject to interpretational difficulties, more or less the same way. However, we can still revert back to the 1957 Convention. From our point of view it still exists. It still regulates our extradition with a whole number of other states, both Council of Europe states as well as three signatories—Korea, South Africa and Israel—who are not Council of Europe members but are nonetheless signatories. Query: do we want the political fall-out that comes from putting France and Germany into the same legal basket as Azerbaijan, a Council member? That is a political question but we could do it. It simply means moving all the Member States into Part 2 of our UK Extradition Act instead of Part 1 as they are at the moment.

The question however, comes at the other end, the other party to the extradition request, whether it is an issuing state or an executing state. Have they kept the Council of Europe Convention and can they automatically revert to it? In some cases the answer appears to be
yes because of course for them as well it regulates the operation of extradition outside the EU states. In some cases it would need amendment to their domestic legislation as I understand it. In the monist states, the states where international treaties are incorporated automatically as part of domestic law, the earlier conventions may well have been automatically repealed because they have been superseded by the EAW.

So in that case we would have to go around negotiating either bilaterals with each of those individual states or a new multilateral. In the case of Ireland, which was a question asked earlier this morning, both the Irish and we have repealed the 1965 Backing of Warrants Act. From our point of view, as I say, it does not make any difference. Ireland would become a Part 2 state and we would operate accordingly. Likewise from their point of view, I think their domestic law would probably be wide enough to cover us, but I am afraid I am not an Irish lawyer and I would need to check that.

The Chairman: We are taking evidence from an Irish academic so I think we will be able to pursue that point then. Yes, please, Lord Rowlands.

Q60 Lord Rowlands: You mentioned earlier that you had heard or listened to Martin Howe’s evidence last week.

Helen Malcolm: Yes.

Lord Rowlands: His proposition is that you can do a kind of multi-deal with the Commission or the European Member States to bring back all these things, and because it is mutually beneficial there would be no reason why the Commission or the Member States would refuse to enter into some kind of new agreement that did not involve adopting but was just negotiated as a new agreement between ourselves and other Member States on all these issues. Do you think that is feasible?

Helen Malcolm: Politically, I do not know the answer to that. Legally, yes, it is feasible. I would have to ask the preliminary question: if it is all mutually beneficial why do we find ourselves in this position anyway—why do we not stick with what we have? Legally, yes, we could negotiate either a fresh multilateral with any states that wish to be party to that or individual bilaterals. Then you get into the political question of would those states wish to sign up to a fresh multilateral treaty run by one of the EU institutions, probably the Commission or negotiated by the Commission, or would they want to get their pound of flesh in each respect. I think you heard some evidence about that this morning. They may well want a price for signing up to that kind of multilateral and we cannot tell what price.

Professor Chalmers: If I could add just very briefly on the Irish position. It has commonly been suggested that what the United Kingdom might do is effectively simply revert back to existing international agreements, and certainly both the UK and Ireland are signatories to the European Convention on Extradition although we have not applied that in the past between the two countries. The problem here is that the backing of warrants scheme that existed prior to the European Arrest Warrant, and which was in many ways quite similar, was achieved not by way of any agreement or treaty but simply by simultaneous legislation passed by both Parliaments, and that legislation has been repealed so there is nothing to fall back on, although no doubt something similar could be enacted.

The European Convention on Extradition could be used as between the two countries but it is unlikely that convention-based extradition would be considered suitable between two countries that share a common travel area where it is very easy for people to move between the two, and with extreme frequency. There may also be some issue with regards to the extradition of Irish citizens because of the provisions of part 2 of their Extradition
Act, but that is something I think the Committee may get more useful evidence on from an Irish lawyer.

**Helen Malcolm:** Perhaps I can touch on one final point, I am so sorry. In the Framework Decision on the EAW, both in the preamble and in article 31, there are explicit statements that it replaces earlier treaties, so that creates further problems.

**Q61 Lord Judd:** What I see is that crime, terrorism and other matters of this dimension are international in the way they operate. We have to have international co-operation to combat them and a judicial system that is competent of responding to that situation. If we go through this process of opting out and then try to get some sort of ad hoc arrangements to replace what we have now, will our effectiveness in fighting terrorism, in fighting international crime and in dealing with it judicially be more effective or less effective in your view?

**Helen Malcolm:** In my view the answer is obvious: it would be much less effective. The whole point of these conventions is there is one system, one form and, in the case of the EAW, literally one blank European Arrest Warrant that is appended to the Framework Decision where you just have to fill in the gaps. That means it is recognised by all judicial authorities and parties around Europe and it is easy to fill in and use. Although we may talk on a very elevated plane, inevitably you are dealing with individual police officers around Europe and it is right and proper that they should be able to operate this as effectively and easily as possible. If I give you just one example of a personal experience I had of trying to obtain evidence from Europe before these better provisions came in.

I sent an officer to gain evidence from Italy in a fraud and he came back with two lever-arch files of papers that read, “Yes”, “Sometimes”, “On Tuesday”, “I cannot remember”, and I sent it back saying, “That is quite sweet but you have forgotten to send me the questions”, and he said, “Miss Malcolm, you do not understand, I was not allowed under their process to take a note of the questions”. It was completely useless. It was a huge waste of time and money, but that was what we operated under when I joined the Bar and started doing international fraud cases. The situation is just so immeasurably better now that I find it difficult to understand why anybody would contemplate, from a legal point of view—I appreciate that the political answer is different—going backwards.

**James Wolfe:** Can I perhaps add one remark?

**The Chairman:** Yes, please.

**James Wolfe:** I think the answer from a legal perspective has to be “Less effective” - unless we can move seamlessly to a set of measures that replicates the content of the measures we have just opted out of.

**The Chairman:** This is a point at which we can draw stumps. Thank you very much indeed for the evidence you have given us this morning; it has been valuable to our inquiry. You will all be able to follow the subsequent evidence we receive and all the other stages of this inquiry because it is all going to be on our website. We are grateful to you for the time you have given us—a rather generous amount of time, particularly including the amount we kept you waiting at the beginning. Thank you very much.
TUESDAY 29 JANUARY 2013

Lord Bowness (Chairman)
Lord Avebury
Viscount Bridgeman
Lord Hannay of Chiswick
Baroness O’Loan
Lord Rowlands
Lord Sharkey

Examination of Witnesses

Professor Ilias G Anagnostopoulos, Chair of the Criminal Law Committee, Council of Bars and Law Societies of Europe, and Evanna Fruithof, Consultant Director, Bar Council of England and Wales (Brussels office).

Q148 The Chairman: My Lords, perhaps we might commence this second session of evidence. I welcome Professor Anagnostopoulos and Ms Fruithof, our two witnesses for this session. The professor is chair of the Criminal Law Committee of the Council of the Bars and Law Societies of Europe. Evanna Fruithof is the Consultant Director of the Bar Council of England and Wales. I think it is right that you are going to be speaking for the Bar Council rather than the Bars of Europe.

Evanna Fruithof: That is right; yes.

The Chairman: We are very grateful to you for coming to give evidence to this inquiry, which we are carrying out into the UK’s decision on the possible opt-out in 2014. It is a joint committee inquiry, our being two sub-committees of the European Union Committee: the Home Affairs, Health and Education Sub-Committee and the Justice, Institutions and Consumer Protection Sub-Committee.

We have had a great deal of written evidence, and we are now taking oral evidence from a number of witnesses such as lawyers and academics, former police practitioners and prosecutors. After that evidence is complete, we hope to have a session with the Home Secretary and the Lord Chancellor, which is currently scheduled for 13 February. The intention is that we will publish the report before the end of the current parliamentary Session in May. The report, if I may anticipate it a little, will we hope cover the merits of the
opt-out decision and crucially what measures the United Kingdom should seek to rejoin, if
indeed it is the Government’s decision to opt-out. The report will be used to inform the
House when the debate and vote takes place.

For the record, may I just remind you that a verbatim transcript is being taken of your
evidence, which will be posted on the parliamentary website? We will send you a copy of the
transcript so that you may check it for accuracy, although I should point out to you that the
uncorrected version goes directly on to the website. If there are any points you want to
make after the evidence session, please do so in writing.

I ask you now whether you wish to make an opening statement or move straight to
questions. Either is entirely acceptable to the Committee. I also ask you again, for the
record, when you first speak to introduce yourselves and the offices that you hold. I do not
know who would like to go first.

Professor Anagnostopoulos: Ladies.

Evanna Fruithof: Thank you. My name is Evanna Fruithof. I have been running the Brussels
office of the Bar Council of England and Wales for the last 13 years. I am delighted and
honoured to be here today. You have indeed already both seen written evidence on behalf
of the Bar and heard oral evidence. While I am delighted to provide any supplementary
information, I do see it very much as supplementary. Therefore, my preliminary opening
statement is very much that the CCBE has the floor. In so far as I can help follow up any
points that have been raised in previous evidence or add anything, I will do so.

Professor Anagnostopoulos: I am Ilias Anagnostopoulos, a criminal defence lawyer in
Athens, Greece. I am chair of the Criminal Law Committee of the Council of Bars and Law
Societies of Europe. In this capacity, they have asked me to come here. I am very honoured
to be here to answer questions on the opt-in/opt-out issue. I also teach criminal law and
criminal procedure as an associate professor of the Law School in Athens.

Q149 The Chairman: Thank you very much. Perhaps we may start with the questions.
From the perspective of the Council of Bars and Law Societies of Europe, what factors do
you think the United Kingdom Government should take into account in deciding whether or
not to exercise the opt-out that they have in Protocol 36?

Professor Anagnostopoulos: My first point would be that this is not only a matter for the
UK. I can understand that the discussion in the UK is whether the UK should opt-in or opt-
out. I understand, of course, that this is a national issue and a very political one. On the
other hand, one should take into account that a decision for or against opt-out will also be a
decision for Europe. How the UK will decide on that issue concerns all European countries,
because any decision taken, either in favour or against the opt-in, will influence European
Union politics, the law and so on. It is important to discuss this issue from a European
perspective and how other Europeans would understand a decision in one or the other
direction as well.

Lord Hannay of Chiswick: Do you have any inkling of what the attitude of the other
Member States has been since the Justice Secretary and the Home Secretary gave the
Government’s inclination to Parliament in October?

Professor Anagnostopoulos: It is well known that the relationship of the United Kingdom
with Europe is not an easy one and has never been so. This is also demonstrated by the fact
that on a number of issues the UK has negotiated and acquired a special position. This
includes the opt-in/opt-out facility that the UK has. The European project has still gone
forward. It is an unfinished and ongoing project. Other European countries feel comfortable, I think, that the UK is within Europe and co-operates with other Member States without adopting an unfriendly position towards Europe.

As an ordinary European citizen—I am not a politician or a specialist in these matters—I would feel that such a decision would be a step backwards from what we Europeans have achieved so far.

Lord Hannay of Chiswick: If the UK does formally exercise the opt-out, which it has not yet done, in your view what would be the impact on the UK’s standing across the EU? Will the UK still be able to continue to exercise influence over an area in which it has a lot of expertise and which a lot of the evidence we have indicates that it has been pretty influential? Would it have any implications, for example, for the Union’s attitude towards the raising of standards of trial rights and the rule of law throughout the EU? What wider implications do you think it might have?

Professor Anagnostopoulos: Though it is difficult to predict how things will develop in the case of an opt-out decision, I do believe that opting in will allow the UK to influence the legislation process within the European Union much more effectively compared with an opt-out decision. An opt-out decision would result in a somehow outsider position for the UK. No matter how influential the UK is as a state—that is a long tradition—if you leave the family, you are not a member of the family any more and the influence you can have is much weaker than if you stay within the family. This is my impression.

Q150 Lord Sharkey: We have seen evidence that considers the Court of Justice of the EU to be a political court.

Evanna Fruithof: I wanted to add something please your Lordships.

The Chairman: Please do come in.

Evanna Fruithof: I know that Lord Rowlands asked specifically about the Bar’s evidence during the oral hearing at which Helen Malcolm QC addressed you regarding Measure C and the ongoing negotiations on that. That was an example of a situation where the UK has not opted in, although it is a different opt-in/opt-out situation. Since I was responsible for that part of the drafting of our written evidence, I wanted to take the opportunity to clarify the point that I wanted to make there.

The issue, as far as the Bar sees it, is the possible negative effect of the block opt-out on the UK’s standing and the related ability, therefore, to influence the debate in Europe, not just in the criminal justice field but beyond that. On the whole question of how we have exercised it in the context of the individual protocol for the UK and Ireland, it has been a very interesting few years when it has been used many times. We have been watching the way the UK has sought not to opt in at the beginning of negotiations but has then sought to influence the debate, usually making it pretty plain from the outset that it is trying to influence the debate in order eventually to be able to opt in at the end of the process.

The strategy itself has been, to some extent, criticised by other Member States, albeit maybe jealously. None the less, there are some concerns about it. We see that there are a number of factors that affect whether the UK can continue to achieve success using that strategy:

One is the publicly stated reason that the UK has put forward as to why they are not opting in in the first instance and the extent to which those concerns are shared by other, particularly influential Member States. The second one is the perceived eminence of the UK
in the particular field in question, and certainly in the criminal justice field, that is not in issue. The third one is whether the proposed measure would be more effective for all the other Member States if the UK does take part. The fourth is the desire among the other Member States for the UK to take part. Although it sounds similar, it is a slightly different point. The fifth one is the level of goodwill towards the UK in general.

It is really the fourth and the fifth that we see as being in play in this particular scenario. In the months and years that led up to the adoption of the proposal for Measure C, several Member States, as we know, were bringing their national legislation into line with the jurisprudence of the Court in Strasbourg, particularly the Salduz judgment on Article 6 of the Convention. The legal professions of England and Wales were very active in assisting some of those Member States to bring their domestic legislation into line. In anticipation of the negotiations on the Measure C file, we were therefore seen as very much in the lead on that. Measure C is the right to legal assistance in the safeguards. It is one of the defence rights measures and it is key to the right to access to a lawyer.

Because of, among other factors, the fact that we had been involved in such active negotiations with all these Member States, there was an expectation in Brussels that the United Kingdom would take a very leading and rather supportive position in the negotiation on the actual proposal. But because of the fact that one of the regions in Europe that was not quite compliant with Salduz was part of the United Kingdom, there was a more nuanced reaction when the proposal came out.

The perception in Brussels, as I saw it at the time, was that the UK’s non-opt-in to something on which we were seen, in particular in light of the Police and Criminal Evidence Act as being the lead standard bearer, was in effect giving the message, “We have our house in order and it does not really matter to us whether the other Member States do or not.” There was an apparent understanding, therefore, that we were not that concerned. It was seen as a negative thing. The fact that the Government issued a letter, together with four other Governments, three of which had only just brought their domestic legislation into line with the Salduz judgment, was also misinterpreted.

Thus, one of the two points I wanted to make in our written evidence was that the actual message at the time—that we did not opt in—was a negative one. It is absolutely correct, Lord Rowlands, that they have been very effective since then in the negotiations.

**Lord Rowlands:** That is the only point I was making.

**Evanna Fruithof:** To bring that into the current context, what concerns us generally is that if that non-opt-in decision were to be taken in the context that we are in now or going forward, in light of this wider debate on the 2014 opt-out, coupled with the additional things we are now looking at—the Prime Minister’s speech of last week, the Balance of Competences Review that is going on and the promised referendum and so on—we would feel there must be a serious concern that already the credibility of the UK, bearing in mind those factors I was describing earlier, would be reduced even just a year on.

**Lord Rowlands:** This was the reason for my question in the last session. It is a very simple point. The Government have not lost all influence in every case where they have opted out. This case, curiously, was that, having opted out, they nevertheless continued to influence the redrafting considerably. That is the only point I was making.

**Evanna Fruithof:** I absolutely accept that, but I think we have moved into a different scenario where that would no longer be such a *sine qua non*, precisely because of the negative impact of this type of discussion.
Q151 Lord Sharkey: We have seen evidence that considers the Court of Justice to be a political court of poor quality and evidence that it is concerned about its alleged judicial activism. The UK Government have referred to the risk of its expansive interpretation and unexpected judgments. Do you have any concerns about the exercise of the Court’s jurisdiction in the police and criminal justice field, including its role in delivering preliminary references?

Professor Anagnostopoulos: The case law of the Court in Luxembourg would make me rather optimistic and not critical of its case law. I would say that one should see the case law of this Court in its historical context. At a time when the European project was still a newborn child, the Court was met with reluctance by Member States to accept the European idea. They did move with some decisions, not in the criminal law area, in order to move things forward. That was the time when they were accused of judicial activism, interpreting the law and not respecting the wording of the provisions and so on.

I have not found any reference, with the exception of the Pupino decision, to a ruling by this Court that would somehow negatively influence the criminal law substantive or procedural. I understand that “judicial activism” is a term that has been readily used, but I do not see real evidence of a risk coming from this Court.

It is well known that it is not easy for national courts to cope and co-operate with courts like the Court in Luxembourg or the Court in Strasbourg. There were a number of rulings from Strasbourg that moved things and as a result of which Member States changed their legislation. I do not think that big problems arose from that source. So I do not think the criticism of the Luxembourg Court is justified by its case law so far.

Evanna Fruithof: I would just briefly add to that. The Radu judgment, we were all waiting for today, which I know is the subject of a different question, but nonetheless is relevant to this one, is a good example of a situation where, given the number of interventions by other interested parties in the case, the Court could indeed have indulged in a little bit of judicial activism had it sought to do so, precisely because people were looking for something rather wider than the judgment in fact reflects. In the end, the Court restricted itself in the judgment to a very narrow interpretation of the questions put forward, so far as we can see having had limited time to analyse the judgment in the last few hours. Therefore, it is precisely an example of the Court not taking an opportunity to extend its powers in this field.

Lord Rowlands: It seems to me from the evidence we have received so far that those who are supporting to block our opt-out rest their case very heavily on the issue of what the Court of Justice is likely to do and whether it is going to embark on an expansionist role of the kind described. In fact, the United Kingdom Government themselves have intimated that that is one of their concerns.

I noticed in the evidence that Ms Malcolm gave us—it is on page 5 of the draft evidence—that she made what I felt at the time was quite a telling point. She said that you should not translate the behaviour of the Court in trade and Single Market issues to be the same as it is going to be in criminal justice issues, because it felt it had an integrationist role in the Single Market. I think that is the point she makes on page 5.

Since then this point has been challenged quite a bit by other formal witnesses, who have given evidence that because of the looseness of the wording and the way the pre-Lisbon measures were drafted, there is in fact very considerable scope for the Court to exercise its interpretative role in a way and manner that could cause a considerable threat to national jurisdictions. I am lost at the moment. I thought Ms Malcolm’s evidence was quite telling at
the time, but since then that has been challenged. Can either of you help me out of my dilemma?

**Professor Anagnostopoulos:** As I said, with the exception of the Pupino decision, I have seen no evidence regarding the criminal law area where the Court has delivered a ruling that could be deemed to be problematic. Even in the Pupino case, the criticism was that the Court there introduced the interpretation in conformity with the aims of the European Union. I do not think that even this is a subversive approach. I see no real reason why we should not trust this Court. I would say that, after the Lisbon Treaty, things are more settled in Europe and the role of the Court is described more clearly in the Treaty. I would rather think that the Court would not tend to any sort of activism in this environment, but, of course, all these are scenarios.

Q152  **Lord Hannay of Chiswick:** From the Bar Council side of things, would it be unreasonable to ask you or Helen Malcolm to let us have a note on how you feel the Radu judgment has affected the testimony you have given to us about this? I think it would be very helpful.

**Evanna Fruithof:** Yes, with great pleasure.

**Lord Hannay of Chiswick:** We are not asking you to do a full critique of the Radu judgment but merely to say how it corresponds or does not correspond to the testimony you have given us. That would be extraordinarily useful. Of course, we have not had an opportunity to analyse it ourselves, and most of us, including me, are not qualified to do so anyway.

**Lord Rowlands:** We had a discussion about the Metock case this morning, which implied very considerable interventions by the Court. Are you aware of that case?

**Professor Anagnostopoulos:** This is not in the criminal law area.

**The Chairman:** No, it was to do with asylum.

**Professor Anagnostopoulos:** I have not studied this decision.

**Lord Sharkey:** I want to follow up on this briefly. One of our witnesses, Mr Howe, talked about the conformity of interpretation. He seemed to represent it as a kind of duty of the Court to have regard to conformity and interpretation in a way that would or could lead to the ignoring or re-interpretation of the intentions of national legislation. Do you think that is a reasonable representation of what the conformity of interpretation means? If he is right, do you think that there is a danger of that?

**Evanna Fruithof:** The Court’s role is the interpretation of EU law. Their interest is in the conformity of interpretation of EU law. The effect of the Court’s ruling saying that the national law is not in conformity effectively means that there has probably been some error in the implementation—it would depend on the individual case—or how it is being applied, if it was a regulation. That is the key issue here. Yes, their role is to do with conformity of interpretation, but it is of EU law as applied in the Member States and interpreted in the courts and so on.

**Professor Anagnostopoulos:** For example, if we look at the case law of this Court on the issue of double jeopardy within the European Union, this Court said that, because the free movement of European citizens within the European area is one of the main aims of the European Union, we should take this into account when interpreting Article 54 of the
Schengen Convention. There is a broad pro-free movement interpretation that results in accepting that a conviction or an acquittal in one Member State bars proceedings in other Member States. This is an EU-conforming interpretation, but I do not see a problem with that.

**Lord Sharkey:** Do you have any concerns about the resource implications and possible delays that might result from the extension of the Court’s jurisdiction?

**Professor Anagnostopoulos:** Of course, they have to reorganise and restructure this Court the more cases they get. I hope that this is something they can deal with. Of course, they need more. There is also a discussion about specialist judges who are more competent in the criminal law area. These issues can be resolved within the existing framework.

Q153  **Lord Rowlands:** This is all central to the whole argument. Do you think the fact that these pre-Lisbon measures are all mutual recognition measures means that there is less likelihood that the Court is going to be given the job of interpreting them or seeking an infringement than in the previous measures in all the cases they have heard? Do you think these pre-Lisbon measures have a different character that makes the Court more or less likely to interpret them in a broader sense?

**Professor Anagnostopoulos:** As compared to post-Lisbon instruments?

**Lord Rowlands:** Yes.

**Evanna Fruithof:** Or harmonisation measures, presumably.

**Lord Rowlands:** Or harmonisation, yes.

**Professor Anagnostopoulos:** This is a different category, of course. The third pillar will not exist after 2014, but, overall, I would not see there being a different approach, apart from these being a slightly different category to other instruments when compared, for example, to Regulations, Directives and so on.

**Evanna Fruithof:** It is quite a subtle point, to the extent that I think it is correct that the very nature of these instruments was precisely to allow the Member States’ own rules to continue but to facilitate mutual trust between the Member States. Therefore, to some extent the role is at one remove from a harmonisation measure, for example.

**Viscount Bridgeman:** I would like you to help me on this point. Am I right in saying that the Council has the power to override the Court’s judgment? If that is so, how often has it been exercised?

**Professor Anagnostopoulos:** I do not know of any such override procedure that the Council may exercise.

**Evanna Fruithof:** I have never heard of that.

**The Chairman:** With respect, I think this arose out of our discussion this morning confirming that the Council could in fact legislate to change this.

**Professor Anagnostopoulos:** Yes.

**Lord Hannay of Chiswick:** The Council can move the legislative goalposts but it cannot comment on a judgment of the Court.

**Professor Anagnostopoulos:** Yes, of course.
Bar Council of England and Wales, Council of Bars and Law Societies of Europe—Oral evidence (QQ148-162)

**The Chairman:** But, presumably, with the consent of the European Parliament now.

**Professor Anagnostopoulos:** Yes. After Lisbon, the role of the Parliament is much stronger. This adds democratic value to the whole procedure. We have seen it with the Road Map measures. Parliament has played a very positive role, in our understanding. It is more protective of individual rights than the Council would like to have here.

**Q154 Lord Avebury:** I would like to move to a different area. Have you made any assessment of the extent to which legal uncertainty might arise during the negotiation of any Commission or Council Decisions regarding the measures that the UK will rejoin, as well as any transitional provisions to cover the period between the opt-out taking effect and the point at which the UK opts back in? What would the consequences of these measures be?

**Professor Anagnostopoulos:** It is clear that a lot of issues will have to be resolved after an opt-out. In some aspects, this will be a unique situation, because we have not had the precedent of a Member State in a union like the European Union opting out of legal instruments already in force and then, after opting out, opting in again to some of them. This whole procedure has to be co-ordinated between the UK and the EU institutions—that is the Council and/or the Commission. It will take time, and a lot of legal questions will arise. The answer will not be easy. No one has a device with an automatic on/off switch to resolve all problems. There will certainly be a period of legal uncertainty, which of course will be a big disadvantage for both sides.

**Lord Hannay of Chiswick:** That would presumably apply particularly to instruments like the European Arrest Warrant, which involves individuals and where recourse to the courts could take place on the basis of the uncertainty?

**Professor Anagnostopoulos:** Yes.

**Lord Avebury:** Can you envisage how that would affect individual cases? Supposing that the European Arrest Warrant has been invoked in respect of an individual and that individual is in custody at the time when the opt-out is exercised, what would then be his legal position?

**Professor Anagnostopoulos:** In custody in the UK?

**Lord Avebury:** Yes.

**Professor Anagnostopoulos:** If he gets bail he will be happy, but, otherwise, until the legal issues are resolved, this would be a critical period. These pending procedures cannot be continued on the same legal basis, which means that we will have to switch into earlier existing instruments or new ones.

**Lord Hannay of Chiswick:** Would the UK be obliged to release him at that moment?

**Professor Anagnostopoulos:** If we apply the rule in favour of freedom, yes. On the other hand, the question would be whether the older legal instruments will be reinstated—for example, the European Convention on Extradition. Then, again, a request will have to be transmitted on a new basis. If the UK has a request based on a European Arrest Warrant from Greece or Germany, this cannot be valid any more. The requesting country will have to send a new request based on the European Convention on Extradition or any other bilateral legal instrument.

**Lord Avebury:** But for the time being the individual would have to be released.
Bar Council of England and Wales, Council of Bars and Law Societies of Europe—Oral evidence (QQ148-162)

**Professor Anagnostopoulos**: If your Lordship is asking me, yes, because he or she should not suffer from the consequences of a political decision.

**The Chairman**: No doubt somebody will brief a lawyer to argue many other points.

**Lord Avebury**: Can you think of any other difficult legal circumstances that might arise from the opt-out before any alternative arrangements have been made?

**Professor Anagnostopoulos**: It is not only the European Arrest Warrant. A large number of instruments are now operating, such as freezing orders or transmission of evidence. These will necessarily be frozen for a period of time until clarity is established on what legal basis the UK will continue to co-operate with other states. All these procedures will have to be suspended.

**Lord Sharkey**: Does that mean, for example, that assets frozen by an instrument will be automatically defrosted?

**Professor Anagnostopoulos**: This is what the “frozen man” will request.

**The Chairman**: That will only be in respect of the pre-Lisbon measures. Any of the measures that are post-Lisbon will carry on.

**Professor Anagnostopoulos**: Yes.

**Q155 Baroness O’Loan**: We have heard a certain amount of evidence about the coherence of the overall pre-Lisbon PCJ packaging. I want to ask you how important you consider it to be that we maintain the coherence of that package. How interconnected do you believe each of the PCJ measures to be? I am not asking you to deal with every individual one.

**Evanna Fruithof**: I see my role here today as very much supplementary. Helen Malcolm QC gave a fairly expansive response both to the question just posed and to this one. Obviously there are different groups of them. Some are obsolete. With regard to the ones that are still operational, which the police and prosecutors are relying on and which to some extent, therefore, the defence lawyers are relying on, whether it be the previous convictions of their client, a witness they wish to be able to connect to through video-conferencing facilities set up by Eurojust and all the other measures that you have heard about, there is a lot of interconnection. We consider some of them to be difficult to divide up. It is not simply a question of identifying one or two and saying, “We will just renegotiate to opt back into those.” As we have just heard, even opting back into one, or agreeing alternative measures to replace it, is likely to be terribly complicated because the pre-existing legislation simply does not exist in all the other Member States. A renegotiation just to opt back into one would be complicated, never mind a whole plethora of different ones in different areas, whether it be the SIS II ones or others that you have heard so much evidence about such as Eurojust or Europol. It is a very complicated situation because of that.

**Baroness O’Loan**: Does that imply that opting out en bloc is not an option?

**Evanna Fruithof**: I say personally, but of course I am not speaking personally. The Bar Council’s view is that it really is not—that there is just too much at stake here. There are other battles to be fought and this is not the right one. We feel that too much of this is just too important to the functioning of justice and the co-operation between the Member States.
Bar Council of England and Wales, Council of Bars and Law Societies of Europe—Oral evidence (QQ148-162)

**Lord Rowlands:** I wonder if you could help us in that respect. We have had all these predictions of 40, 50 or 60 measures of value, but within those is the question of coherence and packaging. Has the Bar Council done any work or could the Bar Council do any work to show us the discrete connections between this measure and that measure? You would have to opt into a group of these rather than just one. Could you do it for us?

**Evanna Fruithof:** I am sure we can certainly try to look at it in more detail. I know that some of the other evidence you have received from Cambridge University, the Association of Chief Police Officers and others has attempted to do that.

**Lord Rowlands:** If you could give us any additional material on that, it would be helpful.

**Evanna Fruithof:** I would certainly be happy to try.

**The Chairman:** Maybe with some examples.

**Evanna Fruithof:** Yes, absolutely.

**Q156 Lord Hannay of Chiswick:** I would like to ask one more question on this coherence issue, which I can see is a very relevant one. In a way, the Commission is going to be, as it were, the guardian of what is coherence between JHA measures, because they are the people who are going to have to receive any UK requests to reinsert and to judge it in the light of coherence.

Presumably, in theory at any rate, it should be possible for the United Kingdom and the Commission to reach broad agreement on what is coherence—i.e. for there not to be a clash over it and there not to be a situation in which the Commissioner has to say, “Your request for reinsertion does not respect the coherence of the JHA legislation”. In theory at least, there should be a possibility for informal contact to enable the United Kingdom to judge what is going to be seen to be coherent, or is that an over-optimistic view?

**Professor Anagnostopoulos:** In theory, yes, but how this would operate in practice is an open question.

**Lord Hannay of Chiswick:** I agree. Clearly, the concept of coherence, although not an exact science, since it deals with law, ought to be capable of being reasonably objectively addressed. In this particular case, oddly enough, there are only two parties. There is the British Government and the Commission. If the British Government come from a position that is contrary to that of the Commission, the Commission will say, “Sorry, that is not good enough; you have to be more coherent”. But if the British Government and the Commission reached agreement on what coherence meant, there should not be a problem.

**Professor Anagnostopoulos:** Yes, but if they have diverging views on whether instrument A also requires B, C and D—so the Commission has one position and the UK Government have another position—how would this be resolved? It would not be easy.

**Lord Hannay of Chiswick:** I agree. I was merely exploring whether there is a theoretical approach to this, given that the British Government have already had some contact with the Commission and are clearly likely to have much more in this very complex process, and whether, in theory, the issue of coherence could be addressed in a properly co-operative spirit rather than a confrontational spirit.

**Evanna Fruithof:** I would have thought that, obviously, that would be advantageous. The interesting issues will be on the edges of the coherent packages, where there is an overlap
between the different elements of the Protocol that allow us to negotiate back in. You will have some situations where, indeed, the Commission has sway and others where the Council has sway, and therefore the Member States have sway and so on. That will be the area where it will be perhaps more complicated.

**Q157 The Chairman:** Helen Malcolm QC indicated to us in her evidence—and Ms Fruithof has said the same thing this afternoon—that legal practitioners specialising in criminal EU law in the Member States rely on a lot of these measures, even if they are not necessarily aware of them.

_Evanna Fruithof:_ Yes.

**The Chairman:** Presumably the same thing applies to Greece and the other Member States. Given that there must be some confusion if the opt-out is exercised, what sort of practical problems is that going to raise for the professions in the Member States, or do you think that it will not create any problems and they will not need to be further trained to cope with a post opt-out situation?

_Professor Anagnostopoulos:_ The professionals are still under training to understand and apply the existing instruments. This is a difficult task, as we all know. It has taken some time and there is still a need for professionals to be trained in how the EU instruments have to be applied, given that this is not an easy structure with instruments overlapping sometimes in how they have to be co-ordinated with national legislation.

What would happen after an opt-out would be that, within the European Union, we would have a third level of legislation of existing instruments. That means that professionals would have to deal with two kinds of instruments within the European Union. Instead of having European Union countries on the one hand and third countries on the other, we would have European countries with no opt-out, the UK opt-out, and then third countries. This would definitely complicate matters.

I would not say that this would be the most decisive argument against an opt-out. We professionals have to do this, but it would be a disadvantage from that perspective as well.

**Lord Hannay of Chiswick:** Presumably it operates in the case of Denmark already.

_Professor Anagnostopoulos:_ Yes, but Denmark is a small country. It is easier to keep a boutique clean and neat. The UK is a big country and it is quite different.

**Q158 Viscount Bridgeman:** I am going to take these questions in a slightly different order from what we have sent you. We have talked about the European Arrest Warrant. Do you agree that the legislation on the EAW requires amendment? If so, what changes should be made and how could they best be achieved? Supplementary to that, do you agree that the implementation of the ESO would alleviate some of the EAW’s failings?

_Professor Anagnostopoulos:_ The European Arrest Warrant is the oldest instrument. Critics say—and there is basis in that criticism—that maybe it was a premature decision to introduce this instrument before achieving agreement on issues like suspects’ rights, other institutions and so on. On the other hand, the basic idea of the European Arrest Warrant—that within a common judicial area it is not necessary to follow the traditional extradition procedures—is the right idea.

Of course, the experience we have with this instrument has shown that there are deficiencies and that things have to be improved in some respects. The way to do this would
Bar Council of England and Wales, Council of Bars and Law Societies of Europe—Oral evidence (QQ148-162)

not be to go out of the European Arrest Warrant and return to the extradition procedures but to try and see which improvements are necessary. There has already been an improvement regarding the *in absentia* decisions, but more can be done. This is the way to go. We should see what improvements we need and then go ahead. In that respect the United Kingdom could play a very influential and important role.

**Viscount Bridgeman:** What would be the place of the European Supervision Order in any change to the EAW? Does that have any relevance?

**Professor Anagnostopoulos:** I think it will. Many countries’ judges and prosecutors are faced with the dilemma that if they put a person on bail in a foreign country, this person has to stay there, which is very burdensome. It is not an alternative to put him in jail, but if the supervision order can be supervised in his home country, this is a more preferable option and will help foreign suspects to be treated fairly and much better than they are treated now.

**Evanna Fruithof:** I completely agree with what Ilias has just said. I would add that there are already a lot of fora in which discussions are taking place—a lot of them informally—between practitioners and judges in the different Member States. There are training projects that you are aware of. There is a certain amount of peer pressure being put on different Member States. The Member States where there are real problems with the European Arrest Warrant are aware of that fact by now because of the debates that have been taking place. To some extent there is movement that is already visible now in which the number of Arrest Warrants that are being issued for, shall we say, less serious cases is dropping in some of the Member States that were being criticised before. Then there are other things such as measures that have already been adopted that will improve the situation in practice, and measures currently in negotiation that have the capacity to improve the situation in practice.

For example, going back to Measure C, my favourite topic, which is access to a lawyer, the most recent texts that have been negotiated in the Council have provision for what is called “dual representation” so that there would be access to a lawyer in both the issuing Member State and the executing Member State. That would obviously speed up the whole process. If you were getting legal advice in both countries, you could resolve rather more quickly any problems likely to arise.

Those sorts of developments are not dependent upon the European Arrest Warrant being amended legislatively. None the less, they are in and of themselves all moving forward in the same direction. We will certainly come back to you on that, but while it would appear that Radu has not resolved the problems we were hoping it might, there will be other cases before the Court and other opportunities for the Court to assist in that.

**Q159 Lord Hannay of Chiswick:** I want to explore what I think you are saying a bit further. I want to be clear because this is obviously likely to be a very important point in the British debate about this. Is what you are saying that, without changing the fundamental legislative basis of the European Arrest Warrant, it has been possible up to a point, and should be possible beyond that point, to remedy the principal defects that people have so far seen in the EAW; or is there going to be the need for some reform that changes the basic decision?

**Professor Anagnostopoulos:** My position is that this could be done on the basis of the existing instrument.
**Lord Hannay of Chiswick:** How long would that be likely to take, given that the British Government are confronted with a time-limited problem on all this? Clearly, a process that would take many years is not going to be not very relevant to the decision they have to take, whereas a process that could be conducted reasonably expeditiously could be a very different proposition.

**Professor Anagnostopoulos:** I cannot judge how much time this will need for improvement. On the other hand, it should not take many years. For example, if Measure C the Directive goes through—the double defence that Evanna referred to—there will then be an implementation time of three years, but if we have it as a right, to have a double defence, this will be a substantial improvement for the individuals concerned. The lawyer in the issuing Member State can help the Court in the executing Member State to understand the legal basis of the European Arrest Warrant, possibly the refusal grounds and so on.

**Evanna Fruithof:** I want to add one point to that question. There is almost an understanding behind your question that if the European Arrest Warrant goes, there is something better—or at least as good as it—to replace it, even on a short-term basis. The European Arrest Warrant was adopted precisely because the alternative was not working very well and everybody agrees that even though it is not a perfect instrument, it has improved the situation terrifically on the ground between the Member States. That must be central to the whole discussion.

**Lord Hannay of Chiswick:** We come on to that in a later question. The point I was trying to feel my way towards was whether you believe—and I think you gave me an answer on that—that the main problems that have been identified under the present legal basis are remediable within that legal basis without changing the fundamental legal basis by means such as you have described. At this stage, that was the point I was trying to get at. We will come on to the other point in a second.

**Professor Anagnostopoulos:** I think they are, yes.

**Viscount Bridgeman:** I have a direct question. What is your view about any attempt by the United Kingdom to make a reform contingent on their continual participation in this measure?

**Professor Anagnostopoulos:** This includes some procedural issues. To demand reform is one thing, but how this reform can be achieved in terms of procedures to be followed has to be resolved within the European Union’s legislation procedures. If this is going to be done through a Directive, then it is through a Directive and so on. It would not be possible to demand that, until the end of 2014, we want reform, otherwise there will be an opt-out. Of course, pressure—in a good sense—can be exercised that these reforms are going forward.

**Q160 Lord Rowlands:** There is another proposal on the immediate horizon, of course, which has caused a lot of emotional feeling at home. That is the European public prosecutor’s office. Do either of you have a view on the merits of this proposal?

**Professor Anagnostopoulos:** First, I would like to note that this is a project that has not yet been presented. We do not have a proposal for a regulation. The Commission has declared that some time during this year it intends to present a proposal for a European public prosecutor. The CCBE has prepared a paper which we will present voicing our concern that if such a decision is to be taken, the EU institutions should not hurry to establish a European public prosecutor before finishing with some open projects, such as suspects’ rights, the
European Investigation Order and so on. In our view, it would be premature to establish such an institution before having resolved some basics of the European judicial area.

I do not think it would be right to let the European public prosecutor’s office heavily influence a decision about opting out or not, because we do not know how this project will develop. In the end, the UK could not opt in to this project—the European public prosecutor—which would mean this would not influence things as they are now in the UK in a substantial way.

**Lord Hannay of Chiswick:** The UK’s opt-out on the European public prosecutor is completely separate from the opt-out decision on Protocol 36.

**Professor Anagnostopoulos:** Yes, there is also a provision on a referendum.

**Lord Hannay of Chiswick:** It is completely ring-fenced.

**Lord Rowlands:** But it does have a potential effect on the UK’s role in Eurojust. I am not clear in my mind what happens to Eurojust if we create a European public prosecutor’s office. We are members of Eurojust. We may or may not opt out or wish to opt back in. That would probably be one of the big ones on the list to opt back into. The idea of a European public prosecutor’s office could affect our role in Eurojust.

**Professor Anagnostopoulos:** It is not clear whether the Commission intends to integrate Eurojust into the European public prosecutor’s office. I have read things but I do not think there is clarity on that point. Eurojust is a co-ordinating institution and it seems to do a good job.

**Lord Rowlands:** It would be a big candidate for opting back in. It would certainly be high up on the list.

**Professor Anagnostopoulos:** Yes. Since Eurojust does not take binding decisions—it is more of a co-ordinating institution—I do not think this would be a problem. If Eurojust continues to exist as it is, it would not be a problem to participate in Eurojust while opting out from the European public prosecutor’s office.

**Evanna Fruithof:** Certainly as it stands at present, the expectation I am hearing is that 14 Member States are indicating an interest in the European public prosecutor, which is a long way short of all of the Member States. Therefore, the talk in Brussels is that this would certainly proceed by way of enhanced co-operation whereby, if more than nine Member States want to do something, they can proceed. That almost certainly means that the UK, if that is how it pans out, will be in a rather large minority. Consequently, therefore, any concerns it has about Eurojust will be shared by all the other Member States that are also outside the EPPO, which will obviously make our bargaining position rather stronger.

Q161 **Lord Hannay of Chiswick:** Presumably also what you are saying you are hearing is that an approach that proceeded with the European public prosecutor by enhanced co-operation would quite possibly leave Eurojust untouched.

**Evanna Fruithof:** Eurojust is wider in its scope in any event than the initial plans for the European public prosecutor’s office, but these things are not yet clear. One would expect it to remain untouched for what does not apply to the protection of the EU’s funds.
Lord Rowlands: Where the emotion comes from at home is the notion that the European public prosecutor’s office could trample all over our common law and so on. It depends what size, shape and power this organisation is going to have.

Professor Anagnostopoulos: The European public prosecutor will need national authorities to conduct investigative acts. No state can be forced to carry out an investigative act that is not in conformity with national legislation, especially a Member State such as the UK, which would not be a part of this mechanism. I would see no real risk in that respect. Of course I am not sure how this will develop because I do not think that this project will be very popular in general in the European Parliament. It seems somehow that the official justification is that we need this prosecutor to effectively protect the financial interests of the European Union, because until today national authorities are not doing enough to protect them. The question is how this prosecutor would force national authorities to do more than they are doing today. If they are lazy in protecting EU interests, why would they not be lazy with the European public prosecutor as well?

Lord Rowlands: You said that your organisation would produce a paper.

Professor Anagnostopoulos: Yes.

Lord Rowlands: Is that paper imminent? Is it in the very near future?

Professor Anagnostopoulos: We will send it as an official statement of the CCBE. This could be adopted on 7 February in Vienna at a standing committee meeting. If this is the case, we could publish it. I will arrange with Peter McNamee to do that at the meeting.

The Chairman: It would be very helpful because we are also conducting an inquiry into fraud against EU finances. We have had lots of people tell us about the need for a European public prosecutor in that connection.

Professor Anagnostopoulos: The first stage of creating a European public prosecutor would mean that they will spend and not save money. What will happen afterwards remains to be seen.

Q162 Lord Hannay of Chiswick: We have touched a little already on this possibility that the UK, having opted out—and this is very much the view of some of the strongest supporters of the opt-out—should rely on the Council of Europe Conventions, for example on extradition, and on bilateral or multilateral negotiated arrangements, as an alternative to Justice and Home Affairs measures such as the European Arrest Warrant and in other criminal matters. Is it your view that there are areas not covered by these Council of Europe Conventions where this simply would not be available, or that some Member States have in fact superseded their commitments under the Council of Europe Conventions so would not be able immediately to replace them? Would we be likely to find some problems if the Government were to opt for that completely alternative approach?

Professor Anagnostopoulos: I do not think that there would be a single approach to this issue. This will depend on the national legislation of each state. Each state would have to see, legally speaking, what happens now after the UK has opted out. Will this mean that the conventions of the Council of Europe are reinstated and applied, or will there be a need for new or supplemental bilateral agreements? I do not think there would be one solution in all Member States. This shows that the UK would need to clarify with each Member State how co-operation will operate in future.
As far as the areas covered are concerned, these old instruments, if I may so name them, do not cover all areas of the 130 instruments by a possible opt-out. What is not covered by the old instruments will have to be renegotiated and covered by supplemental or new instruments. This will not be an easy exercise. It is a very simplistic approach to say that there will be no problem in opting out from these 130 instruments, that it will result in having all the old instruments and that we will go on with the co-operation as it was.

Lord Hannay of Chiswick: Would you agree with some of the evidence we have had that even if the Government were able to negotiate this cat’s cradle of bilateral and multilateral arrangements, it would almost certainly be costlier and slower for individual citizens than the arrangements that exist under European law?

Professor Anagnostopoulos: It will. As Evanna said, this is one of the reasons why these instruments were introduced. The existing instruments were regarded as slow and inefficient.

The Chairman: Thank you very much. Is there anything that either of you would like to say to us that you have not already had the opportunity to say in answer to questions? Are there any questions that we should have asked that we have not asked you?

Professor Anagnostopoulos: No, thank you.

Evanna Fruithof: We have certainly covered it in the written evidence. The one point that I would wish to make from the Brussels perspective is that this cannot be seen in isolation. I am sure you have been told that many times by other witnesses. There are so many other important files from the UK’s point of view that will require our strength in negotiation, and many of them will be crucial to UK interests. To some extent this is a battle that does not need to be fought, especially given the concerns there are in other areas.

The Chairman: We are very grateful to you, Professor Anagnostopoulos and Ms Fruithof, for coming and giving your time and answering our questions. It has been very helpful. It is valuable evidence for us when we come to write the report. Thank you very much indeed.
Bar Council of England and Wales; Law Society of England and Wales—Supplementary written evidence

Introduction

1. This paper provides supplementary evidence to the House of Lords' Select Committee on the European Union, Sub-Committee E (Justice, Institutions and Consumer Protection) Sub-Committee F (Home Affairs, Health and Education), on their joint call for Evidence on the UK's 2014 Opt out decision (Protocol 36). This evidence supplements the written evidence submitted by the General Council of the Bar of England and Wales (the Bar Council) in December 2012, and its oral evidence, given in London on 16 January, and in Brussels on 29 January 2013, during which sessions, questions were raised by their Lordships to which we respond in greater detail below. In preparing this response, we have worked closely with the Law Society of England and Wales, which also submitted both written and oral evidence to the inquiry in December and January. Accordingly, the answers below, though arising from the Bar Council's evidence sessions, should nonetheless be seen as given jointly by the Bar Council and the Law Society, which both welcome this additional opportunity to assist the inquiry.

The Metock case

2. Contrary to the claims made by those in favour of an opt out, the judgment in Metock reflects an orthodox and entirely foreseeable view of EU law. In no way is it an example of the CJEU attempting to extend its jurisdiction – see attached paper provided by ILPA and the AIRE Centre, 20/2/13, which the Bar and the Law Society both endorse.

3. Further, again contrary to some statements that have been made, the judgment explicitly notes and endorses the right of Member States to protect themselves from conferral of rights by means of fraud, including by sham marriages (by Article 35 of Directive 2004/38) – see para 75.

4. In addition, the CJEU explicitly recognises (at paras 77-78) the limits of its power; accepting that while it has jurisdiction in relation to Treaty rules governing freedom of movement of persons, the rules do not apply to issues “which are confined in all relevant aspects within a single Member State”. Thus, any anomalous inconsistency in treatment between Union citizens who operate entirely within their own country and those who have exercised the right of freedom of movement “does not therefore fall within the scope of Community law”. There is no attempt to extend the jurisdiction of the Court to interfere in domestic law.

5. The rationale of the decision in Metock is explicitly based on the need to preserve freedom of movement of persons within the Union: “if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed” (para 62). Therefore even if (contrary to the views of the Immigration and EU law experts) it is arguable that the judgment represents an example of judicial activism, the case is a prime example of the

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19 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, Case C-127/08.
Bar Council of England and Wales; Law Society of England and Wales—Supplementary written evidence

category Helen Malcolm QC distinguished in oral evidence – i.e. a case that is based upon upholding the central tenets of the internal market. The Court holds that granting paramountcy to national law in this particular area, and therefore allowing variations as between Member States “would not be compatible with the objective set out in Article 3(1)(c) EC of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons” (para 68). The rationale is however irrelevant to issues of criminal law, or indeed to any subject matter where the legal basis is mutual recognition.

The Radu case

6. The Opinion of the Advocate General Eleanor Sharpston QC in this case, delivered in the autumn of 2012, excited considerable interest and speculation that, if followed, it would solve the need for a de minimis rule in implementing the European Arrest Warrant (EAW), without needing to amend the Framework Decision; and further that her comments on the human rights bar (in particular lowering the standard of proof required heretofore) would broaden the scope of cases in which human rights issues could be argued, and thus assist in solving the more egregious breaches.

7. In fact the Court, in its judgment given on 29 January 2013, declined to follow the Advocate General on either point. Instead it decided the case on the narrowest possible basis, relating solely to the way the case was argued before the domestic court. This pertained to the argument raised by the applicant that he, as the requested person, was entitled to be heard in the issuing state prior to the issue of the EAW. The CJEU asserted that the EAW does not provide this mechanism and would not be drawn to consider the wider human rights questions raised by the domestic court. Whilst disappointing for extradition practitioners and others concerned about potential human rights breaches, the judgment is undoubtedly a stark example of the CJEU failing to expand its jurisdiction in the criminal field, as noted in her oral evidence on behalf of the Bar by Evanna Fruithof, on the day that it came out.

The Pupino case

8. The judgment of the Court of Justice in Pupino explained at para 43:
   a. "When applying the national law, the national court that is called on to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34.2(b) EU."

9. Article 34.2(b) of the (former) EU Treaty provides:
   b. "Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect."

10. But the Court went on to acknowledge that this obligation is limited by general principles of law at para 44. These include the principle that criminal liability cannot be determined or aggravated on the basis of a framework decision, independently of an

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20 Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu, Case C-396/11.
21 Criminal proceedings against Maria Pupino, C-105/03.
implementing law, at para 45. Further, the obligation ceases when national law cannot be applied compatibly with the result envisaged by the framework decision. In other words, the principle cannot serve as the basis for an interpretation of national law contra legem, at para 47 (per Lady Hale, Assange v Swedish Prosecuting Authority [2012] UKSC 22 at para 174).

11. The UK Supreme Court in Assange held that in any event the Court's decision in Pupino, and indeed any pre-Lisbon measure or decision in the area of police and judicial cooperation is not binding on the UK because they are excluded from the operation of the European Communities Act 1972 (per Lord Mance, at paras 201-218); it is the national implementing law and national court decisions which are binding upon the operation of UK law alone. However, the Court was also clear to indicate that, irrespective of this position, there is a general common law presumption that the UK legislates in conformity with our international obligations. This presumption produces a similar result to the decision of the Court of Justice in Pupino. The decision of the Court in Pupino was a logical approach to construction, which is in conformity with EU law, and which reflects the approach already taken by the common law anyway. There is nothing remarkable in this approach to construction, which only requires domestic courts to interpret domestic law as far as it can be in the light of international law.

‘Opt-in packages’

12. The Bar and the Law Society are reluctant to be drawn on which packages of measures most properly go together; and which packages the UK might wish to opt back into, for the following among other reasons:

a. The Bar and the Law Society's position is and remains that the opt-out should not be exercised. In that case no question of opting in arises.

b. There are naturally groups of measures which must stand or fall together, since they relate to the same subject matter, for example, Council decisions setting up Eurojust, Council and framework decisions creating ECRIS and the exchange of criminal records.

c. However, the measures under consideration are in a continual state of flux, as measures are amended and thus fall out of consideration. This in particular applies to the Eurojust and Europol measures, for which proposals are anticipated from the Commission prior to the opt out decision having to be taken. It follows that any sensible detailed analysis of packages can only be made close to, or at the time of, the Government's decision to opt out, and not months or even years in advance, when it is difficult to predict the final list of measures concerned.

d. The European institutions, and particularly the Commission, will be intimately concerned in any application by the UK to opt back into certain measures and will presumably have to bear in mind representations made (formally and informally) by each of the other Member States. Whilst there are groups of measures which naturally seem to fall together, the ultimate negotiations and decisions are likely to be highly political. It is inappropriate for the Bar or the Law Society to comment on which, in our view, is the lesser of the various evils in what is essentially a political situation.

Measures used by members of the Bar and solicitors
13. A question has arisen as to which measures are regularly used by members of the Bar, (also considered in relation to solicitors) without their necessarily being aware that they are relying on EU measures. That is not an easy question to answer; the individual state of knowledge of barristers and solicitors will vary. In general terms however, the measures most often employed concern mutual legal assistance (including asset freezing and confiscation); previous convictions from EU states; and the assistance of Europol and Eurojust in identifying suspects, collating searches, collecting evidence and facilitating its transmission for use in trials in the UK. Naturally, in the field of extradition, both specialist practitioners and duty solicitors at City of Westminster Magistrates’ court are faced with the operation of the EAW. Where substantive law measures are in issue, such as those relating to terrorism offences, drug and people trafficking, child exploitation, cybercrime etc, these are incorporated into UK law (or in most cases already existed in UK law) and are therefore indirectly exercised.

14. The majority of measures that defence lawyers may wish to utilise themselves rather than respond to are not yet in force, such as the European Supervision Order, the framework decision on mutual recognition of probation measures, the framework decision on in absentia judgments and the post Lisbon Treaty directives on the right to interpretation and translation and the right to information. The framework decision on the transfer of sentenced persons is likely to be the only currently available instrument defence lawyers may wish to use, including in the context of EAW proceedings, to ensure that the requested person can serve their sentence in the UK.

Consultation

15. It should be clarified that the Bar made a number of informal attempts to engage with Government officials on the issue of the Lisbon opt-out from 2011 onwards. Those attempts met with limited success, largely (we assume) because at the time the issue was raised, it was not a political priority for the Government, so the civil servants were not in a position to do much other than note our concern. There has now been a request from the Home Office and Ministry of Justice for a meeting, which was planned for 1st February 2013, but was cancelled at their request. A new date is in the process of being fixed.

16. The Bar Council and the Law Society believe that, before indicating any intention concerning the question of whether to exercise the opt-out, the Government should first have consulted publicly on the question, including on its potential practical and legal implications. The Law Society was aware of the forthcoming decision and the subject had over previous years come up briefly from time-to-time with Government officials. As with any significant change to the law, the Law Society expected the Government to hold a public consultation on this important issue and had not made representations.

17. Following the Prime Minister’s statement in Brazil, the Law Society understood from Government officials that, though the Government was interested to hear from solicitors (particularly on the measures to which the UK should consider opting back into), there was no commitment for a proactive public consultation process.22

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22 On 5 October 2012, the three UK Law Societies jointly, and the Bar Council separately, issued press releases calling for a full and open consultation by the Government.
18. The Home Office subsequently contacted the Law Society to arrange a meeting. This meeting took place on 30th January 2013 with members of the Law Society's EU Criminal Law Working Group and officials from the Home Office and the Ministry of Justice. The possibility of a meeting with a minister was also discussed at the Law Society's request. Although the Law Society welcomes these moves for a dialogue with the Government on this issue, as stated above, it believes that a full public consultation should have been conducted at the outset before any intention was indicated.

27 February 2013
Annex: Comments on the judgment in *Metock C-127/08*  
*Sourced from Immigration Law Practitioners’ Association (ILPA)*

1. In the opinion of the Immigration Law Practitioners’ Association (ILPA) and the AIRE Centre (Advice on Individual Rights in Europe) the judgment in *Metock C-127/08* represents an orthodox interpretation by the Court of Justice of the provisions of EU secondary law (Directive 2004/38/EC). The judgment does not in any sense ‘extend’ the ambit of the provision made for the free movement of persons to nationals of non-Member States (“third country nationals”) otherwise unlawfully present under domestic law.

2. The EU law of free movement of persons has provided a right of residence to a third country national where he or she marries a national of a Member State who is exercising a right of free movement in another Member State since before the UK acceded to the then European Economic Community on 1 January 1973.

3. The principal secondary law (under the European treaties) giving effect to this was Regulation (EEC) 1612/68. The effect of this and related Directives was that a third-country national unlawfully present under domestic law, who married a national of a Member State exercising a right of free movement in another Member State, thereby acquired a right of residence under EU law in that State. The third country national was thus no longer unlawfully present there.

4. This was settled law for some time prior to *Metock* as set out in cases such as *Commission v Spain*, citing *Carpenter* and *MRAX*. Like the courts in those cases, The Court of Justice in *Metock* has faithfully interpreted EU law in accordance with its object and purpose.

5. The Court in *Metock* specifically considered a case that pointed the other way, that of *Akrich*, and held that it failed to take account of settled law as established by *Commission v Spain* and *MRAX*.

“It is true that the Court held in paragraphs 50 and 51 of *Akrich* that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, *MRAX*, paragraph 59, and Case C-157/03 *Commission v Spain*, paragraph 28).”

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23 E.g. Directives 64/221, 73/148, 1251/70, 75/34.
24 Case C-503/03.
25 Case C-60/00, [2002] ECR I-6279.
27 C-109/01.
28 *Metock*, paragraph 58.
6. The judgment in *Metock* held that an Irish law, which imposed a requirement for prior lawful residence before EU rights of residence could accrue to an otherwise unlawfully present person on marriage to a national of Member State exercising a right of free movement, was incompatible with EU law.

7. This ruling did not come as any surprise to EU legal scholars or to lawyers practicing in the field of free movement law. The judgment of the Court of Justice followed the jurisprudence on the rights of EU workers and their family members, which has developed over more than 40 years.

8. The Court of Justice made it clear in the case *MRAX* C-459/99 decided on 25 July 2002 and following faithfully the wording of the treaties and the regulation then in force, Regulation (EEC) 1612/68, that third country national spouses of EU citizens exercising their rights of free movement to live in a second Member State, enjoy a right of entry and residence irrespective of whether the relevant State has categorised them as irregularly present, clandestine entrants or persons seeking to enter the State without the necessary documents.

9. Just as an EU national principal’s right of entry and residence is directly effective and cannot be made dependent on prior authorisation by the State, so too the right of entry and residence of the third country national family members.

10. If the UK authorities had been unhappy with the (predictable) interpretation of Regulation 1612/68 as set out in the *MRAX* judgment, the opportunity to change the law was before them. The EU institutions and the Member States were in the process of negotiating a measure to replace parts of Regulation (EEC) 1612/68 and to consolidate, simply and strengthen other provisions of secondary law providing for free movement. Directive 2004/38/EC was adopted two years later. This was the opportunity for the UK or other authorities to argue for a change to the wording of the Directive to remove the direct effect of the right of entry and residence of third country national family members. Such a provision does not form part of the Directive as enacted.

11. The EU legislature is composed of two elements: the Council of Ministers and the European Parliament. The EU legislature, whose democratic legitimacy derives from the accountability of ministers in the Council of Ministers direct to their national governments and their electorates and from the accountability of the European Parliament to the peoples of Europe, did not legislate to exclude otherwise unlawfully present persons from the protection of EU free movement law on their marriage to EU citizens exercising free movement rights.

12. In *Metock* the Court of Justice faithfully interpreted the new Directive, stating

“…Directive 2004/38, …amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to ‘strengthen the right of free movement and

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29 The European Communities (Free Movement of Persons) (No 2) Regulations 2006 (SI 2006/656).
30 Paragraph 80.
Bar Council of England and Wales; Law Society of England and Wales—Supplementary written evidence

"residence of all Union citizens’, so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals."

13. If there was an instance of judicial activism in respect of matters in the field of free movement of persons, it took place on 23 September 2003 when the Court of Justice unwisely strayed from its constant case law in this matter in Akrich. This is a rather muddled judgment in which the possibility was left open that third country national family members of EU citizens exercising treaty rights in a second Member State may need to have been admitted to at least one Member State under the national family reunification law there.

14. As the Court of Justice recognised in Metock five years later this was an error as the consequence was to render an EU family reunification right subject to widely divergent national legislation on family reunification for nationals in their own Member State. The outcome would be, if that situation were permitted, that EU citizens would no longer have consistent and clear rights wherever they move in the EU but rather would be subject to divergent rules, contrary to the objective of harmonisation of EU law.

15. We are not aware of evidence to support the claim that marriages of convenience have increased following the Metock judgment. Directive 2004/38, article 35, permits States to take necessary and proportionate measures to prevent the abuse of rights such as by marriages of convenience. Concern about marriages of convenience is expressed by the UK government on a regular and recurring basis. In particular, they were identified as a major problem in 2004 when legislation establishing the Certificates of Approval scheme was before Parliament. This scheme, which required most migrants to obtain government permission to marry otherwise than in the Church of England, was found by the House of Lords and the European Court of Human Rights to breach articles 12 and 14 of the European Convention on Human Rights.

16. The UK regulations implementing the Directive in force at that time reflected the requirement of lawful presence that had been suggested by Akrich. Yet, it is clear from the record of parliamentary debates that marriages between non-UK EU citizens and third country nationals were already one source of the concern about marriages of convenience.

20 February 2013

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31 Paragraph 59.
32 C-109/01, see above.
33 See above.
35 See the Asylum (Treatment of Claimants etc.) Act 2004, Procedure for Marriage, sections 19-25.
36 R (on the application of Baiai and others) v SSHD [2008] UKHL 53; O'Donoghue and others v UK (2011) EHRR 1.
38 See e.g. Hansard HC Report, 12 Jul 2004 : Column 1223.
**Dr Gavin Barrett—Oral evidence (QQ 249-263)**

**Evidence Session No.15**  **Heard in Public**  **Questions 249 - 263**

**WEDNESDAY 13 FEBRUARY 2013**

Members present

Lord Hannay of Chiswick (Chairman)
Lord Anderson of Swansea
Lord Avebury
Lord Blencathra
Lord Bowness
Viscount Bridgeman
Lord Dykes
Viscount Eccles
Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts
Lord Judd
Lord Mackenzie of Framwellgate
Baroness Prashar
Lord Richard
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Earl of Stair
Lord Stoneham of Droxford

**Examination of Witness**

Dr Gavin Barrett, Senior Lecturer, School of Law, University College Dublin.

**Q249 The Chairman:** We are extremely grateful to you, Dr Barrett, for coming to give evidence to our Inquiry, which, as you know, is into the UK’s 2014 opt-out decision under the Lisbon Treaty. The Committees—and there are two Sub-Committees meeting together here—consider this to be a very important matter, which could have far-ranging implications for both the UK and the whole of the European Union. I would like to begin by explaining the background a little bit.
The British Government’s “current thinking” is in favour of exercising the opt-out but they have promised to consult Parliament before making a final decision. In order to inform the House of Lords’s deliberations—we—these two Committees—launched an Inquiry on 1 November 2012, which is being conducted as a joint Inquiry between our two Committees: Justice, Institutions and Consumer Protection, and Home Affairs, Health and Education. We had a lot of written evidence before the end of last year and we have been taking oral evidence from lawyers, academics, think-tanks, and NGOs, as well as serving and former police practitioners and prosecutors. They, along with this session, will inform our deliberations.

The oral evidence sessions conclude later on today, when the Home Secretary and the Lord Chancellor will be appearing before the Committees. We hope to publish our report just before the end of the current parliamentary session in May. It will cover both the merits of the opt-out decision and which measures the UK should seek to rejoin were it to be exercised. It is intended that the report will inform the House’s debate and the votes in both Houses, which have been promised by the Parliament, and which could take place some time this summer. However, that is a matter in the hands of the Government.

As I mentioned to you when coming in, this session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible through the parliamentary website. A verbatim transcript will be taken of your evidence and this will be put on the parliamentary website. A few days after this evidence session you will be sent a copy of this transcript to check it for accuracy, and we would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence, or have any additional points to make, you are very welcome to submit supplementary evidence to us. There is a choice now. It would be very helpful if you would introduce yourself. If you wish to make some opening remarks, that would be entirely welcome to us. If you wish rather to proceed straight to the questions then that would be equally welcome. So it is a choice for you.

Dr Gavin Barrett: I might make an opening statement, if that is agreeable to the Committee. My name is Dr Gavin Barrett. I am a senior lecturer in the School of Law in University College Dublin, which is Ireland’s largest university.

The Chairman: Could you speak up a little bit and go a little bit more slowly? The acoustics of this room are not brilliant.

Dr Gavin Barrett: Absolutely; I beg your pardon. My name is Dr Gavin Barrett. I am a senior lecturer in University College Dublin in Ireland, which is Ireland’s largest university. The reason I am here before you today is because I have taken a particular interest in justice and home affairs coordination, which has moved firmly back into the crosswires of public attention with the announcement in relation to Protocol 36.

I was very kindly given a list of questions that might arise today, and one of them was: why do you think that the Irish Government chose not to negotiate a Protocol 36 opt-out? By way of preliminary statement, I thought perhaps I might address that question first, and that might form a kind of framework to what else might be said. In fact, Ireland did negotiate an opt-out decision. It negotiated adherence to Protocol 21, on the position of the United Kingdom and Ireland, which is the famous opt-out with an opt-in arrangement. What it did not do, however, was negotiate a Protocol 36 arrangement. Understanding the Irish position regarding police and criminal law cooperation begins with the fundamental point that Ireland is happy with justice and home affairs cooperation generally at European level.
and with police and criminal law cooperation in particular. There is caution in Ireland—a lot of caution at times—at an official level but there is no fundamental concern or hostility to the idea of a role for the European Court of Justice or the Commission—and by this, I mean hostility either at an official level or on the part of the public. The Irish absence from full participation in justice and home affairs cooperation is reactive in nature. What should be understood by that is that, if it were not for the United Kingdom’s decision not to participate fully in this policy field, Ireland would almost certainly be a full participant with no Protocols whatsoever distinguishing our position from that of any other EU Member State. The absence of full Irish participation in this policy area is thus a reaction not simply to EU-level police and criminal law cooperation, but rather to EU-level police and criminal law cooperation without any guarantee of UK involvement.

Now, at Lisbon we saw a kind of bifurcated Irish response to that situation: a distinction was drawn between the Irish position on post-Lisbon-Treaty measures and pre-Lisbon-Treaty measures. As regards post-Lisbon-Treaty measures, the view was taken by Irish officialdom—if I can call it that—that Ireland, without UK involvement, would be in a weak negotiating position as the only country of significant size with a common law tradition. I mean no disrespect to Malta or Cyprus in that regard. The fear on the part of the Irish Government was that the risks of confronting more or less alone any potential Commission inflexibility in relation to proposals would be too great. That drove Ireland into participation alongside the UK on Protocol 21. The idea was of protecting the Irish common law system, in a system dominated by non-common-law countries, and in which, crucially, the UK might conceivably be absent as a heavyweight negotiating ally. None the less, the Irish Protocol 21 position, although close to the UK position, is different in a few respects. Our opt-out is more limited. We did not opt-out in relation to Article 75 TFEU, which relates to anti-terrorist fund freezing measures, although I note Britain’s own declaration at Lisbon, Declaration 65, in which the UK declared an intention to opt in to all Article 75 measures. So perhaps that particular distinction does not make as much difference as it otherwise might. There are other distinctions, however. Ireland’s opt-out is more easily escapable as well. Under Article 8 of Protocol 21, Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of that Protocol. Finally, Ireland’s opt-out in relation to that Protocol is different in that Ireland made a Declaration about the Protocol at Lisbon, in which it declared its firm intention in the declaration to exercise its right to opt in to JHA measures to the maximum extent possible, particularly in relation to police and criminal law cooperation measures. That is the Protocol 21 position that Ireland adopted. It is a significant opt-out even if, as I have pointed out, there are some differences between it and the UK position regarding Protocol 21.

How about the Irish position in relation to pre-Lisbon measures, which is the reason we find ourselves here today? Here the position of Ireland was and is fundamentally different. It will be recalled that these measures have already been shaped by a very full participation on the part of the United Kingdom in negotiating them. At Lisbon the assessment was made by the Irish Government that Ireland was happy with the police and criminal law cooperation measures and there was no desire to undo the position established by these measures. Now, it is true that the Treaty of Lisbon envisaged a greater role for the Court of Justice and for the Commission, after a five-year period, but that did not sound the same alarm bells in Ireland, either politically or officially, that it might have in the UK. The prospect of the involvement of both institutions has been regarded with some equanimity in Ireland. As a result of that combination of factors—in other words, the fact that the measures covered by Protocol 36 have already been adopted and are being enforced rather unproblematically, and the fact that there is less concern about the prospective involvement of the Court and the
Commission in relation to these measures—meant there was never really any chance of Ireland signing up to Protocol 36. Moreover, unlike in the case of Protocol 21, UK absence from participation was never going to drive Irish absence, simply because Britain had been there at the most crucial time in relation to these measures, when those measures were being negotiated. That explains the difference between the Irish position in relation to Protocol 36 and the United Kingdom’s participation in relation to it.

Overall, the position in relation to police and criminal law cooperation measures on the part of Ireland can be seen as a kind of compromise. It balances a certain caution regarding the need to protect Ireland’s common law system, with a generally favourable approach to European integration and a desire and wish to be seen to be team players and to cooperate to the maximum extent at European level - because that is seen to best serve Ireland’s interests. I would just say that by way of introduction to the Irish position and then you might want to ask me regarding further details. I would be very happy to assist the Committee in any way I can.

The Chairman: Thank you very much; that was actually a valuable introduction for all of us to the Irish position. It answers the first question we were going to put to you. Does anybody want to take up any points on that before we move to the other questions?

Q250 Lord Rowlands: Can you just tell us what has been the Irish experience on post-Lisbon measures? Have they joined every one of them?

Dr Gavin Barrett: No, we have not joined absolutely everything, but by and large Ireland tends to opt in to more police and criminal law cooperation than it stays out of. We have a very high rate of participation. A study published in May 2012 indicated that of 22 measures that had come forward at that point, Ireland had opted in to 18 of them already and was considering a further two. Generally speaking, the attitude in Ireland in relation to such measures is that we opt in to them unless there is some kind of countervailing reason as to why we should not. We have not opted in to a number of them. Ireland did not opt-in to the European Investigation Order, which envisaged direct contact with judges, rather than working through a central authority in the manner of the European Arrest Warrant, the European Protection Order and the right of access to a lawyer proposal. Although I understand that it may opt in at some stage to the access to a lawyer proposal. By and large, Ireland has opted in to the vast bulk of measures in this regard, with certain exceptions.

The Chairman: With the European Investigation Order, which is still under negotiation, Ireland will have the option to opt in at the adoption stage.

Dr Gavin Barrett: That is certainly true. Of course, you always have the option under Article 4.

The Chairman: You can always adopt later, yes.

Dr Gavin Barrett: You can do so.

The Chairman: Would it be very troublesome for you to give us a list of the ones that Ireland has and has not opted in to, or would that be difficult for you?

Dr Gavin Barrett: I do not have it with me at the moment, I am afraid.

The Chairman: No, I mean in writing afterwards.

Dr Gavin Barrett: I can certainly seek it from the Department of Justice and Equality.

The Chairman: I think it would be very helpful to us; thank you.
Q251  Lord Bowness: First of all, may I offer you my apologies that I shall have to leave a few minutes before you finish. May I ask you: if the United Kingdom does exercise its opt-out, what implications, if any, would there be for Ireland, considering how closely the two countries work together on police, security and immigration matters, as well as the common travel area in which we both participate?

Dr Gavin Barrett: The UK and Ireland do work very closely on police and security matters. I think that it would be the view of all of us would be that it would be intolerable for that cooperation to decline or be reduced. Would there be implications to the UK opt-out for Ireland? The answer is that yes, there most certainly would. As a preliminary point let us note that the scale of those implications depends on a number of factors. One of them is what the UK then opts back in to. A second factor is the length of the period of time during which the UK is outside. A one-minute absence, carefully planned before the 2014 exit ever happens, is obviously not a problem; a year-long absence might well be a problem. Thirdly, it depends on how much notice is given to the Irish authorities of what is happening in order for them to make appropriate adjustments. That much said, let us reflect on what those adjustments would concern. Ireland and the UK enjoy excellent cooperation in police and criminal cooperation matters. That cooperation is based on a complex tangle of EU-inspired and non-EU-inspired rules. It is a veritable Gordian Knot of domestic, European, and domestic-but-European-inspired measures. Perhaps the crown given to Archimedes would be a better analogy than a Gordian Knot. As of yet, I am not aware of anyone having done a comprehensive analysis of the EU and non-EU-inspired measures. Up until now, there simply has never been any need to because everyone just got on with cooperation without worrying about the origins of the rules. A basic analysis indicates that the problem areas would be: the European Arrest Warrant; a range of mutual assistance measures, not just in justice but also on the customs side; Europol; some drugs and organised crime measures; measures concerned with information exchange; and measures concerned with establishing databases of criminal records and false documents. Replacing all of those would be challenging. Of all of them, there is absolutely no doubt that the European Arrest Warrant is the one that is inspiring the most concern. With your permission, I will talk about that just for a moment.

The European Arrest Warrant is a European-wide system but it is a system that has entirely replaced the formerly bilateral arrangements that operated between the United Kingdom and the Republic of Ireland. It is at present a system that may have its problems as far as other countries are concerned, but it works very well between Ireland and the UK, in part perhaps because of the similarity in the manner of which we have implemented it. Its significance can be assessed from the fact that, out of 601 individuals surrendered by the Irish State between 2004 and 2011, 170 have been surrendered to the UK. That is over 28% of them. The figures in the other direction are even more striking. Out of 184 individuals surrendered to Ireland between 2004 and 2011, 160—approximately 87% of them—were surrendered by the United Kingdom. That is a lot of traffic, if one may call it that. There is more to say. Whatever else one may say about the European Arrest Warrant, the system is more certain and a lot more rapid than the earlier system that it replaced, which was complex, drawn out and involved proceedings taking years to get through the court and uncertain in their outcome. Under the European Arrest Warrant system in Ireland, on average, 50% of individuals do not actually contest their surrender in the first place. Where a case is contested it will take, in practice, about five to nine months to effect a surrender and to go through the process of surrender. There have been very rare cases that have gone a long way through the courts and gone on for a period of years. It is extremely rare, although not
Dr Gavin Barrett—Oral evidence (QQ 249-263)

unheard of, it has to be said, for an appeal against surrender to be successful. So all in all, the Arrest Warrant system is an efficient and effective way of getting individuals back to countries for trial and to serve their sentences.

Those kind of figures, and that kind of movement between Ireland and the UK, mean that it would be a significant development for Ireland were the UK to leave the European Arrest Warrant system. If such a system disappears then certainly, from the point of view of the Irish State, it would be desirable, if not essential, to replace it with another system that is similarly efficient. Otherwise, we may end up with the movement of criminals from one jurisdiction to the other, seeking to hide behind extradition laws for lengthy periods of time. It would be very regrettable to see a well functioning system of criminal law cooperation of this nature operating between our two countries jeopardised on foot of concerns that really have nothing to do with either of our systems.

That is not to say that the European Arrest Warrant system does not have its problems. We have experienced problems in Ireland, just as you have in the UK. One of them can be seen in the fact that in 2011 two thirds of the persons surrendered by Ireland were surrendered to one other state: Poland. So there is a problem in that regard; there is no doubt about that. We are aware also of the controversy that has arisen in the UK concerning pre-trial detention. Ireland would have similar concerns to those which exist in the UK. It is not something that has raised concerns in Irish cases but we are aware of the controversy that it has raised in the UK. So we would have similar concerns in that regard but, at the same time, there are major advantages, in terms of our bilateral arrangements, to the current situation. That was a rather lengthy answer to your question, but I hope it provides some guidance.

Lord Avebury: I wanted to ask you whether there are ongoing discussions that you know of between Ireland and the UK on the measures the UK is minded to opt back in to. Do you think particular risks arise for Ireland if you are notified very late in the day, towards the 2014 deadline, of the measures that the UK wishes to opt back in to?

Dr Gavin Barrett: There are ongoing contacts between officials on both sides. It is hard to believe that issues like that are not being discussed but there is a great deal of uncertainty at the moment in relation to everything. For example, in relation to whether the European Arrest Warrant system would be replaced and what that replacement would be. I can talk a little bit further about that if you like. As of yet, there is a great deal of uncertainty out there. Obviously, from the Irish point of view, the more certainty we have the earlier in advance the better it is, because that gives us more time to prepare some sort of substitute system, particularly in relation to the European Arrest Warrant.

Q252 Viscount Bridgeman: It is a pity that Baroness O’Loan is not here, as this is her speciality. There was a problem at one time with individuals arrested in the Republic for alleged offences in the North and the Irish courts treating these as political offences. Can you give an idea of what the position of the Irish courts at present is?

Dr Gavin Barrett: Under the European Arrest Warrant system that has ceased to be a concern. That simply does not happen any more. However, this raises the issue of Northern Ireland. That forms a vital context for the whole discussion in this area. Do you want me to deal with that particular issue of the Northern Irish issue now?

The Chairman: By all means, if it helps to respond to Viscount Bridgeman’s question it would be very good if you could.
Dr Gavin Barrett—Oral evidence (QQ 249-263)

Dr Gavin Barrett: I just wanted to say that many of the Irish concerns about the prospect of a Protocol 36 opt-out are intrinsically linked to the existence of Northern Ireland. The very existence of the land border alone, and the large amount of cross-border traffic that almost automatically flows from that, would almost certainly be reason enough to make the case for very strong Irish and UK cooperation. Obviously it would be intolerable if a person could seek to cross the border in either direction and shelter behind extradition processes taking years, in order to protect themselves.

The political situation in Northern Ireland, and the ongoing threat posed by paramilitary and criminal organisations, makes such cooperation even more necessary. Those threats are very real. In the last few weeks, an Irish police officer has lost his life in the discharge of his duties at the hands of a gang, which fled across the border immediately afterwards. There has been excellent cooperation, and there is no criticism at all to be made of the cooperation offered in that regard, but it does just show how crucial such cooperation actually is. Noticeably, when the Irish Minister for Justice, Alan Shatter, recently spoke out to voice his concerns about a Protocol 36 opt-out, it was Northern Ireland that featured first and foremost among his concerns. Specifically, and I am quoting, he expressed fears about, “The implications of an opt-out for the peace process and for dealing with criminal justice issues on the whole island of Ireland”. A certain amount of cooperation goes on through the exercise of executive discretion. That would not be jeopardised by the exercise of a Protocol 36 opt-out but some of it is based on EU law instruments. The European Arrest Warrant Framework Directive is the most prominent of these, and UK withdrawal from that is first and foremost among the concerns of the Irish Government.

Q253 Lord Anderson of Swansea: As you know, the UK Government has said it is minded to opt out. From your knowledge of the precedents, are there likely to be any problems that might arise if there were an attempt to have a selective opt-in?

Dr Gavin Barrett: I suppose it depends on what you opt back in to. That is the problem. In relation to the areas I have mentioned—first and foremost the European Arrest Warrant, and other areas of cooperation that I mentioned, depending on which are opted back in to and which ones are not opted back in to—there will be problems in that regard. Somehow one has the feeling that, in relation to the other issues, something can be worked out, but the European Arrest Warrant is something that needs to be thought about with particular care. That is the one that I would put the red mark beside.

Lord Anderson of Swansea: Because it is mutually beneficial it is unlikely one would meet any opposition to such an opt-in but there may be, if one were to have a pick-and-choose approach.

Dr Gavin Barrett: You are asking me to forecast the reaction at European level.

Lord Anderson of Swansea: On the basis of precedent.

Dr Gavin Barrett: The difficulty with European matters is the fear that it will not just be judged on the actual measure itself but that other matters might get tangled up in it, such as political agendas in relation to border matters at European level, or that political attitudes might come into it as well. The fear is the uncertainty. One really does not know, if one opts out, exactly what one is going to get back into and how well that is going to function. The attitude in Ireland in relation to this would be, to use the colloquialism, ‘If it ain’t broke, don’t fix it’. There are certainly some aspects of the European Arrest Warrant—the whole question of proportionality and pre-trial detention—that could be looked at more closely.
Whether that would be seen, from an Irish point of view, as justifying bringing the whole house of cards down would be another matter.

**Lord Sharkey:** I think that Dr Barrett has answered the question I was going to ask about Northern Ireland and any consequences that might arise as a result of the land border, as well as the obvious historical context. So unless there is anything you want to add to what you said previously, we can move on.

**Dr Gavin Barrett:** No.

**Q254 Lord Anderson of Swansea:** You have mentioned the generally warm attitude of the Irish Government to cooperation in this field. Is that something that is shared by practitioners and the police?

**Dr Gavin Barrett:** I think it is, generally speaking. The broader context of European integration in Ireland is that it is a process of empowerment for a very small nation with very little bargaining power. Through it, you become a country that actually has a place at the table. It might be a relatively quiet voice compared to more powerful Member States, but you have a place at the table and you are listened to. That forms the background to European integration and the Irish approach to European integration generally. That is a view shared right across the spectrum in Ireland. There is relatively little Euroscepticism. Perhaps there is a somewhat increasing amount in recent years but, relatively speaking, there is little. In terms of the particular issue of concerns about an opt-out, the major concerns I have heard expressed about this have been by the Minister for Justice, Mr Shatter. Those were reported in the Financial Times and in the Irish Times in January of this year. Apart from that, there really has not been a great deal said in public about this particular matter. One would not expect concerns to be expressed by the Gardaí, the Irish Police Force, because generally this would be regarded as a political matter, and it would feel that it is not its role to comment publically in relation to it. I have little doubt that they are making their feelings known about the necessity for police cooperation privately within the Irish political system, but the external representation of that would be left to the Minister for Justice.

I am not aware either of there having been any concerns expressed by legal practitioners, but at one level that does not surprise me. I have gotten used to being something of a justice and home affairs aficionado at this stage and, even if I find it fascinating, I realise that a lot of practitioners do not. More seriously, one could say that British withdrawal is going to be of more concern to prosecutors than it is to lawyers, who might have an interest in the defence of individual interests. That would tend to dampen down any expression of concern in relation to it.

**Q255 Lord Richard:** I have two questions. If the UK were to opt out of all this and then opt back in, what happens in the interim, if there is a gap between the time that you opt out of the EAW and when you opt back in to it? The second point that occurs to me is that, by and large, the impact of these 130-odd measures that the UK is opting out of has been much the same in Ireland as it has been in the UK, yet there is this feeling in the UK that we have to opt out and shake the whole thing up. That does not seem to have surfaced in Ireland. Is that true, and is there any reason why it has not surfaced in Ireland?

**Dr Gavin Barrett:** In relation to the first question on interim arrangements, that is absolutely the case. There is no doubt about that: that the interim question would be a problem. That is particularly the case in relation to the European Arrest Warrant. What happened was that when the European Arrest Warrant was implemented in Ireland it was done by means of a statute that was adopted in 2003. That particular statute repealed the
Dr Gavin Barrett—Oral evidence (QQ 249-263)

pre-existing arrangements regarding extradition under the Extradition Act 1965. That means that, if the European Arrest Warrant system collapses, there is nothing there in Ireland; there is no domestic law there providing for us. I am not sure if you want me, at this point, to go into the 1957 Convention, or I can come back to that later on. In relation to that, Ireland, like the United Kingdom, is what is called a dualist state. In other words, the rules of public international law including treaties, like the 1957 Convention, are of no binding force within our respective countries unless and until they are incorporated, usually by Acts of Parliament. That is the way that it works. As I mentioned, with the European Arrest Warrant the implementing legislation in Ireland was adopted in 2003, and the pre-existing legislation was repealed. As I said, that means that, if the UK were to withdraw from applying the European Arrest Warrant system, there would need to be a legislative act to replace it. Some form of legislation would have to be adopted. What I mean by that is that the Council of Europe 1957 European Convention on Extradition, as an international law instrument, would not be sufficient in and of itself to fulfil the gap. What you would be looking at is a bilaterally arranged new system to take its place, or you would be looking at recreating the system based on the 1957 Convention. Something would have to be done; legislation would have to be adopted.

I would not want to underestimate the difficulties or the problems of the 1957 Convention. If you have a look at the 1957 Convention it is riddled with exceptions and reasons not to extradite individuals. That is really why the system was so ineffective. I looked at the Convention last night, and there are reasons not to extradite for political offences in Article 3, military offences in Article 4, fiscal offences in Article 5, no extradition of nationals in Article 6, offences committed in the requested state in Article 7, lapse of time, and so on and so forth. There is a series of strict formal requirements. The 1957 Convention would not really be seen as a very satisfactory basis for reconstructing a new system to replace the European Arrest Warrant.

The Chairman: In your view, is there any possibility that the Commission would take the view that bilateral negotiation on a matter covered by European Union law would not be permissible anyway?

Dr Gavin Barrett: I do not think so, in the sense that it would not be covered by European Union law, as regards the relationships between the United Kingdom and Ireland at that particular point in time. You did negotiate the Protocol 36 arrangement, and that involves the ability to withdraw, as far as the United Kingdom is concerned, from these matters. As far as I understand the situation, that would mean that those matters are no longer covered by European Union law, and that therefore it would be possible to negotiate bilateral arrangements. Now, on the other hand, the prospect of negotiating bilateral arrangements with 26—soon to be 27, and perhaps more—other Member States, is an onerous prospect indeed. I would not underestimate that. The hope in Ireland would be that priority, because of our close situation and Northern Ireland, might be given to arrangements with Ireland, because of the very obvious risks and dangers associated with not doing so.

Q256 Lord Hodgson of Astley Abbots: I want to just go back to the legal practitioners issue from the previous question. One of the things that has bedevilled the Anglo-Irish relationship has been the political dimension of extradition. If we were to move away from the European Arrest Warrant and find a satisfactory bilateral placement, do you think the political dimension would re-emerge? Are there practitioners who would see that as a way of better defending their clients, by playing the political dimension for what may be on the edge of criminal paramilitary activities? Secondly, I am interested to hear that you think that
pre-trial detention has not really registered with the Irish public yet. Obviously Ireland has been through an extremely difficult economic cycle, more difficult than most. It has been extremely brave, and those of us that have Irish parentage are pleased to see it beginning to emerge from this. Do you think the fact that this had to depend heavily on the European Union for the transitional financial arrangements means that the Irish Republic is inclined not to bite the hand that feeds it, and therefore is prepared to allow European-based activities and promulgations greater latitude than they would in other circumstances?

Dr Gavin Barrett: Would the political issue arise again? From the point of view of Irish officialdom, what that would like to see recreated, if the European Arrest Warrant cannot continue to exist, is then a micro-European Arrest Warrant created between Ireland and the United Kingdom. We have had the European Arrest Warrant since 2003 or 2004, and it has been working very well indeed. The official view would be that we would like to see that recreated more or less instantly to replace it. If we cannot have a multilateral system then we should have at least a bilateral system. At the same time, if you are recreating the system it has to go through the political process and I do not know what the outcome would be of the political process. Whether exceptions may creep back in that had been done away with under the European Arrest Warrant system, I do not know, quite frankly. Sometimes these things are easier to operate or negotiate at a European level, because you can look around and say, “Everyone is doing it”. Perhaps it is a little bit more difficult to do it on a purely bilateral level. At the same time, the hope would be for the Irish Government to renegotiate and put in place something so that, if Britain must withdraw from the European Arrest Warrant, an equivalent replacement would be put there.

In terms of pre-trial detention, the reason that has not registered with the Irish public is because there have not been any prominent cases involving Irish individuals, so it simply has not featured in the news.

As to the question of Ireland not biting the hand that feeds it, generally speaking, as I said at the outset, I think European integration would be seen as a positive thing in Ireland for a whole host of reasons, including financial reasons but for a whole host of other reasons as well. It gives Ireland more voice, it gives us a seat on the board of directors of the single market. The peace implications of European integration would be important as well. There is a further factor here as well, which is that the role of the Commission and the Court of Justice would be seen in somewhat more positive terms than at times they are in the United Kingdom. The role of the Commission, for example, would be seen as useful because it is seen as proposing more balanced proposals than might necessarily come from Member States. In terms of enforcement, at the moment, without the Commission being involved through actions before the European Court of Justice, you are relying on peer pressure through scorecards and periodic evaluations. That is not seen as being particularly effective. The prospect of an Article 258 TFEU prosecution by the Commission is a lot more efficient in getting Member States to obey their obligations. There are questions about how well implemented, at times, various framework decisions on other measures are at European level. The role of the Commission would be seen positively. Similarly, the role of the European Court of Justice in ensuring uniformity in terms of how measures, such as the European Arrest Warrant and a Framework Decision is applied, would be viewed positively. It was noticeable in one prominent case—the Bailey case, which was decided by the Supreme Court—that Mr Justice Fennelly, one of the most eminent members of the Irish Supreme Court and a former Advocate General, criticised the fact that, although the Irish 2003 Act had to be implemented in light of the Framework Decision having been adopted to implement it, the option of actually referring a question to the European Court of Justice to ask what exactly was meant by the Framework Decision was absent. So there are very
positive advantages, as well as perhaps some disadvantages, to the further involvement of those institutions. There would be a degree of official consciousness of that.

**Q257 Lord Rowlands:** Was not the Metock asylum case an Irish case?

**Dr Gavin Barrett:** It was.

**Lord Rowlands:** That was a case where the Court of Justice played an expansionary role and caused a lot of trouble, did it not?

**Dr Gavin Barrett:** I wonder if that case was not more controversial in some other Member States than in Ireland? I seem to recall the Danes being particularly exercised about that case.

**Lord Rowlands:** I thought it had a very serious ripple effect on the Irish.

**Dr Gavin Barrett:** It did raise a certain amount of controversy in Ireland at the time. I am not saying that justice and home affairs matters are not without capacity at times to create controversy. I do not want to paint too rosy a picture in that regard. Perhaps — raising matters like pre-trial detention — if there had been such a matter involving an Irish citizen, then perhaps it might have been a greater issue in Ireland. Regarding pre-trial detention, the Irish position would generally be supportive of the United Kingdom in seeking reforms, rather than seeing the destruction of the European Arrest Warrant system because of certain well known failures in relation to it.

**Lord Avebury:** You suggested that the legal vacuum that would arise in Ireland if the European Arrest Warrant did not exist could be replaced by a micro-EAW arrangement between the UK and Ireland. Would that require legislation both in the UK and Ireland? Would it then further require a repeal of that legislation if we opted back into the EAW?

**Dr Gavin Barrett:** Probably yes and probably yes is the answer to that. It would be hard to envisage a system like that coming into place otherwise. It certainly could not come into place without legislation in Ireland. There would be an obvious bilateral side to it in terms of setting up arrangements, so I imagine it would require legislation in the United Kingdom as well. And yes, obviously such legislation would then need to be done away with or superseded if the United Kingdom opted back in to the European Arrest Warrant at a later stage.

**Q258 Lord Elystan-Morgan:** My question is question number five on your list, which I think Dr Barrett has dealt with very comprehensively. On the issue of the vacuum, can I just ask a question? Ideally, one should not opt out of the European Arrest Warrant, but assume that that happens and that there is no opt-in. The 1957 European Convention on Extradition leaks like a sieve and probably would be worse than useless. Therefore, one has to think of some new mutual arrangement very suddenly. Ideally of course, if in the next few months the two Governments manage to sketch out something that would be acceptable, that would be marvellous, but assuming things do not happen in that way, is there not going to be an embarrassing void and a void that will cause immense problems, bearing in mind our common land frontier? Is there any way in which we can bridge that void, assuming that the opt-out does take place and that opt-in does not operate?

**Dr Gavin Barrett:** Yes, I think it would be more than embarrassing; it would be positively dangerous. You are left in a situation in which, as I noted, if criminal offences take place on
Dr Gavin Barrett—Oral evidence (QQ 249-263)

one part of the border and you need to get people back quickly in relation to those offences, there is no system for doing so. That is deeply problematic. If some kind of arrangement is not negotiated, legislated for and acted on very quickly there will be a void and that will be very problematic. If nothing is negotiated, I presume Ireland will adopt legislation on the basis of the 1957 Convention, because there will be nothing else there. It may not have escaped your attention—in fact, I know it has not because I know it was raised previously in front of this Committee—that Ireland has made declarations in respect of that Convention. There is a provision, Article 28(3), under that particular Convention, according to which it is possible to replace, with a mutual arrest warrant, the arrangements that are there under the 1957 Convention. Ireland made a declaration in that regard vis-à-vis other Member States of the European Union, including the United Kingdom, insofar as the European Arrest Warrant decision is applicable in relations between Ireland and the other Member States.

Interestingly, a further declaration was made in relation to the Channel Islands and the Isle of Man, which continue to apply the 1957 Convention as between Ireland and those jurisdictions, and it continues to apply to non-European Member States. The way I would read those particular declarations is that, if the United Kingdom withdraws from the European Arrest Warrant system, that declaration would no longer apply to Ireland’s relationship with the United Kingdom. The declaration expressly applies, “insofar as the Framework Decision is applicable in relations between Ireland and the other Member States”, so if the UK withdraws from the European Arrest Warrant system then the declaration no longer applies. So, if you like, the 1957 Convention resurrects itself between the states. So at the level of public international law I would not see there as being a vacuum. There would be the 1957 Convention, albeit with all the defects, all its imperfections, all its outdatedness, all its afflictions and all its potential for endless litigation with an uncertain outcome in relation to the surrender of individuals. That is what you would be left with. One has to remember as well that that is an international law instrument. As dualist states, it does not apply within the United Kingdom or within Ireland so legislation would need to be adopted on the foot of it, certainly in Ireland.

Lord Elystan-Morgan: So if it came to a question of tarting-up, if I may use that expression, the 1957 Convention, one would still need fresh legislation in the domestic law of both our countries?

Dr Gavin Barrett: Yes.

Lord Elystan-Morgan: That inevitably takes time.

Dr Gavin Barrett: Yes, it does. The sooner we find out about what is going to happen the better.

Q259 Lord Anderson of Swansea: You have set out all the difficulties—the possibility of a legal vacuum and so on. In light of that, from your contact with the Irish legal establishment, how do they interpret what is happening in the UK?

Dr Gavin Barrett: With a great deal of concern and worry, to be honest with you. I would put it as simply as that. The general attitude is that the system is working, with some imperfections, very well. It is certainly working between Ireland and the United Kingdom. There is a matrix of rules there, some of them of European origin and some of them not of European origin. The overall effect of the existing rules is that things are going fine in terms of justice and home affairs cooperation. The other point I would make about this is that there would be concern not alone about the effects of a unilateral withdrawal in terms of the pre-Lisbon instruments, but also general concern about the British approach in relation
to justice and home affairs cooperation generally. Ireland would be concerned if this formed part of a broader context of Britain turning its back on justice and home affairs cooperation in the future at European level. Ireland benefits greatly from UK involvement here. We have very similar legal and criminal justice systems, and you are a heavyweight ally for Ireland at European level. We can make common cause in relation to this area. We do not make common cause in relation to everything at European level—we have different interests in some respects—but in this area there is a lot of common cause, and there would be concern in Ireland about losing a heavy-punching partner in the justice and home affairs field at European level. There would also be concern about an eventual drift between European-style cooperation and the United Kingdom’s operation and administration of justice matters, a drift which we would not see as being particularly desirable. Ireland obviously has to have a partnership both with the United Kingdom and with other European Member States. There would be concern about an eventual drift away from the two of them. So there is concern about the specifics and concern about the general.

Q260 Lord Judd: My question follows on from what you have just been saying and the whole discussion about EAW. Looking beyond the EAW specifically and taking into account the very much improved operational relationship between the Gardaí and the police, what do you think the wider implications for all that cooperation would be if we were in a new situation where we were not wholeheartedly involved in the EAW? Can you indicate any areas where you think this might become affected? Would existing instruments be adequate or would we have to start negotiating a whole lot of detailed new arrangements?

Dr Gavin Barrett: I am not sure I can add a great deal to what I have already said. The European Arrest Warrant is certainly one area. I am given to understand that there are a range of mutual assistance measures, not just in the justice area per se but also in the customs area, and that would have to be looked at as well. Police cooperation with Europol forms a basis for cooperation, not just between the UK and Ireland, but also vis-à-vis other EU states. I understand that there are negotiations on reforming the legal basis for Europol. If that happened before the 2014 withdrawal, then the 2014 withdrawal would not affect that. So that would solve that problem, were that to happen. Obviously, a lessening of cooperation in that regard would be of concern as well. There are some drugs and organised crime measures, particularly ones that define the scope of cooperation, which are of concern as well. There might be some need for negotiations in that regard. I understand there is something there with information exchange provisions as well. They may be difficult to replicate. As far as I understand, some of those information exchange mechanisms actually involve European-Commission-designed software, so I am not sure exactly how they would be replicated at a bilateral level. That would have to be thought about as well. There are other criminal records databases and false documents databases, so there would be some losses in terms of cooperation there as well. Over and above all of those is the European Arrest Warrant. That is the big concern.

The Chairman: The Schengen Information System II, which Britain has opted in to, is a very important package, of course.

Dr Gavin Barrett: Yes, and I understand you have invested quite a lot of money in preparing for that.

The Chairman: Yes, €40 million. On Europol, you are right to pose the questions of whether the new Europol legislation will have completed its legislative course by 2014. It could well not have done, but of course the British Government will have had to decide whether to opt in to it as a post-Lisbon measure within a short, fixed period of time after
the tabling of the Commission’s proposals. So, to some extent, there would be some clarity introduced into that situation by the post-Lisbon decisions.

**Dr Gavin Barrett**: That is true. Absolutely.

**Q261 Lord Elystan-Morgan**: Is it not the case, as far as the criminal law systems and the substantive criminal law of both the Republic of Ireland and the United Kingdom extend from a common origin, pre the establishment of the Irish Free State? We have heard a great deal of evidence over the last few weeks. As far as the weakness in the European Arrest Warrant is concerned, the main weakness would appear to be the problem of proportionality. Not all 27 countries interpret the idea of what is a genuinely serious offence in exactly the same way. Bearing in mind the similarity of our system and the commonality of much of the criminal law between the two countries, has the Republic of Ireland in relation to any other country—not the UK, but any other country of the European Union—come across a problem?

**Dr Gavin Barrett**: The answer to that is yes. You are absolutely right in saying that we have systems that have a common origin. That very much marks the Irish reaction to justice and home affairs measures and marks our reaction to individual measures, such as the ones that I mentioned that Ireland has chosen not to opt in to. Generally speaking, that will be because the Irish system is a common law one and particular measures do not seem to fit very well with that situation. So we are very marked by our common law tradition in that regard.

In terms of the proportionality issue, that is something that has become noticeable in Ireland. As the years are going on, it is becoming more noticeable. The proportion of surrenders to other countries from Ireland to the United Kingdom is about 27% to 28%. The proportion, by and large, should be larger than that. The reason it is not larger than that is the number of surrenders we are making to one country: Poland. There is a Polish question in relation to the European Arrest Warrant. They seem to regard it as necessary that in relation to every trivial offence a European Arrest Warrant be issued. There are obviously cost implications to that and proportionality implications to that. If that problem could be sorted out, that would do away with a lot of the problems that tend to be seen as associated with the European Arrest Warrant. It does just seem to be concentrated on that one country. The difficulty at European level in dealing with that problem is that there would be concerns at European level, on the part of the Commission, of introducing a reason for refusing surrender on the part of executing states. They are afraid that if they introduced a proportionality reason to refuse then it might be seized upon in various jurisdictions. As a result, a very well functioning system might get gummed up.

I am not sure what their solution is or whether they would rather see that issue resolved at the Polish level. I am not sure what the solution is but that certainly has been a problem. That is noticeable in practice in Ireland. There is no doubt about that. Apart from that, there are no major problems. There have been two high-profile cases: the Bailey case and the Tobin case, in which there was a refusal to countenance extradition. They involved very peculiar circumstances. One of them involved a second request being made in the same case—that is the Tobin case—and the Bailey case involved an assertion of extraordinarily wide jurisdiction on the part of the French judicial system, which the Irish courts refused to countenance. Apart from that, there are no problems.

**Lord Elystan-Morgan**: So proportionality is essentially a localised, Polish problem?
Dr Gavin Barrett: As far as I understand, looking at the figures in Ireland, yes. The proportions of other states to which surrenders are being made would correspond with what one would expect, but not Poland.

Q262 Lord Judd: Specifically between our two countries, cooperation is not just a technical matter; it is also a cultural matter. If we took the course that is being contemplated, would that culture, which has been very encouraging in the way it has been developing, take a severe knock? Do you think it would do real damage?

Dr Gavin Barrett: It is difficult to say. With the United Kingdom and Ireland, there are certainly a lot of cultural similarities but there have been historical difficulties there as well. Sometimes regulation of matters like that at European level provides a very friendly and, if you like, more acceptable context than might otherwise be the case. It took a long time; there were a lot of discussions and negotiations between Ireland and the UK regarding extradition. I am not sure that we would have seen a development like the European Arrest Warrant if we had been relying on bilateral developments in 2004. Yet it was agreed at European level and then it was introduced between Ireland and the UK, as well as between all of the other Member States. Culturally, there are great similarities. The relationship between Ireland and the United Kingdom has never been better than at this stage, so you could rely on a great deal of Irish good will. You can rely on a great deal of Irish good will in facilitating the United Kingdom in any way we can, no matter what the United Kingdom decision is in relation to Protocol 36. But the Irish view in terms of what would make life easier for everybody I would not have any doubt about: that is that the Protocol 36 option is not exercised.

Q263 Lord Avebury: You said in your introductory statement that involvement of the CJEU in police and judicial cooperation and criminal matters did not sound the same alarm bells in Ireland as it does in the United Kingdom, apparently. There must be some implications for Ireland of the CJEU assuming jurisdiction on the pre and post-Lisbon-Treaty measures and the Commission being able to undertake proceedings. I wonder if you can elaborate a bit on that and, at the same time, say whether there are concerns about the resource implications and possible trial delays resulting from this process. Also, would there be the same benefits or disadvantages that you can think of?

Dr Gavin Barrett: I suppose I should not overegg the pudding in terms of the positive Irish attitude to the institutions. In some ways Ireland is conservative or cautious as well. It was noticeable that, pre-Lisbon, Ireland did not sign up to the full jurisdiction of the European Court of Justice police and criminal law cooperation measures. You might recall that, pre-Lisbon, there was the option for Member States to sign up for preliminary references. 17 Member States signed up for preliminary references. 16 of those states signed up to references being made by lower courts as well as higher courts, with Spain only signing up to courts of last instance doing so. The UK, Ireland and Denmark, as well as some of the new Member States that entered in 2004 and 2007, did not sign up to the jurisdiction of the European Court of Justice. None the less, Ireland signed up to the role of the European Court of Justice at Lisbon fully; it agreed to that. Generally speaking, there is not a great deal of fear about the European Court of Justice or the Commission.

The European Court of Justice already has a role in the very sensitive area of asylum and immigration. That is seen to be working satisfactorily. There are fears of delay; that is always a very serious matter in criminal matters – but the European Court of Justice has introduced a whole range of reforms within the Court of Justice itself to deal with cases that are highly urgent and that need a fast-track response. Broadly speaking, the approach of
Ireland is not without caution, and the failure to opt in to the jurisdiction pre-Lisbon to the European Court of Justice shows that there is some caution about the matter, but as I said, there is an appreciation of the role of the European Court of Justice as well. Very serious cooperation is going on in the police and criminal law field at European level, and it is appropriate to have judicial control over that. It is not appropriate to have that level of power without a corresponding increase of protection of the individual, provided in part by the courts. Also, there is the European Court of Justice’s role, which I referred to already, in establishing a uniform observance of the law right across the European Union. So I think there would be some caution but also a great deal of appreciation of the role of the European Court of Justice in that regard.

I have already referred to the issues with the Commission but the role of the Commission, particularly in coming up with balanced proposals and in terms of enforcing Member State obligations in respect of the various European Union law measures, has been seen by and large as being positive. Of course, no Member State appreciates being prosecuted by the Commission when it happens but, taking a more long-term view of matters, by and large it is seen as ensuring fair play, and—this applies particularly in relation to Ireland as a small state—ensuring fair play between the smaller Member States and the larger Member States as well. To a certain extent, one’s weight can be thrown around a little bit at the negotiating table in the Council but, before the European Court of Justice every State is equal.

The Chairman: On that note, I think we really ought to draw this session to a close. In doing so, we thank you, Dr Barrett, very warmly for the full, positive and helpful way in which you have answered our questions. I can see the Lord Advocate sitting behind, who has been waiting very patiently for the next session to begin. Thank you very much.
WEDNESDAY 23 JANUARY 2013

Members present

Lord Bowness (Chairman)
Lord Avebury
Viscount Bridgeman
Baroness Corston
Lord Dykes
Viscount Eccles
Lord Elystan-Morgan
Lord Hannay of Chiswick
Lord Hodgson of Astley Abbotts
Lord Judd
Baroness Liddell of Coatdyke
Lord Mackenzie of Framwellgate
Baroness O’Loan
Baroness Prashar
Lord Richard
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Earl of Stair
Lord Stoneham of Droxford

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Examination of Witnesses

Hugo Brady, Centre for European Reform, Jago Russell, Fair Trials International, and Jodie Blackstock, JUSTICE.

Q110 The Chairman: Ms Blackstock, Mr Russell and Mr Brady, first of all, welcome and thank you very much for giving your time this afternoon to give evidence to this inquiry. I apologise for the fact that we are starting later, but it is difficult to judge how long
questioning will take and it is even more difficult when we are interrupted by votes. I will keep our introduction as short as possible.

You know the purpose of the inquiry. You may have heard my introduction at the beginning of the previous evidence session. As I say, we have had written evidence and we are now taking oral evidence. This is a report that we are preparing for the use of this House when the debate and vote takes place when the Government are prepared to give a final indication as to whether or not to exercise the opt-out.

As I said before in the previous session, this is being broadcast. It will be posted on the parliamentary website. You will have a transcript that you can correct for any inaccuracies. That will be posted on our website, however, before you get it. Nevertheless, let us have any corrections as soon as possible.

Members will declare their interests as and when they speak. I do so as a solicitor and notary public in so far as it may be relevant. Perhaps I could ask you again for the record, when you first speak, to introduce yourself, your position and your organisation. I invite you to make any opening statements that you wish. If you want to go straight to questions, that is perfectly fine by the Committee. Who would like to go first?

Hugo Brady: If you go into politics, I am told it is great to have a name that starts with a “B” or an “A” because you are always at the top of the ballot paper.

The Chairman: Yes; I remember that.

Hugo Brady: You would be much better able than I to comment on that. I begin very briefly by saying that my name is Hugo Brady. I am a Senior Research Fellow at the Centre for European Reform. We are a think-tank that is pro-European but not uncritical, which is code for, “We think the EU is, broadly speaking, a good idea but in many ways it could work better.” The term “reform” can be misinterpreted as overly anti the European project, which we are not. We are for the supranational institutions but think that we need to constantly submit them to serious proposals for reform and give them ideas on how they can do things better.

I have already published one paper on this issue in October, which I know the Committee is aware of. I should just begin by saying today that I have published a second paper called, Britain’s 2014 Justice Opt-out: Why It Bodes Ill for Cameron’s EU Strategy.

My line, following on from the last paper, has basically been to assess the reaction among the other Member States to Britain’s intention to leave the majority of European policing and criminal justice co-operation. I then analyse what I believe are five critical areas of analysis that proponents of the move, like Dominic Raab, who has just been speaking, have made, why it bodes ill for the overall policy of repatriation and what repatriation actually means in this context.

Going into some of the little details of it, I feel that the Conservatives, if they were serious about this move, should have started campaigning with other European countries from more or less the moment of their re-election, which was in their manifesto; they have left out other things such as recent developments at the ECJ, which seem to disprove their case, and they have forgotten the Scotland issue, which is rather important, given that it has as many individual needs and as much international co-operation as many similar-sized EU Member States. The Scots cannot speak for themselves in Brussels and there was apparently no consultation with them on this matter before it was announced.
I also think you cannot take such a step as this unless the alternatives truly are plausible. We are in the serious business of government here. The alternatives cannot just sound nice; we have to have examples of how they have worked before. I really do not think the MoU route—the Memorandum of Understanding route—is realistic. Also, I think an ad hoc arrangement in the aftermath of the opt-out would be a prime target for judicial blood-mindedness, which was more the norm 15 years ago before the EU got seriously into this area.

I will leave my comments there. I have brought some copies of the report for the Committee, which you can take away with you, by all means. I have already sent a copy to the clerk. Thank you very much for your invitation.

**Jodie Blackstock:** Lord Chairman, thank you for the invitation to come and give evidence before you this afternoon. JUSTICE is the British section of the International Commission of Jurists. In the area of criminal matters, we have certainly lobbied and briefed governments since our inception in 1957 on issues of concern for both suspects and victims of crime in the context of accessing justice, ensuring the rule of law and, in more recent times, human rights.

As I mentioned in my written evidence, we have just conducted a two-year study on the European Arrest Warrant. I have brought some copies of it today. It looks like this and has quite a colourful cover. It is entitled *Ensuring an Effective Defence*, because our findings related more to the flaws in ensuring the quality of arms in the process rather than the actual warrant itself, but I am sure we will come on to that in more detail. If anyone would like a copy, it is quite thick and I was only able to carry 10 with me. I see certainly more than 10 of you in the room, but, if you would like a copy, we will be more than happy to send them because downloading it from the internet makes a very lengthy document.

**Jago Russell:** Thank you, Lord Chairman. I am Jago Russell representing Fair Trials International. I would like to say, first of all, that we are a human rights organisation that is neither for nor against the European Union. We have taken the view that we will closely look at EU justice policies and laws and identify areas in which they are inadvertently undermining basic defence rights. We will also look to encourage EU action where it is improving respect for defence rights across the European Union. That is the approach that we have taken when looking at the 2014 opt-out decision. The major focus of our interest in this question is the European Arrest Warrant, which we have been working on, and we have worked on many cases involving the European Arrest Warrant over the last four years in particular.

**Q111 The Chairman:** Thank you very much. In the first place—and to some extent you have answered it—do you believe that the Government should exercise the opt-out? What would be their grounds for so doing? Can you give an indication of the list of measures covered by the opt-out that, in your opinion, you think we should try and opt back in to, leaving aside for the moment any difficulties about that?

**Jago Russell:** Our view is that, if the Government can obtain a commitment to reform the European Arrest Warrant or there are good decisions coming out of the EU Court creating safeguards within the European Arrest Warrant scheme, we see no reason why the Government would want to exercise the opt-out. The European Arrest Warrant is the only one of the measures that we have any concerns about. That is our one caveat.
It becomes more difficult for us if there is no willingness to consider reform of the European Arrest Warrant at a European Union level. At that point, it very much depends whether the Government are faced with the all-or-nothing approach, which some suggest is the case, or whether the Government can indeed pick and choose. We think that reform of the European Arrest Warrant needs to be at the heart of the UK Government’s negotiations on the 2014 question.

**Jodie Blackstock:** Our position is similar in terms of sharing the concerns that Fair Trials International has about the European Arrest Warrant. However, we have adopted the view that it would be better for us to remain engaged in the police and judicial co-operation area because we have more prospects of ensuring reform within that system than outside it. We do not feel that any coherent arguments have been put forward for why we should exercise the opt-out. As we have heard this afternoon, there is only one real argument that seems to have been suggested, which pertains to the Court of Justice of the European Union. We certainly disagree with the arguments that have been made about that. We can come on to that in question 4, if that is to be raised.

Our main concern is that, irrespective of what the Government chooses to do, crime will continue to cross borders within the EU while we remain part of the Single Market and have free movement of peoples. That crime needs to be managed, and the rights of victims and suspects embroiled in that criminal activity need to be properly respected and recognised.

**Q112 The Chairman:** Thank you. Mr Brady, do you want to add anything? Perhaps I should say that I do not want to stop anybody contributing, but, if you do not have anything to add to what one of your colleagues has said, then there is no obligation on you all to reply to questions.

**Hugo Brady:** Sure. I can offer maybe one or two comments very quickly and probably go back to more points in detail later. The first is that the CER has a plurality of opinions inside it, though not on this issue where I am the only expert. We do not have to have a line. To us, our liberalism of opinion is an important internal thing intellectually and we try to keep to that. In general, we cannot see any good reason to trigger the opt-out because of all the uncertainties that surround its use.

The first thing to note about it is that it is rather a unique agreement in the history of the EU. Nothing like this has ever really been agreed before. At the time it was negotiated, Britain’s stock in Brussels was quite high and people did not need an empirical, evidence-based list of reasons why the British felt they needed this option. It was put into the Treaty. Officials who negotiated it or were around at the time—the other Europeans—did not like it. There was a Friends of Schengen caucus formed, centred around Austria, that tried to oppose the idea of a British opt-out en masse in 2014. But Britain enjoyed reasonable negotiating heft and said, “Look, we need this. Please help us out here.” Eventually, the other countries conceded without really understanding what the whole issue was anyway. It has been hidden away in the back of the Lisbon Treaty since then.

Now it has been dusted off by a different political party with a different view on Europe, who have decided that they are minded to use it. They have not really given very strong reasons to do so except that it will undermine the British common law. If you are going to
take a measure that, almost to a man, anyone who deals with these issues on a day-to-day basis is opposed to, you have to give good reasons why you are doing it. What is the exact threat to the common law? What are the fundamental elements of the common law: habeas corpus, the presumption of innocence, the right of silence and so on? What bits of European law are going to damage those things? They are the fundamental aspects of Britain’s criminal justice system.

We also think that the argument that has been made in some quarters that what Britain should do is leave the European Arrest Warrant and only opt back in once it has been reformed to London’s satisfaction is quite implausible. If you know anything about international negotiations, if you suddenly decide to leave the law of the sea and then say to the rest of the world, which also shares the sea, “We will only opt back in when you have changed the rules to suit us”, it does not make any sense. If you do not have a place around the table on these matters, you cannot affect how they develop. Although Britain is an important part of the system and other countries are dismayed that a large and important country would choose to leave the system, or a lot of it, and create a huge set of uncertainties for other people as well, it is just not clear that that would be a workable strategy.

If we leave the Working Time Directive and only opt back in to it when it has been reformed to our satisfaction, would that work either? In general, I cannot give you a list of things that would be good for Britain to stay in because we do not think that triggering the opt-out is worth it anyway.

I would like to mention the references earlier on to the ACPO evidence. The police did not just say that there were 13 things that were quite good and the rest was rubbish. They said that there are 13 elements of EU co-operation that are vital to be retained. That means that they are vital to be retained; they cannot be lost. That is Europol, the European Arrest Warrant, Eurojust and so on. Quibbling about Europol’s flower bill is another matter entirely. That is about bureaucracy. The reality is that everyone I have spoken to about this issue has said that, over the last two years, there has been a step change and something magical has happened.

For example, in Europol, they could not get Spain and Italy to share information with them. This is why relations with the Mediterranean countries are really important. Like the Anglo/Irish relations, the European Arrest Warrant is one of the few things that magically transformed these relationships because they did not operate like that before. That is why one country that is particularly crestfallen by the announcement is Spain. They imagine that the Conservatives wish a return to the bad old days, as they would see it—for example, when there was the huge constitutional issue over the extradition of Pinochet. It is bringing up all these bad memories. Whatever you thought of that issue at the time, the European Arrest Warrant has just covered them. It is the same with the Irish situation, which I can comment a little bit more on in detail afterwards.

**Jodie Blackstock:** In relation to the information you heard about the ACPO evidence, I would add that one of the specific examples given this afternoon was about combating terrorism. The police’s role is to tell you what instruments are operational and which are not. All of these EU instruments have a non-regression clause in them. Of course the police might be concerned about standards in EU instruments being lesser than those in the UK. In the context of EU law making, that is not an actual concern that needs to be considered because of the non-regression clauses in all of these instruments. No standards can be dropped below what already exists in the domestic systems, and it is quite an important thing to recognise. Obviously, as you read the ACPO evidence, you will also find out that
they were talking about the fact that, if an instrument is already in UK law, we do not need to be concerned about it. My reading of that, at least, is that just because we have implemented a piece of legislation from the EU does not then mean we can opt out of it. We are still engaged in the system and, indeed, we have given effect to it. On reading their evidence, it is very helpful operationally, but the analysis does not necessarily take the same approach that you might do on a question of opting in or out.

Q113 Lord Elystan-Morgan: Lord Chairman, Mr Russell suggested very strongly that, in relation to some of the imperfections in the European Arrest Warrant, judicial initiative could have an ameliorative effect, if not indeed curing the situation. Appreciating, of course, looking at our own common law, how splendid many developments have been but how long they have taken to mature, is there any real prospect of such amelioration taking place in the fairly short term?

Jago Russell: Yes, I think in the very short term potentially. We are expecting a decision next Tuesday from the Court of Justice of the European Union that has been asked to address specifically two of the problems we have highlighted with the European Arrest Warrant. That is its use for very minor crimes—proportionality—and also the question of whether or not countries should be considering human rights issues before extraditing a person. In the very short term there is the possibility of the EU Court providing some guidance or clarity—or, indeed, some safeguards—in the way this instrument is used.

My view is that, perhaps, if there had been the scope for referrals from the UK to the EU Court for clarity on questions like, “What is a judicial authority?” or many of the other questions, some of the problems we now have experience of—and particularly our clients that have personally experienced the problems with the European Arrest Warrant—may not have happened. I hope that answers the question.

Q114 Lord Hannay of Chiswick: This question is mainly addressed to Fair Trials International and JUSTICE. I should declare an interest as a member of the Advisory Board of the Centre for European Reform.

In your answers to the earlier questions, you have both said that the only one of the 133 matters that will be covered by the opt-out which you consider to be problematic at the moment is the European Arrest Warrant. I think that is roughly what you said. Is that the case? Am I also right in interpreting your answers about the European Arrest Warrant that you are not saying that Britain’s interest will be served, even on the European Arrest Warrant, by opting out, but that there were changes that you think are highly desirable, some of which could come about through rulings of the Court of Justice and some of which, of course, could be secured by the European Supervision Order, which the Government has not brought into effect? Have I got that right?

Jodie Blackstock: The reason the European Arrest Warrant is given as the prime example all the time is because it is the instrument that is in operation across Europe and has been seen as the most successful. We do not know yet in relation to quite a number of instruments what the impact, once fully rolled out, will be on suspects’ rights or on victims. It is difficult to really express the same sorts of concerns in the same way.

It is also the instrument that is always going to have the most draconian effects immediately upon a person because of the nature of the surrender process. It happens extremely quickly, it is streamlined, and a person is returned to another country within a very short space of time away from their family, work and so forth, in a way that perhaps the other instruments will not have quite such an impact. It is right to say that JUSTICE has expressed concerns
about the implementation of a number of these measures as they have come on board in relation to the exchange of criminal records—for instance, the transfer of prisoners and even in relation to the European Supervision Order when it was first proposed.

The reason for that is that, often, we find that there is little awareness of these instruments among defence practitioners. They are often buried within another UK Act; it is not necessarily flagged up that they have come from Europe or the implications they will have in a client’s case. There is little training given on these instruments for defence lawyers and there is no equivalent EU institution such as Eurojust, Europol or the European Judicial Network for defence lawyers in order to exchange information. Immediately, when any of these instruments come into force, particularly if they are a prosecution-orientated instrument, they create a possible imbalance in the equality of arms and the ability of defence lawyers to represent their clients effectively. That is exactly what JUSTICE has found with the European Arrest Warrant in the research that we have conducted on it.

The criticisms that we have been making are in that context. The nature of these instruments is such that a request is issued and usually a defence lawyer is not engaged in that decision to issue; so a measure is taken already in the issuing state without consideration of the defence’s case. It gets to the executing state where there is a limited role for challenge; the person or evidence relating to the person, or whatever it is, is then engaged and dealt with at the trial stage in the issuing country, often again without the defence being able to challenge its admissibility.

All of these instruments do create problems. I am sure that Fair Trials International would share our concerns on that because of the cases that they have looked at. Nevertheless, we say the mechanisms for dealing with those problems are becoming available. The training for defence lawyers and their awareness—and, indeed, for judges—in giving effect to equality of arms with these instruments is improving. Yes, of course, the European Arrest Warrant has been around for more than eight years now. Things should have happened sooner, but we do not see that as an argument for extricating ourselves. The efficiencies in the system and the mechanism for improvements are still better by remaining engaged. I hope that answers the question. I know it was long-winded.

Q115 Lord Hannay of Chiswick: Thank you. It was helpful and clear.

Jago Russell: I have two points in addition. I entirely agree with Jodie’s reference to both ECRIS, the Criminal Records Information System, and the prisoner transfer Framework Decision. We do not yet know what kind of issues they are going to throw up. It is fair to say that many of these measures were not the most beautifully drafted and no doubt will raise issues. From Fair Trials International’s point of view, though, they are of a less significant order than the European Arrest Warrant.

We do differ to JUSTICE, and I think your interpretation of our position is actually wrong in terms of the European Arrest Warrant. If the European Union refuses to consider reforms to the European Arrest Warrant, or the EU Court turns around on Tuesday and says, no “human rights are irrelevant”—which is possible—Fair Trials International’s view as a defence rights organisation is that the UK Government should not opt in to the European Arrest Warrant. We think that, once we have opted in, having asked for sensible reforms in the process and been refused, we are stuck with the European Arrest Warrant, including its many flaws. I am very hopeful that there is going to be some agreement and some scope for sensible reforms and that the significant step of opting-out, which the police, understandably, are very concerned about, will not be necessary. Given the cases we have worked on and the people whose lives have been torn apart by inappropriate uses of this European Arrest
Centre for European Reform, Fair Trials International and JUSTICE—Oral evidence (QQ 110-131)

Warrant, we think that, unless there is a commitment to reform, the UK Government should not opt in. We do not expect all of the reforms to have been put in place by the time the opt-in decision is made.

Q116 Baroness O’Loan: Could you tell me whether any of the pre-Lisbon PCJ measures have undermined the UK common law systems in any way?

Jago Russell: I do not believe so, no. It is not at all a concern I have. In fact, many of them seem to have had a much more significant impact on civil law jurisdictions. If you take the European Arrest Warrant, one of the major changes from that was the fact that countries had to agree to the extradition of their own nationals. We have always allowed that but many other European countries did not. So I do not believe they have undermined the UK system.

Jodie Blackstock: We would agree with that. Moreover, the majority of these instruments look at co-operation. That is the word and the description used. It is not about changing national law; it is about finding mechanisms to ensure that the investigation and prosecution of crime that crosses borders is facilitated. Therefore, it should not have to have an impact on common law. We certainly have not seen that it has.

There may be some arguments and objections to demands made upon our system—for example, with the European Arrest Warrant having to return someone in the face of whatever a judicial authority is. That is an example that was given in relation to the Assange case in Martin Howe’s evidence. In our view, that is not an impact upon common law. Indeed, it is not something that would ever disappear, irrespective of what system you use. Each Member State has its own mechanisms of giving effect to its judicial system. Indeed, many Member States are very surprised by the discretion given to our police officers. They would never have the ability to manage their own cases in the way that ours do, but then their police officers may not have direct accountability to the public in the way that ours do. It is very difficult to cast aspersions about other Member States’ systems. We certainly do not see any undermining of the British system by these measures.

Baroness O’Loan: Some of our evidence suggests that the opt-out will protect the United Kingdom from the Commission’s ambitions for the development of a pan-EU criminal law code enforced by a European public prosecutor. What is your view on that?

Jodie Blackstock: We would say immediately that it simply is not an issue for the opt-out decision because they will be dealt with under Protocol 21, which entitles the UK to make a decision on a case-by-case basis. Certainly, we already have a cast-iron exclusion from the European public prosecutor system.

I have not heard from any conversations I have had in Brussels or in any other Member States that there is a call for a pan-European criminal code, but, if there were, we could simply not opt in to it as a result of our Protocol 21 arrangements.

Jago Russell: One of the things that has become clear from a number of these mutual recognition instruments is that there are some areas in which some better co-ordination or harmonisation of standards is necessary and, in particular, the defence rights measures. One of the major problems with the European Arrest Warrant is the fact that there had not hitherto been effective guarantees of defence rights across the European Union. I think that also needs to colour the decision on the 2014 opt-out. If there is continued progress towards basic minimum standards of defence rights in the European Union, then that will address many of the concerns that we have had about the operation of the European Arrest Warrant.
Q117 Lord Avebury: Obviously, if we opt out, then we do not have a say in improving the rights of the defence, do we? My question is about the witnesses who have suggested to us that the CJEU is becoming a political court of poor quality or, alternatively, that they are concerned about its alleged judicial activism. The Government have referred to the risk of expansive interpretation and unexpected judgments. I am wondering whether you have any concerns about the exercise of the CJEU’s jurisdiction. Do you also have anything to say, further to your earlier evidence, about the prospects, as you mentioned, of the EU providing the amending legislation that is necessary to deal with some of the criticisms made in the Fair Trials International written evidence, for example? Within the period that our investigation is covering, do you see the possibility that extradition on human rights grounds could be refused by the courts at their own discretion?

Jago Russell: Lord Avebury, could I briefly respond to your comment at the beginning of your question? The UK will continue to have a role in the negotiations on the EU defence rights measures. They are all post-Lisbon and we have the opt-in, opt-out decision on each of those. I very much hope that the UK Government will continue to engage constructively and that they will decide to opt in to the latest measure on access to a lawyer.

Personally, I think it is unlikely that all of these changes will be in place to the European Arrest Warrant by the time the opt-in decision needs to be taken. What we are asking for is a political commitment to make those changes. I would also say that we do not really care whether they come in the form of legislation, direct change to the Framework Decision, or in the form of EU Court decisions. Provided the safeguards are created, that is what really matters to us.

In terms of the concerns that have been raised about the CJEU, I greatly welcome the idea that the CJEU is going to have jurisdiction over a whole range of EU-wide measures. It seems crucial to me that, if you have a legislature and you have legislation passed, there is a single judicial body that is able to interpret that and make sure it is applied consistently across the EU. My reading of the CJEU’s limited case law in the area of criminal justice is that, in fact, they are incredibly deferential to Member States in this area, recognising that Member States are very concerned about retaining the unique features of their criminal justice systems. I do not share those concerns that are being expressed by some people about judicial activism.

Hugo Brady: I will come in very quickly on this. One case that is frequently referred to as an example of the ECJ’s intention to harmonise criminal procedures in Europe is the Pupino case. That seemed to say a few years ago that EU-level agreements on minimal judicial standards trumped national practices where necessary. That would be a very clear line drawn from the Single Market legislation, which says that, where it is necessary to achieve the objectives of the Treaty, European law is superior.

You will see a number of rowing backs on that apparent position. It is not clear that that is what the Court actually said. I have mentioned in my paper two rulings with the case numbers, and you can go back to them afterwards, addressed to the same Italian court in 2011 and 2012, which tweaked Pupino further to say that, yes, it is true that EU minimum standards matter and have to be applied, but they do not take away from national discretion as regards fundamental aspects of its justice system or the role of its prosecutors or police.

The conversation is evolving at the ECJ level. I am working on a project at the moment, which is perhaps ambitiously called “10 things everyone needs to know about the ECJ”. That is to try and raise the level of debate on this matter. It has become a much less ambitious court over the last 15 years. I think that is clear to anybody. If you see its intentions, as Jago
Centre for European Reform, Fair Trials International and JUSTICE—Oral evidence (QQ 110-131)

said, on the criminal justice side, there is a clear understanding of the sensitivities at play here.

One of the things I suggest in my paper, which might seem a little bit unlikely but I think is a good idea, is the establishment of an office for the protection of the common law, partly based in the Commission’s Legal Service and the Court at Luxembourg. That would work in the same way that the EU’s data protection supervisor does. It can issue formal opinions where a draft piece of legislation or a ruling touches on the fundamental aspects of any country that uses the common law, not just Britain but Ireland, Cyprus and Malta also. That is one potential way of improving the optics of this particular debate.

There simply is not any evidence there that the ECJ’s jurisdiction will be inherently bad for this country.

Q118 Lord Elystan-Morgan: In short, should one assume then that, certainly in so far as the relevant criminal law is concerned, judicial activism is far more likely to be ameliorated than it is going to be dangerously messianic?

Jodie Blackstock: There was a question raised earlier with the previous panel about the distinction between the cases they and the Government were giving as examples of concern from different areas of competence, and the impact on this area of police and judicial co-operation. There is, of course, a reason why the Court will not exercise its jurisdiction in an expansionist way, if indeed it ever has, because of what is contained in Article 267 TFEU, which requires the Court not to look at the operation of criminal cases within a national jurisdiction. It cannot look at the maintenance of law and order. Certainly, we would interpret that in the way that it comes from Article 72 TFEU, which is directly related to this area and within this chapter on police and judicial co-operation, to mean that where subsidiarity has been exercised, and instruments like the European Arrest Warrant are in play, the Court can interpret the EU instrument and whether that has been transposed into national law correctly. What it cannot do is look at the individual case and comment on whether the actual investigation is proportionate or not. In our view, that seems to be where the concern lies in terms of the Court having too much engagement with the national issues.

I would also like to say this about it. There has been a suggestion that, because these were pre-Lisbon instruments where the jurisdiction of the Court was not taken, there may be ambiguities in them. I am not sure that is entirely correct, because the opportunity to take the jurisdiction of the Court was there in Article 35 of the previous Treaty. Indeed, at the time of signing the Treaty of Amsterdam, five countries immediately took up that jurisdiction. The instruments that were immediately drafted thereafter were taken in the context of the Court having jurisdiction for five countries which held unanimity. By the end of the previous Treaty 19 Member States had taken up that jurisdiction.

Certainly, in our view, it is not accurate to suggest that the Court was never in mind in the drafting of these instruments. Furthermore, they were all being drafted through careful, detailed analysis, and the Council and Commission Legal Services were always consulted before an instrument was adopted.

I would certainly concur with Jago that the Court is in fact useful to have. We welcome its jurisdiction where there are ambiguities in creating a uniform reading of EU law. The cases that have been referred to talked about improvements in equality or justice. That should be seen as a welcome analysis rather than one that is unduly expansionist.
Q119 Baroness Prashar: My question is for Mr Russell and Ms Blackstock. Have the Government engaged with you regarding the possible reform of the European Arrest Warrant?

Jodie Blackstock: They have to a certain extent. Certainly, we would be of the view that both of our organisations’ engagements with the Government or lobbying towards the Government set up the Scott Baker review because of the concerns we had expressed about it. That inquiry process was detailed and took evidence in a way that was certainly welcomed. Since then, in relation to the report that I have indicated I have finished recently, the Government did not engage in that process because of the opt-out decision. Any reform process in which we wanted to engage with Government, in the last six months or before that, has been stymied because of this opt-out consideration. But we would hope that, going forward, we can certainly continue to make our concerns known.

Lord Hannay of Chiswick: To be quite clear, in the context of the Prime Minister’s statement in September and the statement of the Home Secretary and Justice Secretary in October about being minded to use the opt-out, they had no consultation with you about the 133 measures covered by the opt-out.

Jodie Blackstock: No; sorry, I thought the question was about the European Arrest Warrant. My question was about the European Arrest Warrant. I was going to come to the other ones later.

Lord Hannay of Chiswick: Sorry; I have jumped the gun.

Jodie Blackstock: But I could answer that at this moment, if you wish me to.

Q120 Baroness Prashar: Before you do, would Mr Russell like to respond as well, please?

Jago Russell: We have no concern whatsoever about the lack or otherwise of consultation on the European Arrest Warrant. There have been ample opportunities now for civil society organisations to express their views on the Arrest Warrant with the Scott Baker review, the Home Affairs Select Committee’s review and the Joint Committee on Human Rights’ review. They have all reached the same conclusion, which is that it is a useful instrument but it needs fixing. I have no concerns about a lack of engagement.

Baroness Prashar: You can now answer my supplementary.

Jodie Blackstock: At the time when the announcements were made, no, it took us by surprise, and we were dismayed to hear that that decision appeared to have been categorically made when the Prime Minister made his announcement without consultation. Since then, we certainly have been contacted to be consulted about our concerns. We hope to meet with the Government representatives in the first week of February. Both our organisations have been invited to meet together.

Baroness Prashar: Has it been their initiative to invite you?

Jodie Blackstock: Indeed.

Baroness Prashar: Will you be pursuing the issues raised in your research report on the European Arrest Warrant?
Jodie Blackstock: I am not entirely clear at the moment what the remit of that meeting will be. If it appears that it wants to look at it in the wider context, then, yes. As far as we are concerned, it is an integral part of the decision whether we opt in or out. We would certainly like to think that they will listen to our concerns.

Baroness Prashar: Do you think they should have consulted all the interested parties before deciding on the opt-out?

Jodie Blackstock: Yes.

The Chairman: Lord Sharkey, I think quite a lot of your question has been answered.

Q121 Lord Sharkey: There are two bits that I should perhaps ask. The first is, how feasible do you think it would be to rely on alternative instruments like the 1957 Council of Europe Extradition Convention in place of the European Arrest Warrant? The second is, to what extent would the problems you see in the European Arrest Warrant be mitigated if the Government implemented the European Supervision Order?

Jago Russell: In response to the first question, all EU Member States are signatories and have ratified the Council of Europe Convention, so it is there. I can see that the police would much prefer to be using the European Arrest Warrant system, but I do think it is there as a possible fall-back measure if there is no agreement to look at reform of the European Arrest Warrant. I do not mean to suggest that there would be no technical difficulties or issues in applying it, but it does exist and, indeed, it is the Convention that we are already using in relation to extraditions with Russian, Turkey and other countries. So it does exist and it is there.

The European Supervision Order is one of the measures that we very much hope the Government do opt in to. It could have a massive impact on a number of extradition cases. The most frequent problem we see is people being extradited months or years before they are anywhere near ready for trial. If those people could be transferred back to the United Kingdom to remain on bail, it could have a huge impact for them. It would not deal with all of the problems with the European Arrest Warrant, of course, but it could deal with some of them.

It could also have a much wider impact than extradition because it is also applicable to British citizens who are travelling around the EU and find themselves arrested in those countries. That is, again, a common problem we encounter at FTI. People are arrested in a country like Spain and are detained for four years awaiting their trial, when in fact they could have been bailed back to the UK with their families for that four-year period and then extradited back to Spain or even just voluntarily return to Spain when they are ready for trial. It is an important measure, and I am glad to see that so many of the people that have submitted evidence to you, including the police, have recognised what an important measure it is.

Q122 Lord Hannay of Chiswick: This is not an opt-in issue, is it? It is an issue of implementing a piece of European legislation that is available. The Government have failed to implement it by the due date of 1 December 2012, if I understand it rightly. It is entirely within the gift of the British Government now, today, if they wanted to, to implement that.

Jago Russell: That is absolutely right, but it is one of the measures that would be affected by an opt-out.
Lord Hannay of Chiswick: Yes, I understand that, but the status of it is not as an opt-in status; it is not one that requires further negotiation. It is there waiting to be implemented if they want to.

Jago Russell: Indeed.

Hugo Brady: I would say quickly about the 1957 Convention—the European Extradition Treaty, which those who are in favour of using the opt-out say is a plausible alternative for Britain—that the fact of the matter is that the text of the European Arrest Warrant legislation itself abolishes the terms of the Extradition Convention between EU countries. If Britain leaves the Arrest Warrant, other countries will have to adopt legislation through their own Parliaments to reflect that situation vis-à-vis Britain. That means that Britain is relying on the legislative schedules of 26 other countries, which is how judicial co-operation used to work.

If you look at the Baker Report, for example, it recalls the operation of the 1957 Convention as “cumbersome, beset by technicality and blighted by delay”. That is what we would be going back to; that is how it used to work. The question is, do we actually have the choice? The other countries have to amend their own legislation. It will be subject to at least the opinion of the ECJ as to whether it is consistent and so that it does not undermine the operation of European law à la the European Arrest Warrant. Therefore, it is not clear that this is the automatic alternative that everybody thinks. That has to be very seriously considered. Also, it would have to be in place and perfectly legally watertight by 1 December 2014. Anybody who has any experience of negotiating extradition treaties, given the mutual suspicions that come up in the process, will know the toughness of that negotiation.

The reason why there is a big fuss over reopening the EAW is because it was one of the toughest negotiations in the history of European judicial co-operation. One of the people I interviewed—a senior interior ministry official from another country—said, “If they reopen the Arrest Warrant, in all seriousness I will apply for early retirement.” On top of that, of course, they greatly feared that, if you reopen the European Arrest Warrant, a huge complicating factor is that the European Parliament would now have a say over the text for the very first time. Going on the Parliament’s track record over the last few years, if you take the Victims Directive for example, they submit hundreds of amendments to agreements that are already painstakingly eked out between Justice Ministries. This is just to explain why there is this natural resistance to reopen the text of the EAW.

Q123 Lord Hodgson of Astley Abbots: I have one quick question. Since this is the first time I have spoken, I should declare that I am a trustee of Fair Trials International. Some of the evidence we have had is that the opportunity for a patchwork quilt does not really exist because other European EU Members will have to reach a certain basic standard in order to comply with the way the EU is working. What you will have is a basic standard but maybe some add-ons. There may be some additional proportionality in Poland that has proved particularly difficult and so on. Is that a realistic issue? Some people have said that this is not a problem and you now seem to be opposing it. You have a basic standard with maybe one or two additions for individual countries.

Jodie Blackstock: I am not entirely clear what you mean. Do you mean as an additional piece of legislative—

Lord Hodgson of Astley Abbots: If we have opted out. We have got out. You are then left with a situation where everyone says, bilateral, bilateral, bilateral. Some people say that bilateral exists but only in name, because most of the other countries will have a basic
standard that will be common across the piece. Therefore, what you will have is the ability to tackle some of the issues that are of concern, such as proportionality in the case of Poland, by a bell and a whistle on specific bilateral negotiations.

Jodie Blackstock: So, with Poland, for instance, you would want to tackle the proportionality issue but you may not need to with Romania.

Lord Hodgson of Astley Abbots: Yes.

Jodie Blackstock: I see what you mean. That certainly would be a possibility if we had 50 years to do it because it could take that long. If you take 10 years just to work on the European Arrest Warrant between 27 countries, and 28 if you include Croatia, on that one issue, and there are 133 measures here, it is going to be an incredibly difficult process to try and arrange if we were to go down that route. I think it was even conceded this afternoon that it would have to be a one block bilateral arrangement rather than 27 separate ones. That, even in itself, is going to be incredibly difficult because we are not looking at one instrument. If you look at the process of negotiations on the Convention on Mutual Legal Assistance, that was a nightmare to arrange. The European Investigation Order, which we have opted in to and which will deal with quite a lot of the issues about evidence and searching and so forth between Member States, is still going on, and it has been two years since this was proposed.

It will not be an easy process at all. You have to ask the question why, when this process has already been carried out, we wish to embark on it again unless there is a really sensible reason put forward for doing so. All of the mechanisms in these instruments have been carefully negotiated already. We would have concerns about going back to the Convention systems. Not all Member States are signed up to all of those instruments. On the European Extradition Convention, we would have concerns about levels of judicial scrutiny under the old system in comparison to the requirement that squarely exists in the European Arrest Warrant for a defendant to have legal representation, a hearing and an ability to consent or not to that process. It does not exist in the same way in the Convention system.

We would see all of the problems with the European Arrest Warrant system as resolvable through instruments that are either coming up or could be arranged extraneously to it. That is certainly set out in our report, but we would be very concerned to see us going down bilateral arrangements that tried to deal with add-ons in that way.

Lord Hodgson of Astley Abbots: It would be very difficult.

Q124 Lord Judd: Is there too high a degree of complacency and, indeed, possibly too much arrogance in an assumption that seems to be there among those who are favouring opt-out that other people will then very much want to opt back in to agreements with us? Are we underestimating how far the amount of ill-will that the disruption and all the rest that will be caused by our opting out will lead to a reluctance to step back in to arrangements with the UK to accommodate the UK? Will we have earned the goodwill that is necessary to make a success of that?

Jodie Blackstock: Our view is that we would certainly advocate not underestimating the impact that this will have on our relations in other Member States. Their key concern at the moment is dealing with the economic downturn and how they address the problems of providing jobs and so forth in their Member States. As a result of doing the project on the European Arrest Warrant, I spent time this summer in the Ministries of Justice in Athens, Rome, The Hague, Berlin and a few other countries as well. It certainly struck me that, while
they had their own concerns about the European Arrest Warrant, this was not the primary issue for them to deal with.

We will be asking other Member States to see this as a priority because, ultimately, it will be, if we pull out, for how they then assess their criminal processes. It requires it to be at the forefront in their legislative calendars, when clearly it would not have been otherwise. From the conversations I have had with colleagues in Brussels in the Commission and representing other Member States in the Council, there is already a sense of confusion about this process, concern about it and certainly frustration with the uncertainty that it is generating. That has been very clear from the UK’s attitude in relation to some instruments that we have opted out of or not opted in to in relation to Protocol 21, particularly in relation to the right to a lawyer. Obviously, the Justice Committee had its view on that instrument.

The way that was received in Europe, because we had, arguably, the strongest right to a lawyer across all of the Member States, was one of confusion and concern. I do think that there are certainly going to be problems in assuming that we can simply demand from other Member States an alternative.

I also think, certainly with the European institutions, that they will not take kindly to what is a clear expression of mistrust of the Court of Justice of the European Union as a reason for not continuing in this area.

**The Chairman:** Do either of you want to add anything to that? I think you agree that we cannot take anything for granted.

**Jago Russell:** Absolutely. It is so difficult to know what is happening with the negotiations at the moment. My hope is that the negotiations on reform of the European Arrest Warrant, for example, are going ahead in a constructive way. This is what can be done to fix the flaws with this. It is not just the UK that has concerns. To some extent other countries do too. I am absolutely of the view that we do not want to throw the baby out with the bathwater and go down a big new rewriting process for a brand new European Arrest Warrant Framework Decision. I can see why the Commission and Member States have major concerns about it.

**The Chairman:** I think we understand the difficulties that you have outlined.

**Q125 Lord Elystan-Morgan:** Would the opt-out decision have any implications for raising the standard of trial rights and the rule of law in other Member States, including the UK’s role in this? Which of the PCJ measures are most important in your view for achieving this in terms of the rights of citizens?

**Jago Russell:** As I mentioned earlier, for us, one of the most important is the European Supervision Order, which directly relates to the right to liberty and the right not to be detained unnecessarily pre-trial.

For me, one of the big disappointments with the pre-Lisbon measures is that, among those, there should have been a range of measures on basic defence rights. Sadly, the UK led the way in preventing efforts of the European Union to put in place basic defence rights safeguards to accompany the European Arrest Warrant.

Strictly speaking, the UK can continue to have a constructive role in the ongoing discussions on minimum defence rights, but, obviously, the ability of the UK diplomatically to influence and inform those decisions is going to be affected by the broader dialogue in the UK on its role in Europe, not least in the context of this but also in the context of speeches like that today by the Prime Minister.
Lord Elystan-Morgan: Mr Brady, I think you have covered it in your paper to some extent.

Hugo Brady: To take up Jago’s point directly, there is a certain irony. If you read the text of David Cameron’s speech today, he said it was all about what Europe should be focusing on and turning its back on needless bureaucratic navel-gazing. One of the things, including climate change, that he said we really need to do more on is organised crime and terrorism. Then a few paragraphs down he spoke about what a great thing it was that they were leaving a lot of the legislation in the area.

I do believe the Conservative Party have misread public opinion in this area. If you look at the YouGov survey done for Chatham House in 2012 on citizens’ attitudes towards international co-operation, irrespective of a general antipathy towards Brussels and voter preference—Labour, Lib Dem or Conservative—the vast majority, starting at 78% of people, want close co-operation with other EU countries in this area. It is simply not possible to do that if you are not in the relevant legislation.

There is maybe a Faustian bargain here to some extent on the European Arrest Warrant. London cannot achieve reform of that instrument unless it agrees to remain bound by the same legislation as the rest of the people around the table. You may get a political commitment to reform the European Arrest Warrant, but that is probably as much as is going to be achieved.

Jodie Blackstock: There is one other brief aspect of that question. If we remain engaged, we have a judicial system where the rights of the defence are properly considered. In all the cases where our courts refuse the applications coming from other Member States, we have the opportunity to highlight our concerns about their system of fair trial rights or the rule of law that operates in that country. You have already been given a prime example by James Wolffe QC about the case of HH in the UK Supreme Court in the summer, which JUSTICE intervened in. In one of the joined cases of F-K in that appeal, the Supreme Court acknowledged the need to consider the proportionality of a request. It decided in that case that, because the offence was not particularly grave, the return and the impact of it on the rights of the children of that particular person would be disproportionately affected. Poland can only sit up and listen to that and, in the future, contemplate whether it will issue in the same circumstances. We have seen the same thing in Poland about prison conditions.

The Chairman: Lord Mackenzie, I think maybe your question has been answered, has it not?

Q126 Lord Mackenzie of Framwellgate: I think it probably has, but I am going to ask it anyway, if you do not mind, because it is a very brief answer I am going to ask for. Do you think it is acceptable that the Government have chosen not to implement these 14 or so measures pending the opt-out decision being made? These are the ones we have been discussing.

The Chairman: Lord Mackenzie did ask for a very brief answer.

Jago Russell: No; I do not think it is acceptable.

Jodie Blackstock: No.

Hugo Brady: I think it is unfortunate, yes.

Lord Mackenzie of Framwellgate: It was important to have that on the record, Lord Chairman.
The Chairman: Thank you. I wonder if Members would think it appropriate for Lord Stoneham and the Earl of Stair to both ask their questions, because I think the answers run one into the other.

Q127 Lord Stoneham of Droxford: I was going to ask a question about the impact of the opt-out decision on the UK’s standing across the EU and the exercise of influence going forward with the opt-out. What you seem to be saying is that your needs and attempts to get reform and improvement of the European Arrest Warrant are going to be undermined and slowed up by the opt-out decision. Is that a right thought on my part?

Jago Russell: No. My view is that, hopefully, this discussion and negotiations that the UK is having on 2014 are providing an opportunity to raise concerns and highlight the need for reform of the European Arrest Warrant. This is a positive opportunity to try and push for reform.

Jodie Blackstock: I would agree with that. If the UK is taking the opportunity, which we asked it to at the point in 2009 when the Treaty came into force, of raising this issue and raising the consequences of us potentially opting out if we were not to see reform, that is a positive process. The fact that we have already had an announcement from the Prime Minister in Brazil that we were opting out anyway has, in our view, caused potential disruption to the impact of our demands for reform of the European Arrest Warrant through this mechanism.

Lord Stoneham of Droxford: That is the point I am making. So you say it has disrupted the process.

Jodie Blackstock: It is difficult to know if it has because we are not involved in that process. Our concern is that it certainly will have. From the expressions of concern that I have received personally, I can only repeat that concern.

Earl of Stair: On the basis that the opt-out is taken through, how straightforward do you think the negotiations would be on rejoining a second part? What kind of political considerations do you think would apply to any negotiations in the Council or any conditions that might be set by the Commission? I do not quite know who is going to answer that first—whether it is the legal side or reform.

Hugo Brady: Briefly, I think that there would be a natural determination on behalf of the Commission at least to make the process reasonably difficult for Britain. It is not just about Brit-bashing in Brussels; it is for a practical reason. If this is the kind of thing that can just be done willy-nilly, then what is to stop any country around the table seeking a similar arrangement which would make a patchwork of EU law, and an attempt to get some kind of harmonised minimum set of standards in this area would make a mockery of all that? It would be naturally difficult, as it is in EU enlargement negotiations if you are Iceland, if people perceive it is something you really need. Then you are what they call a “demandeur” and there is a sense that you have to give up something, as it were. It would not be an easy negotiation. The question would be, at the end of the day, could other Member States put pressure on the Commission to say, “Look, after all the Brit-bashing is over and all the emotions have passed, we have practical operational issues here and we need Britain to stay in as much of the system as possible”?

After all the interregnum of being upset about this move passes, the question is, is there then a determination to move forward to work with Britain? I am afraid that is a bit of an unanswerable. All I can say is that I know for a fact that there would be considerable push-
back from the institutions not to make this a straightforward process for a number of reasons.

Lord Hannay of Chiswick: So you are rather discounting the provisions in Protocol 36, which suggest that the Commission should at least be trying to achieve the greatest measure of applicability to all Member States. You think that is not going to count with them very much.

Hugo Brady: It depends. The Commission has only begun to look into the practicality of this matter. When this Protocol was negotiated, there was a genuine belief that Britain would never use it. That is because that is what many British officials told their counterparts at the time. They said, “This is just an insurance policy.” We did, after all, expect much of this area to be reformed and repealed by now. That has not happened. The 130 agreements are still largely there. Some of them have been replaced but nowhere near as many as we thought. The reason it looked like an insurance policy was because Britain would be able to opt back in on a case-by-case basis to all of this legislation.

One thing that they may do, in what seems to be the unlikely event of Britain remaining in all this legislation, is to have a better regulation agenda for those 130 agreements. Some of them could be done away with—but for everybody and not just for Britain. It depends what the Commission defines as its self-interest. Is it self-interest to drag Britain in to as many things as possible, therefore ensuring it stays in 80% of the area anyway and many things it did not want to in the first place—say, for example, to remain a full part of Europol and Eurojust—but have to accept stuff on criminal asset seize that it does not like? Or is it that Britain should remember this lesson as something that was very difficult to achieve, that they chose to be locked out of, and then it becomes a bad memory to haunt the junior diplomat who then becomes the ambassador so that he will always remember that this was something that was not wise and did not work well? I am sorry, but that is a consideration.

Q128 Lord Judd: We have been tackling this issue very much on a professional legal level and that is very proper. The European Union is a political entity in which political objectives and anxieties play a very significant part in the whole development. I have two questions I would like to ask you. First, are you satisfied that, when you strip everything away, all the pressure that is coming from some quarters to opt out and “reduce European influence on our affairs when we don’t want it” is about enhancing the quality of justice and enhancing human rights, or could it be quite the opposite? That is the first question.

The second question is that, if you have to make a broad judgment, does belonging to the commitments that are being considered strategically help in the fight against international terrorism and international crime, or does it detract? If, on balance, it helps, is not the logical purpose to demonstrate ourselves as second to nobody in our commitment to this international strategy and in that context win the authority to take up the cause of putting right what may be wrong in some of the ways these things operate?

The Chairman: They are two very formidable questions.

Jodie Blackstock: To answer the second question first, that is almost how we had articulated it to the Government of the day in 2009 and have thereafter. In relation to reform, the UK is a leader in many areas of criminal investigation, prosecution and the human rights of the defence and of victims. We have certainly led from the front and in the high echelons of these EU institutions, as you have seen in all the evidence that has been submitted. That should give us a very strong bargaining position to talk about the necessary reforms in these instruments and in the procedural safeguards instruments, roadmaps on
suspects and victims. It is unfortunate that we have not taken that role. Nevertheless, JUSTICE hopes that the UK will do so.

It is fair to say in relation to the measures where we have opted out—such as the right to a lawyer—that the UK has stayed around the table and has expressed its concerns where perhaps the rights of the defence in that context have not been in accordance with UK law, but we do not know whether that will be possible, going forward.

The first question is much more difficult. Obviously, we would like to see the promotion of human rights. Perhaps it is too much of a political question for an organisation like ours to answer either way.

Q129 The Chairman: Does anybody else wish to add anything?

Jago Russell: The first question was about the underlying rationale for why some people are calling for an opt-out. It is clear that there are far broader political agendas involved in questions of the extent of the UK’s involvement in Europe. All I can do is reassure you that Fair Trials International’s view on the 2014 opt-out decision is purely from the point of view of trying to use it as an opportunity, if possible, to address the problems with the European Arrest Warrant. For us, it is purely about improving respect for human rights and for justice.

On your second question, if we have to make a broad judgment—if this is all or nothing and you either opt in to all of it or you opt in to nothing—my view would be that the UK should opt in to all of it. If it is all or nothing, it seems to me, even as a defence rights organisation with major concerns about the European Arrest Warrant, that there are so many useful instruments such as Europol, Eurojust and the European Supervision Order that we should opt in to all of it. For us, if there is a choice, if there is an absolute adamant refusal to consider reform of the European Arrest Warrant and we can choose whether or not we want to be part of that instrument and just that instrument, we do not think we should be part of just that instrument if we have been told that there is no willingness to look at sensible reforms to it.

Hugo Brady: Very briefly on the first question—what is the actual motivation of many proposers of the opt-out?—the issue here is that it is a matter of perspective. It is the idea that Britain is the mother of liberty, as it were, and that the other European systems are simply not up to standard. In some cases, some of the other systems would have practices that we would not find acceptable. This is what the whole process of what has been going on in the EU for the last 10 years is about. It is setting a minimum floor under all that.

Some of the arguments for the plausible alternatives for Britain, such as an EU-wide MoU, just do not seem credible enough at all. I think to say, “We should definitely use the opt-out and we will get through what comes after” is not a strong enough argument because of the uncertainty that is there afterwards.

From my point of view, the best thing Britain can do is stay in, seek a limited reform of the European Arrest Warrant—and I have some specific ideas about how that could become politically possible—and pursue a better regulation agenda for those Framework Decisions that most countries would agree are not useful. They are not threatening but they are just not doing anything, and we can get them off the statute books and think again about better ways of co-operating.

Q130 Baroness Liddell of Coatdyke: Much of the question I was going to ask has been answered by Ms Blackstock. It is about the UK’s relationship with other Member States. I would like to ask Mr Brady specifically, because of his job and not because of his nationality,
what he thinks the implications would be for the relationship with the Republic of Ireland on criminal justice matters if the opt-out is exercised. How do you see that dynamic?

**Hugo Brady:** That is fine. I actually do not know as much about the Irish constitution as I should, believe it or not. If you do a little Google search or go into Hansard and see all the hearings that have been in this House over the years in relation to terrorism cases involving Ireland and Britain, you will see all these cases where the Irish Supreme Court made a decision that a particular suspect was wanted for what was called a political offence. Political offences were one of the reasons why countries did not extradite their own nationals. If another country wanted you for a political offence, you were entitled to the protection of your national constitution.

One of the things the European Arrest Warrant did was take away the idea of a political offence and, therefore, took out the politics from the system, to no discernible terrible effect on the rest of Europe, I must say.

If Britain left the European Arrest Warrant, the Irish constitution in article 29.10 has a little provision which says that nothing in this constitution affects Ireland’s ability to perform its obligations under European law. That covers all EU law, including the European Arrest Warrant. If the UK is no longer in the European Arrest Warrant, then that opens the door for political offences again.

The relationship between the two countries has improved dramatically, obviously. We would not expect a return, perhaps, to the dark old days when it was very difficult to cooperate on extraditions in many cases. The problem with this process is that, even then, the mutual suspicions were that the Irish Government were not doing enough to help Britain. In fact, the Attorney-General’s Office and the official authorities were doing their utmost to get suspects extradited but the Irish Supreme Court felt differently, as has happened in this country when the Supreme Court differs very strongly with the CPS and Home Office about sending someone abroad. You cannot discount a return to that in some way, shape or form, because all you need is a good defence lawyer who gets the case up to where it needs to be and argues a point of law. It is very simple that that would reopen that door to a limited degree. That is why the Irish Government are quite concerned. They do not want to get the bad rep again for stopping extraditions. It is really a constitutional matter.

**Q131 Lord Hannay of Chiswick:** I have one more question on Ireland. If Britain opted out of all the rest, as well as the European Arrest Warrant, does that concern Ireland—things like Europol and Eurojust—given that we share a common travel area and have so many things that we do together which no other two Member States do together in quite that way?

**Hugo Brady:** Apart from the great benefit of multilateralising the whole process of police co-operation so that the Irish and British police would see themselves in a very brotherly fashion in the multilateral context in Europe, of course it would make life more complex. The interesting thing to note about Ireland is that in many ways it can be more sceptical about European judicial co-operation than Britain. In many ways it is more conservative on the things it opts in to, for example. Indeed, that is why we share the Protocol on opting in to criminal justice matters on a case-by-case basis.

They just took a look at the 2014 opt-out idea and said there was too much uncertainty around it and it was going to be too messy. They said it was a risk they preferred not to take. When even quite conservative Ireland has chosen not to go down that road, it is an interesting question to ask anybody who can give an official comment on that as to why they
had no interest in sharing the Protocol with Britain and why they chose not to do that. Obviously, if Ireland stays in everything and Britain leaves everything—and we have not spoken here today yet about the lacuna—I do think that, after years of getting nowhere, other countries would find a new settlement with Britain. But what happens in the meantime? Even in the Irish context, what happens between 1 December 2014 and 2 December 2014 when Britain opts out is very interesting legally. What happens to all those who have currently been served with EAWs, for example, and who are affected by that decision? Do they all fall?

If I may say so—my colleagues here are lawyers and I mean no disrespect—there was lots of potential in the old system for lawyers to gum up the system as much as possible, often for very good reasons of concerns over the rights of the defence and liberty. If you open the door to legal complexity, it will be filled.

**The Chairman:** Can I say as one lawyer to two others, let us not be tempted by the last statement? Are there any other questions Members wish to ask? Are there any questions you think we should have asked you or anything you wish to say to us? If not, I thank you very much indeed and apologise again for the late start. Thank you for your very full answers to all our questions. I am sorry to have kept everybody as long as we have.
Council of Bars and Law Societies of Europe, Bar Council of England and Wales—Oral evidence (QQ 148-162)

Submission can be found under Bar Council of England and Wales
Court of Justice of the European Union—Written evidence

Decisions of the Court of Justice of the European Union in the field of EU police and criminal justice

In the context of an inquiry into the United Kingdom’s 2014 opt-out decision (Protocol n° 36 of the Treaty of Lisbon), the House of Lords EU Committee asked the Court of Justice of the European Union for information on decisions of the Court in which issues relating to EU police and criminal justice measures have arisen.

In answer to that request, the following list sets out the principal decisions of the Court of Justice and the General Court in which EU police and criminal justice measures, including Schengen-related measures, have been examined. A direct link to the text of the decisions is provided. 39

In the final section of the list, other cases which relate more broadly to the determination of the framework of Schengen co-operation beyond the specific field of police and criminal justice are included for the sake of completeness. Direct links to the text of these decisions are also provided.


- Judgment of the Court of 28 June 2007, Case C-467/05 Dell’Orto [2007] ECR I-5557 (Council Framework Decision 2001/220, Art. 1, a), 2, para. 1, and 8, para. 1)


- Judgment of the Court of 15 September 2011, Joined Cases C-483/09 and C-1/10 Gueye and Salmeron Sanchez, not yet reported (Council Framework Decision 2001/220, Art. 2, 3, 8 and 10, para. 1)

- Judgment of the Court of 21 December 2011, Case C-507/10 X, not yet reported (Council Framework Decision 2001/220, Art. 2, 3 and 8)

- Judgment of the Court of 12 July 2012, Case C-79/11 Giovanardi, not yet reported (Council Framework Decision 2001/220, Art. 1 and 9)

39 To access each link, it is necessary to place the mouse on the link, press Ctrl and click at the same time.
- **Order of the Court of First Instance of 1 April 2008, Case T-412/07 Ayyanarsamy v Commission and Germany, not reported**
  (Application for legal aid; Manifest inadmissibility; Action for annulment; Framework Decision 2001/220. Appeal rejected by order of the Court of 17 March 2009, C-251/08 P Ayyanarsamy v Commission and Germany, not reported)

**Council Framework Decision 2002/584/JHA of 13 June 2002 (European Arrest Warrant):**

  (Council Framework Decision 2002/584, Art. 1, para. 3, Art. 2, para. 2 and Art. 31)

- **Judgment of the Court of 18 July 2007, Case C-288/05 Kretzinger [2007] ECR I-6441**
  (Convention implementing the Schengen Agreement (CISA), Art. 54 - principle of ne bis in idem; Framework Decision 2002/584, Art. 3, para. 2 - see also below under CISA)

  (Council Framework Decision 2002/584, Art. 4, para. 6)

- **Judgment of the Court of 6 October 2009, Case C-123/08 Wolzenburg [2009] ECR I-9621**
  (Council Framework Decision 2002/584, Art. 4, para. 6)

  (Council Framework Decision 2002/584, Art. 31 and 32)

- **Judgment of the Court of 1 December 2008, Case C-388/08 Leymann and Pustovarov [2008] ECR I-8993**
  (Council Framework Decision 2002/584, Art. 3, 4 and 27, para. 2, 3, and 4)

  (Council Framework Decision 2002/584, Art. 4, para. 6, and 5, para. 1 and 3)

- **Judgment of the Court of 16 November 2010, Case C-261/09 Mantello [2010] ECR I-11244**
  (Convention implementing the Schengen Agreement, Art. 54 - principle of ne bis in idem; Framework Decision 2002/584, Art. 3, para. 2. See also below under CISA)

- **Judgment of the Court of 5 September 2012, Case C-42/12 Lopes Da Silva Jorge, not yet reported**
  (Council Framework Decision 2002/584, Art. 4, para. 6)

- **Judgment of the Court of 28 June 2012, Case C-192/12 PPU West, not yet reported**
  (Council Framework Decision 2002/584, Art. 28, para. 2)

**Council Framework Decision 2005/214/JHA of 24 February 2005 (Financial penalties):**
Court of Justice of the European Union—Written evidence

- Judgment of the Court of 7 June 2012, Case C-27/11 Vinkov, not yet reported
  (Manifest inadmissibility of the request)

Council Decision 2002/187/JHA setting up Eurojust:

  (Council Decision 2002/187/JHA setting up Eurojust, Art. 30 - Staff; Staff Regulations of EU officials)

Convention implementing the Schengen Agreement (CISA):

  (CISA, Art. 54, 55 and 58 - principle of ne bis in idem)

  (CISA, Art. 54 - principle of ne bis in idem)

  (CISA, Art. 54 - principle of ne bis in idem)

  (CISA, Art. 54 - principle of ne bis in idem)

  (CISA, Art. 54 - principle of ne bis in idem)

  (CISA, Art. 54; Framework Decision 2002/584, Art. 3, para. 2 - principle of ne bis in idem. See also above under the Framework Decision on the European Arrest Warrant)

- Judgment of the Court of 18 July 2007, Case C-367/05 Kraaijenbrink [2007] ECR I-6619
  (CISA, Art. 58 and 71 - principle of ne bis in idem; narcotic drugs)

  (CISA, Art. 54 to 58 - principle of ne bis in idem)

  (CISA, Art. 54 - principle of ne bis in idem)

  (CISA, Art. 54; Framework Decision 2002/584, Art. 3, para. 2 - principle of ne bis in idem. See also above under the Framework Decision on the European Arrest Warrant)
Other judgments of the Court of Justice relating to the determination of the framework of Schengen co-operation:

  (Regulations 789/2001 and 790/2001 - Visa)

  (Directive 64/221 - Freedom of movement for persons, Schengen Information System)

- Judgment of the Court of 3 October 2006, Case C-241/05 Bot [2006] ECR I-9627
  (CISA, Art. 20 – Visa)

- Judgment of the Court of 18 December 2007, Case C-77/05 UK v Council [2007] ECR I-11459
  (Regulation 2007/2004 - FRONTEX)

- Judgment of the Court of 18 December 2007, Case C-137/05 UK v Council, [2007] ECR I-11593
  (Regulation 2252/2004 - Passports and travel documents)

  (CISA, Art. 6b and 23; Regulation 562/2006 - Schengen Borders Code)

  (Regulation 562/2006 - Schengen Borders Code)

- Judgment of the Court of 26 October 2010, Case C-482/08 UK v Council [2010] ECR I-10413
  (Decision 2008/633/JHA - Access for consultation of the Visa Information System, VIS)

- Judgment of the Court of 14 June 2012, Case C-606/10 ANAFE, not yet reported
  (Regulation 562/2006 - Schengen Borders Code)

- Judgment of the Court of 19 July 2012, Case C-278/12 PPU Adil, not yet reported
  (Regulation 562/2006 - Schengen Borders Code)
Crown Office and Procurator Fiscal Service—Written evidence

The 2014 opt-out decision

As the sole prosecuting authority in Scotland, it is neither appropriate nor desirable for Crown Office and Procurator Fiscal Service (COPFS) to address all of the questions asked within this paper. Our answers are firmly focussed on the measures that affect the day to day business of COPFS. Whether or not the UK Government should remain within the third pillar is not a matter for COPFS. However, Scottish prosecutorial interests are best served remaining fully in the “3rd pillar”.

The UK’s current participation in PCJ measures

Questions 4, 5

There are two main measures which form part of the day to day business for COPFS, namely, the European Arrest Warrant (EAW) and the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

From the point of view of the Crown Office and Procurator Fiscal Service, the European Arrest Warrant is undoubtedly the success story of all the Framework Decisions. The Scottish Law Officers and the prosecutors in the Crown Office and Procurator Fiscal Service dealing daily with extradition business, do not favour opting out of the EAW scheme. The EAW system works in practice; prosecutors throughout Europe are familiar with its operation; and leaving the system would be fraught with an element of uncertainty, especially while the EAW continues to be operated by our European colleagues as the standard method of conducting surrenders within the EU.

The EAW is very much envisaged as being integral to the operation of SIS II, in which the UK is investing heavily. EAWs will be systematically certified, uploaded on to the system within hours of receipt, and inserted as attachments to SIS II alerts. The system is not being designed to work with other forms of extradition request.

Whilst it has been difficult to assess the impact of the Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, in our day to day business they play a significant part in the role of the Prosecutor and this is especially the case when considering the appropriate forum for a particular case to be heard. Being in the receipt of criminal history data at the point of considering the case is essential to ensure that the case is properly prosecuted in the public interest. The effect of the Framework Decision has enabled our organisation to focus on obtaining this data and using it to make informed decisions.

In addition to these measures, it is considered undesirable from COPFS viewpoint to take any action which would result in withdrawal from Eurojust. It is recognised that the volume of purely Scottish business flowing through Eurojust is relatively low; however, in a number of cases, co-ordination meetings have been held which have been beneficial to the prosecution of Scottish cases, and where assistance from Scotland has been requested and
provided to EU partners. The benefits which flow from this are, however, of a nature which is difficult to measure purely in terms of statistics.

**Question 6**

In Scotland, extradition cases are handled by the International Co-operation Unit of the Crown Office. The ICU performs the role of central authority for Scotland, and the Crown Agent has statutory responsibility for certifying incoming EAWs. As a general rule, an EAW will only be issued in a serious case which merits prosecution in the High Court of Justiciary or before a Sheriff and jury. No EAW is issued from Scotland without the specific instructions of Crown Counsel representing the Lord Advocate, and all EAWs from Scotland are signed by a Sheriff.

In the last two years, ICU has received 202 incoming EAWs. In the same period there have been 130 arrests on EAWs (although not necessarily all on EAWs received during that period). Extradition was been ordered in 91 of the cases, with 17 cases still at the extradition hearing stage. A further 6 cases are outstanding because the person failed to appear for a hearing, and 9 cases are at the appeal stage. In 19 cases the person was either discharged or the warrant withdrawn. In the last two years ICU issued 28 EAWs to other Member States. Extradition to Scotland was ordered in 6 cases during that period. Some 70% of Scotland’s incoming EAWs are received from Poland, whereas Spain and Ireland together account for over 35% of outgoing EAWs from Scotland.

Statistical comparisons are difficult, but there is some indication that it takes longer to trace fugitives abroad than it does in Scotland, but that once fugitives are found and arrested, court processes in other member States do not take as long as they do in Scotland under the Extradition Act 2003.

**Question 7**

As far as the EAW and the Framework Decisions on the use of previous convictions in new criminal proceedings is concerned they have both, on the whole been implemented. The EAW Framework Decision has largely been implemented into national law by Parts 1 and 2 of the Extradition Act 2003. The Commission, following a review in 2005, focussed on two main points on the way in which the UK has implemented the Framework Decision. Firstly, the time limits imposed by the EAW are that a decision must be made within 60 days (10 days where an individual consents to their extradition). The statutory right of appeal embedded within the UK legislation which provides for the right of appeal ultimately to the European Court of Human Rights, often means that the timescales imposed are routinely missed. The experience in Scotland is that many of those to be extradited exercise their domestic right of appeal at least.

The “human rights bar to extradition” contained within Part 1 of the Extradition Act 2003 requires a judge to consider whether an individual’s extradition would be compatible with their rights under the Human Rights Act Article 3 and 4 of the Framework Decision, which provide the mandatory and optional bars to extradition. These provisions do not provide a human right bar to extradition. We understand that the UK has in the past argued that Recital 13 requires a Member State should not remove an individual to a State where there is a serious risk that he or she would be subjected to the death penalty, torture of other inhuman or degrading treatment or punishment.
The Framework Decision 2008/675/JHA of 24 July 2008 was enacted into Scottish legislation by way of section 71 of the Criminal Justice and Licensing (Scotland) Act 2010. This enabled the Scottish Courts to take account of European previous convictions as it would a domestic conviction. There are no obvious difficulties with whether this Framework Decision has been transposed, the difficulties lie with the way in which it has been transposed in Scotland. Section 71 of the Criminal Justice and Licensing (Scotland) Act 2010 provides;

71 Convictions by courts in other EU member States
(1) Schedule 4 makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).
(2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.
(3) The provision may, in particular, confer functions—
(a) on the Scottish Ministers,
(b) on other persons.
(4) An order under subsection (2) may modify any enactment.
(5) In this section, the “Framework Decision” means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

The vires of the powers to legislate are inextricably linked to implementing the UK’s (Scotland’s) obligations under the Framework Decision and if the Framework Decision falls following an opt out, then any provisions enacted in implementation thereof will no longer apply.

Question 8
To assess the practical effects of the Court of Justice (ECJ) having jurisdiction on interpretation of the measures covered by the opt out one has to first consider what measures are covered by the proposed opt out and the nature of those measures. Exercising the opt out would in fact only remove a portion of existing PCJ measures from the court’s jurisdiction. The measures it would remove largely relate to mutual and cross border cooperation between prosecuting and investigative authorities. (See e.g. Centre for European Legal Studies (University of Cambridge) Opting out of EU Criminal Law September 2012- in particular at Annex 1). These measures don’t readily appear to have the capacity to raise the sort of fundamental issues about the scope or application of the criminal law or its rules of evidence which have proved problematic in relation to some decisions of the ECtHR (which given its existing jurisdiction in criminal matters is the best analogous supra national court to look at to consider possible effects). So whilst on a general level one might have some concerns about ceding jurisdiction to a supra national court, the sort of issues which have occasionally caused concern in the context of the ECtHR don’t seem particularly likely to arise in relation to the measures covered by the proposed opt out. Given the nature of these particular measures there are also definite advantages in obtaining European wide consistency in their application and interpretation which the ECJ should in theory be able to provide.
The general concern with ceding jurisdiction to such a supra national court is that experience with the ECtHR tends to show that having an appellate court which is unfamiliar with your legal system and not responsible for dealing with the domestic consequences of its decisions carries with it the occasional risk of poorly thought through decisions with unintended, broad and potentially disruptive consequences. The breadth of the potential consequences of such ‘disruptive’ decisions are magnified by the terms of the Scottish constitutional settlement which presently make it ultra vires for the Lord Advocate in his capacity as the head of the prosecution system to carry out an act which is in breach of EU law and which even after amendment by the Scotland Act 2012 will make it unlawful for the Lord Advocate to carry out such an act. As already commented on however the measures covered by the proposed opt are not such that they seem particularly likely to generate ‘disruptive’ decisions with broad consequences. Such issues are more likely to arise from some of the more recent directives and proposed directives on Criminal Justice such as the letter of rights and right of access to a solicitor - but those measures are not covered by the present opt out and the ECJ will have jurisdiction over such of those directives as we adopt regardless of the opt out presently being considered.

It might in any event be unduly optimistic to suppose than an opt out would completely insulate the UK from decisions of the ECJ, even in relation to the measures opted out of. In the modern world decisions of supra national and other nation’s supreme courts often prove highly influential to the decision making of national courts and the ECtHR. See e.g. Ambrose v HMA [2011] UKSC 43 and the extent to which the ECtHR and the UK Supreme Court have drawn on the US Supreme Court decision in Miranda v Arizona 384 US (436) (1966)). Accordingly there is no reason to suppose that decisions of the ECJ would not still be influential or even highly influential to decisions of our national courts even if the opt out were exercised.

Question 9

The answer to this question is largely dealt with above. At present little or no attempt has been made to use the powers of reference contained in the Criminal Procedure (Scotland) Act 1995. Increased ECJ jurisdiction over such matters could lead to an increase in the use of these provisions, which could be costly and time consuming, although it could also provide the benefit of consistency of application mentioned above. Insofar as the Commission’s enforcement powers are concerned that is not a matter for COPFS to comment on.

The potential Consequences of exercising the opt-out

Question 10, 11 and 12

The most obvious disadvantage to the European Arrest Warrant is the scope of the Framework Decision, which enables it to be used for trivial cases. Scottish experience, particularly with a high percentage of EAWs coming from Poland, shows by and large that proportionality has not been a particular problem and there has been no flood of trivial cases. Problems are more likely to be caused by the passage of time between offences and extradition procedures, but those can be fully argued and resolved in court hearings.
Scotland has not experienced any problems in practice with the definitions of offences in the Framework list, and no significant difficulties have arisen over dual criminality. Scottish prosecutors are therefore aware of no legal problem with the operation of the EAW that would require or justify the UK opting out of the Framework decision.

Opt-out would create uncertainty, both domestically and in other Member states. It may be reasonable to assume that, after an opt-out, the alternative to an EAW regime would be that all EU Member States would be re-designated as Part 2 territories. Using Part 2 procedure would mean that extradition was not longer purely a judicial process, and Ministers would again have a role to play in all extradition cases. One risk might then be that additional delays could be created by the extra opportunities created for judicial review.

At best, it might be possible to continue to operate a streamlined extradition system with our European partners – perhaps even the EAW system in all but name. At worst, especially if accompanied by a collapse of goodwill, an opt-out would create significant delays both in outgoing and incoming extradition cases. The result might be that Scottish fugitives would remain at large in serious cases while more foreign criminals would remain at large on our streets with little or no information available to the Scottish authorities about the risk they present to the public.

It is also important to note that the United Kingdom and Republic of Ireland have long operated within a common travel area. While both States were parties to the European Convention on Extradition 1957, in recognition of the relationship between the two States, the United Kingdom enacted the Backing of Warrants (Republic of Ireland) Act 1965 to regulate extradition between the two states. This provided that the United Kingdom authorities were able to execute extradition requests from the Republic of Ireland for indictable or summary offences where the sentence that could be imposed was at least six months imprisonment by the Irish warrant being endorsed by a Magistrate and the warrant then executed. There was no requirement for the provision of evidence by the Irish authorities to the United Kingdom. The EAW scheme is a significant improvement on the scheme of convention based extradition as it enables the Irish authorities to order the extradition of own nationals and has removed the erstwhile political exception which previously led to the refusal of requests from the United Kingdom in serious cases.

A UK opt-out from the EAW might also create technical legal problems in other Member States. That will depend on how those states have transposed the Framework decision into their domestic legislation as far as the United Kingdom is concerned.

In our view the UK Government should seek to opt back into both the EAW and the Framework Decision 2008/675/JHA of 24 July 2008.

19 December 2012
WEDNESDAY 13 FEBRUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Anderson of Swansea
Lord Avebury
Viscount Bridgeman
Lord Dykes
Viscount Eccles
Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts
Lord Judd
Lord Mackenzie of Framwellgate
Baroness Prashar
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Earl of Stair
Lord Stoneham of Droxford

Examination of Witnesses


Q264 The Chairman: Lord Advocate, thank you very much for coming to testify before the Committee. I am going to cut down the introduction a little because we are up against a time problem. In any case, because we have had written evidence from Scotland, which has been very valuable to us, and yourself in coming to talk to us this morning, I do not think I need to explain to you the background of this Inquiry, with which I suspect you are familiar. We are trying to get our report out in this session of parliament—that is to say before Prorogation, which is expected right at the end of April or early in May. There is likely to be a vote some time before the summer, though that is in the hands of the Government. They have committed themselves to votes in both Houses. The work we are doing is designed to
Crown Office and Procurator Fiscal Service and Frank Mulholland QC, Lord Advocate —
Oral Evidence (QQ 264-273)

enable the House of Lords to understand the background to that vote, when it comes, and
to the Government position.

As you know, this session is open to the public. A webcast of this session goes out live as an
audio transmission and is subsequently accessible on the Parliamentary website. A verbatim
transcript will be taken of your evidence and this will be put on the Parliamentary website.
A few days after this evidence session, you will be sent a copy of the transcript to check it
for accuracy. We would be grateful if you could advise us of any corrections as quickly as
possible. If, after this session, you wish to clarify or amplify any points made during your
evidence or have any additional points to make, you are welcome to submit supplementary
evidence to us. There is a choice now for you. Having introduced yourself and your
colleagues, who will be very welcome to the Committees, you may wish to make an opening
statement. It would be entirely welcome to us if you did so. Equally, you may wish to not
make an opening statement and we would then move straight on to questions. It is entirely
for you.

Frank Mulholland: Good afternoon to all. Perhaps I may make a very brief opening
statement and introductions. On my right I have Catriona Dalrymple, the Head of Policy for
the Crown Office and Procurator Fiscal Service. On my left I have David Dickson, who is
the Acting Head of the International Cooperation Unit. This is a unit that is situated in the
Crown Office. It deals with all extradition matters. I am the competent judicial authority in
Scotland for extradition matters, including the European Arrest Warrant. Mr Dickson has
day-to-day responsibility in relation to European Arrest Warrant extradition matters,
Europol, Eurojust, foreign criminal convictions and a whole range of Mutual Legal
Assistance matters. My role, as Lord Advocate, is as the prosecutor in Scotland responsible
for extradition, as indicated. I have a number of roles in relation to extradition. I represent
the foreign government or foreign country seeking extradition in judicial matters in Scotland,
and I am also the prosecutor. So when there is a crossover or an issue about where the
jurisdiction is or where someone should be prosecuted if a foreign state is looking to
extradite that person, we will liaise with the foreign state in relation to prosecutorial
matters.

Very briefly, as made clear in our written evidence, we strongly support the retention of the
European Arrest Warrant and a whole raft of other JHA measures: access to foreign
criminal convictions; Schengen I and II, the information-sharing; and particularly the European
Arrest Warrant. We would have real concerns if there was an opt-out to the European
Arrest Warrant. Other than those preliminary remarks, I am very happy to take any
questions. If there is any other matter you wish me to deal with post this session, I would
be happy to respond in writing.

The Chairman: Thank you very much for those introductions and those remarks. When
Kenny MacAskill, the Member of the Scottish Parliament who is Cabinet Secretary for
Justice, wrote to us he told us that he had not been consulted, nor received any prior
notification, before the Home Secretary made her announcement on 15 October about
being minded to trigger the opt-out. Could you tell us about any subsequent consultations
that have taken place between London and Edinburgh? We understand that James
Brokenshire, the Minister in the Home Office, was there recently. Could you say something
about that?

Frank Mulholland: Yes, I can. The Cabinet Secretary for Justice, Kenny MacAskill, was
absolutely right; there was no prior consultation before it was announced that the UK
Government was considering the opt-out. That applied to the Scottish Government and it
also applied to me as the head of the prosecution service. I am pleased to say that since the Cabinet Secretary responded in writing, as you rightly said, Lord Chair, there has been a visit to Scotland by Mr Brokenshire, who met Kenny MacAskill. I think he spent a couple of hours with him and then, on the same day, he came to meet me, and we had a very useful, productive and candid meeting about our views in relation to the European Arrest Warrant and other JHA measures.

Q265 Lord Stoneham of Droxford: I have a three-part question. Do you think the UK Government should exercise the opt-out? What do you consider would be a clear and compelling case for doing so? If the opt-out is exercised, what would the potential implications for the efficient operation of justice in Scotland be, including the operational requirements of the Scottish police service? Does the Scottish Government intend to make its position on the opt-out clear ahead of the UK Government’s final decision?

Frank Mulholland: The quickest answer is in relation to the last matter. The Scottish Government will make its position clear. I do not think that now is the moment in which they wish to make their position clear. They are obviously very interested in the work of this Committee and the report. They will also be interested to learn what the UK decision actually is. Then the Scottish Government will make its position clear.

In relation to the other matters, as I indicated, I do not think the view of the Scottish Government and the Lord Advocate is that the UK Government should opt out and then seek to opt in. We have real concerns in relation to a number of matters, particularly the European Arrest Warrant, which works very well in Scotland. We have some figures. In the last two years, 277 warrants under the European Arrest Warrant have been received in Scotland and, as a result of that, 155 have been arrested and dealt with through the EAW procedures. We have issued 20 European Arrest Warrants, and 11 persons of those 20 have been surrendered to Scotland. I should just indicate that amongst the 20 warrants have been the most serious cases. Over 10 have been charged with murder, drugs, child pornography, very serious assault and rape. The European Arrest Warrant works very well for Scotland in justice. I am old enough to remember the system before European Arrest Warrants; it was very bureaucratic. You required affidavits, evidence, statements, sworn statements, and very detailed documentation. It does take a lot of time to be able to process such a request.

Could I firstly deal with timing? Where the European Arrest Warrant is not contested in Scotland we are surrendering in around about 17 days on average. When it is contested, it is just under 50 days to deal with the matter. My experience pre-European Arrest Warrant was that you would be talking about many, many months. My experience was that you went through a bureaucratic process, prepared the paperwork and you might have the paperwork returned to you in five or six months with a technical issue, which you would then have to deal with and send the papers back.

Can I just give you a very good example of a European Arrest Warrant backed up by Eurojust and Europol working very effectively? In Scotland, about three or four years ago, we had the horrific murder of a young woman. She was English and living in Glasgow. She was murdered in Queen’s Park in Glasgow. The suspect was later convicted and was a man called Marek Harcar. Within 48 hours after, he fled the country. As a result of the European Arrest Warrant and as a result of Europol and Eurojust, we had him arrested by our Slovakian colleagues at an airport. The clothing that he was wearing, which was bloodstained with the woman’s blood, was seized as evidence in the case. You can never look into the future as to what the system would be pre-European Arrest Warrant but I
would venture to suggest that certainly we would not have the bloodstained jacket under
the old system. There are other examples. We had the quite horrendous murder of a
Polish man living in Edinburgh. We were able to deal with the Polish authorities. It was a
Polish man that murdered another Polish man in Edinburgh and we were able to get his
return for trial and conviction very expeditiously. So there have been plenty of really good
examples. I would be really concerned, as a prosecutor and head of the system of
prosecutions and investigations, if we opted out of the European Arrest Warrant.

I can also tell you that I had lunch yesterday with the new Chief Constable for the single
police force in Glasgow. He can speak for himself but we were discussing the European
Arrest Warrant and his view is the same as mine: that if there are problems with the
European Arrest Warrant, as have been alluded to by Dr Barrett, particularly in relation to
proportionality, it is better to amend and adjust from within rather than from without. We
do not have a particular problem with proportionality in Scotland. That is really to do with
our set-up and the fact that the people that work in the International Cooperation Unit,
processing, dealing with these warrants and appearing in court, have very good relations
with the Polish authority. If we are concerned about something we will pick up the phone,
speak to them and tell them how the courts will proceed with it in Scotland. I can also tell
you that our experience about the way the Scottish force deal with it is—although this is not
specifically proportionality—that they do deal with it when they are considering Article 8
issues and whether or not executing the warrant would be oppressive. Of course the
Extradition Act in Section 21 requires the court—and the court is the public authority—to
ensure that the extradition is compatible with the European Convention on Human Rights.
Of course, when you are dealing with Article 8, that has proportionality built into it. So the
courts are looking at that.

I have one final matter on proportionality, if I may. There was a recent case at the UK
Supreme Court in relation to a number of persons arrested under the European Arrest
Warrant. There were two Scottish persons who are wanted by the US authorities in
relation to allegations of supplying constituent parts to manufacture crack cocaine. Since the
extradition had been sought by the US authorities, the woman had had a number of children
and she challenged the extradition on the basis that her Article 8 rights were infringed. The
UK Supreme Court looked at it and held that the Article 8 rights were engaged. Of course,
if you hold that they are engaged, then proportionality is then an issue. In my view, we do
not have real experience in executing this proportionate warrant. I am aware, from
speaking to UK Government colleagues, that it is more of a problem for them than in
Scotland. I thought that may be of some assistance to you.

Q266 Lord Mackenzie of Framwellgate: Lord Advocate, given that justice delayed is
justice denied, which you have illustrated extremely well, would you agree that at a time of
austerity the cost of going back to the old system would add financial implications to the
picture? We talk about the delay causing problems with justice but the sheer cost of the old
system and the time it takes to respond means the whole system is delayed, and it is a
financial implication as well.

Frank Mulholland: Absolutely. I could not agree more with that. The point is that you
come back to a very bureaucratic system. Whilst the bureaucracy is working its way
through you will have someone locked up in a Scottish jail. The cost of that mounts up the
longer the person is kept in jail. There is an issue about the liberty of the subject as well
until the extradition process is worked through. I gave you the figures with that point in
mind because what we are doing is surrendering the persons to the requesting state very
timeously. It means that they are not spending an inordinate time in a Scottish jail before
the extradition is approved and then the person is returned to the foreign state and spends a significant time there. So you are absolutely right.

**David Dickson**: Could I just add something in relation to what Lord Mackenzie said, in relation to the delay aspect? If we take the case that the Lord Advocate has referred to about Poland and the murder: that was facilitated very quickly. The warrant left Edinburgh and he was arrested within five hours. The reason for that was because of the close cooperation provided by some of the other instruments available. That was particularly effective through the European Judicial Network, of which I am sure the Committee is aware. In our experience there is almost daily contact with prosecutors and judges in other jurisdictions within Europe and, aware that this individual may be in Poland, we made contact with the judicial authorities in that area and liaised with them very closely, so that when the warrant was available they had their police in place and were able to execute it immediately. Of course, investigation had been commenced in advance of receipt to identify where he was. Then afterwards there was close cooperation in relation to the provision of additional information required.

Another example of that level of cooperation, which the Lord Advocate has indicated was not previously available under the Convention, is in relation to the protection of the Scottish public by arresting those who are wanted on European Arrest Warrants from abroad. The particular authority that the Lord Advocate has to direct the police in Scotland also applies in relation to the execution of European Arrest Warrants. We have had instances where warrants have been received from abroad, again in relation to murder, where the individual was arrested within an hour of it leaving our office. Again, geography and size is a factor, of course, but it is because of the close cooperation available, which previously was unavailable.

**Q267 Lord Elystan-Morgan**: Newspaper editors who are not enamoured with the European Arrest Warrant sometimes draw up a balance sheet and say, “Look at the number of requests that you have received and look at the number of requests that you have issued”. That is a pretty short-sighted view, is it not? On the one hand you are recovering criminals who should appear before your own courts who have committed offences in your country and, on the other hand, you are exporting some very, very dangerous criminals or at the very least suspected criminals. In other words, both sides of the balance sheet benefit a country, do they not?

**Frank Mulholland**: Absolutely. I could not agree more. It is a public safety issue. We are receiving a number of European Arrest Warrants, and when you look at the information provided, what they are suspected of having committed and also the antecedents of background, there are real public safety issues. It is very important for the citizens of Scotland and the United Kingdom that these people are surrendered back, through due process in the requesting state.

Could I just add one other issue? You mentioned Eurojust, and I would like to illustrate the benefits of Eurojust. In Scotland we had a challenge to the system of jury trials. It was argued that jury trials were incompatible with the European Convention on Human Rights because juries do not provide reasons. It is the same both sides of the border, so it was a major challenge. It was a judisprudential challenge, which would affect England and Wales as much as it would affect Scotland. We were citing a Belgian case in the Strasbourg court called Taxquet. The Scottish Appeal Court was examining the issue in relation to Article 6. It was a hearing that lasted around two weeks, and the case was called Beggs. We had to find out quickly the details of the systems in the Council of Europe countries that operated jury systems—how they operate, how juries are charged, what questions are asked of juries,
and what the framework is within which they have to give their verdict. Through Eurojust we had that information within 24 hours; it was right across a whole raft of European countries, and we were able to present that to our court. The fact that you have this very close cooperation between law enforcement in the EU is very beneficial.

The 1957 Convention was drawn up in a different age, really. Crime is international now. We just finished a large international fraud case in the High Court in Glasgow, involving evidence from four or five different countries and witnesses from four or five countries, requiring Mutual Legal Assistance through Eurojust. You have investigations right across a number of European countries, and Eurojust is a fantastic body that enables representatives of the countries affected to sit down at the table and work out an investigative strategy. It encourages cooperation. There are real benefits in relation to Eurojust that I would be concerned about if the UK Government opted out.

**The Chairman:** We had some interesting testimony on that from a number of our witnesses, and we have spoken to Eurojust itself; they gave us some valuable material.

**Q268 Lord Rowlands:** Those who support the opt-out rest their case fairly heavily on the concerns and fears about the role that the European Court of Justice may play in the future, based on its past judicial activism. Indeed, the United Kingdom Government, in its evidence, has referred to a risk of expansive interpretation and unexpected judgments. I notice that, in reply to question eight in your evidence, you cast some doubt on this issue by saying that it is not going to play the same role in these measures because of their mutual recognition basis. Can you elaborate on this?

**Frank Mulholland:** We do not have a particular concern about the European Court of Justice in relation to Scots law. We do not have the same concerns as some people south of the border have, perhaps. We have not had a particularly bad experience from the European Court of Justice. I would make a broad point about courts being expansionist. That allegation is not restricted to the European Court of Justice. For example—and I am making no value judgment on this—we had quite a lengthy spat in Scotland about the jurisdiction of the UK Supreme Court in relation to Scottish matters. That was quite a polemic for some time. That view is not restricted to the European Court of Justice. For example—and I am making no value judgment on this—we had quite a lengthy spat in Scotland about the jurisdiction of the UK Supreme Court in relation to Scottish matters. That was quite a polemic for some time. That view is not restricted to the European Court of Justice. As I understand it, when you look at the European Court of Justice’s rules in giving judgments or guidance in relation to the interpretation of EU law, the European Court of Justice is then required to refer it back so that that judgment can then be applied domestically in relation to the facts of the case. It is up to the domestic court, having received this interpretation of EU law, to then apply it. I make the obvious point that it is in all Member States’ interests that you have a similar application and interpretation of EU law. You do not want to have 27 or 28 different interpretations, and that is what the European Court of Justice is there for. To answer your question directly, in Scotland we do not have a particular concern about the expansionist agenda of the European Court of Justice.

**Lord Rowlands:** Specifically, you also make the point in the evidence that you think these particular pre-Lisbon measures are not, as you say, core law and do not readily appear to have the capacity to raise the bigger issues the European Court of Justice has used in other cases. Is that what you think? Can you explain that to us a bit more?

**Frank Mulholland:** Do you have a particular view on that, David? You will know better than me in relation to how it operates individually but I have not seen a particularly expansionist view of the European Court of Justice and JHA measures?
David Dickson: No, there has not been. I think the Committee is aware of previous evidence—in particular Mr Wolfe from the Faculty of Advocates raised the case of Radu, for which the Grand Chamber decision has now been reported. While there is a distinction between the decision of the Grand Chamber and the wider consideration of issues by the learned Advocate General in the initial Opinion there is, as the Lord Advocate has indicated, a certain advantage in the approach of a European court. It does provide a mechanism where, in an issue, it can provide a consistency across Member States. We have not seen any evidence of an expansionist approach, certainly in relation to Scotland, but in terms of the application of EU rules, there certainly is. It can go both ways but having Radu, in particular, in mind does provide some element of consistency in the decision.

Frank Mulholland: In Radu the Advocate General, Eleanor Sharpston, in her Opinion, seemed to be suggesting that you could factor in proportionality. That would be an expansionist approach, it could be argued.

Lord Rowlands: It would have been.

Frank Mulholland: Yes, but the European Court of Justice, in their ultimate decision, did not know go there. Perhaps that is an indication that they are very aware of avoiding the assertion that they are expansionist. I went over to the European Court of Justice fairly recently, and met the Deputy President. He is very aware of how the European Court of Justice is perceived in the United Kingdom. I do not have a particular concern.

Lord Rowlands: So you have no problem about delivering preliminary references?

Frank Mulholland: No, I welcome them. I do not want to say too much about it because there are live proceedings but in Scotland we are looking at minimum unit pricing on alcohol, and there is an issue about whether or not that is something on which we would welcome the European Court of Justice’s interpretation on Articles 34 and 36 of TFEU. We will await the decision of the court on that. No, we do not have a particular concern.

Lord Avebury: Am I correct in saying that Radu was a preliminary ruling and that further rulings may be given, particularly in the case of Melloni, which is due to be heard on 26 February, which could vary the implications of the decision.

Frank Mulholland: It could do, yes. I will only make my observation in relation to what the European Court of Justice has produced as a judgment thus far.

The Chairman: I think in fact your remarks about Radu were rather similar to those that the Law Society representative in Brussels gave us—namely, that the Court had decided to make a rather narrow ruling as opposed to the wider ruling that the Advocate General had advocated. That is very helpful.

Q269 Earl of Stair: Leaving aside the European Arrest Warrant for the moment, have there been any other negative implications for the remainder of Scots law, following the adoption of any of the pre-Lisbon ECJ measure?

Frank Mulholland: No. We had a lengthy discussion about that to try to identify whether there had been any negative implications. We could not think of any.

Lord Hodgson of Astley Abbots: Obviously your role is to ensure that these crimes are prosecuted and people are brought to book. You have given us some graphic examples from Croatia and so on, which I understand obviously ring with the public. My registered
interest here is that I am a trustee of Fair Trials International. I must say that, when I read the evidence here, it does not seem to chime exactly with what we see at Fair Trials International. There are UK citizens—I do not just mean particularly Scots but UK citizens—who are disadvantaged by some of the way in which European continental systems have worked. I am surprised your evidence has not picked up more of this in terms of pre-trial detention and so on. Do you have no concerns about the civil liberties aspect of what we are entering into?

**Frank Mulholland:** There are always concerns about civil liberties when someone is locked up pending trial for a very significant period of time and, on a number of occasions, does not face trial because proceedings are abandoned. I have made the point that that does happen in the United Kingdom as well—it happens in Scotland; I cannot speak for England and Wales but I know of at least a case where we had a German citizen, charged with a very serious sexual offence, surrendered to Scotland through the European Arrest Warrant. We then went through domestic criminal proceedings. He then was remanded in custody pending trial. We were unable to indict him because the victim did not want to go ahead with it, and we always respect victims’ wishes. So there was a reason for that. Looking at the other side of the coin, David you mentioned a case involving a Scottish woman who is awaiting trial in relation to supplying methadone.

**David Dickson:** Yes, it is a case that Fair Trials International has highlighted. It is a case of Ms Reid. That is the only case we are aware of from Scotland where someone has been extradited, whether a UK national or otherwise, where there has been what some may say is an excessive period of pre-trial detention. She was detained in custody for a year and is currently released on bail but not permitted to return to Scotland. That clearly has had implications. Rightly or wrongly, the position of the UK courts is, reflected in relation to speciality, that these are matters for the foreign authorities. Domestic authorities do not have a mechanism through which they can seek to influence what happens abroad because those are domestic proceedings. However, the framework of the Extradition Act, as I am sure the Committee is aware, provides that the very final consideration by the court is whether or not extradition is compatible with Convention rights. Something as bold and stark as that was not available under the Convention. The courts in Scotland do consider, daily, challenges to prison conditions and pre-trial detention. Evidence has been led on that. We have reports from the Committee for the Prevention of Torture, on which evidence was led on that. In some cases we have had experts who have given evidence on other aspects.

So there is a mechanism there that allows the courts to test the assertion that is put forward. Part of the discussion just now is around the question of proportionality. Judicial activism is perhaps not the right phrase to use to talk about the UK courts but perhaps judicial ingenuity is a way of putting it. The Lord Advocate made reference to the case of HH, which I think the Committee has heard of from Mr Wolffe, who was involved in the BH case with America. That questioned, where there was a sole carer or both parents were sought for surrender or extradition, what was the right of all family members and whether extradition was proportionate in relation to the public interest case of someone facing trial elsewhere. That has worked its way through the system and we now see the courts taking that and working with it. One of the most recent cases was that of Cazan against Romania, which we can provide more information on. The Appeal Court in England took a phrase by Lord Justice Thomas in one of his other decisions, and slightly developed it. It took the view that, while the UK Courts do not comment on the sentence imposed abroad, where the circumstances of the offence are such that it would appear to be disproportionate—looking at it initially under the Article 8 argument and then developing it—to send the person back
to serve a sentence of 12 months imprisonment. The circumstances of the case were that he was a disqualified driver who had simply moved a lorry 200 metres around the corner because the driver of it was drunk. So the courts here are looking at developing the jurisprudence of the Supreme Court and it is now working its way down to the lower courts.

**Frank Mulholland:** I would encourage the European Supervision Order. I think that would be a good development.

**The Chairman:** Yes, I was coming on to that. I want to ask you, in the case that was referred to about the person waiting for trial for rather a long period, is that the sort of case that could be caught by the European Supervision Order if the UK were to implement that? They have, of course, not done that by the due date of December 2012. Individuals like that would be able to take advantage of that; is that the case?

**David Dickson:** Absolutely. The particular facts of that case are more difficult because while the partner consented to going back to Spain, the mother of the child did not. So it now means that both of them are back in that jurisdiction, while there is a child in Scotland. Of course, the European Supervision Order would be ideal for a circumstance like that, whereby she would be able to come back and then, when required, attend the jurisdiction for trial.

**Q270 Lord Mackenzie of Framwellgate:** Given the separate judicial systems in Scotland and the rest of the UK, your written evidence to this Committee emphasises the importance of the European Arrest Warrant and access to previous convictions to Scottish prosecutors, and suggests that the UK should opt back in to these measures if the opt-out is exercised. Are these the only crime and justice measures that the Scottish Government would like the UK to rejoin or does it consider other measures to be important, such as Eurojust, which you have touched on? If so, which measures should the UK seek to rejoin? On the end of that, I would ask whether the measures on the common definition of offences and mutual recognition decisions are significant to Scottish law enforcement.

**Frank Mulholland:** I deal with what we consider is vital to opt back in to if the UK Government opts out: Eurojust and Europol, for which there are five measures; the European Arrest Warrant, which we have spoken about; the exchange of criminal records—there are two Framework Decisions on that of which data protection is one; Joint Investigative Teams, which we strongly support; and the Schengen Information System I and II. I can provide details in writing. We feel these are vital to opt back in to.

We also feel that the UK Government should opt in to a number. Those include combating child pornography on the internet, although our domestic law is actually better than the 2003/75 Directive. It includes the transmission of controlled substances, for example which means controlled drugs can be transported from Scotland by law enforcement to France without a very convoluted procedure system of authorisations. Another very important one is 2002/348, concerning security. It is in connection with football matches with an international dimension—but it encourages and sets up football intelligence and mandates the exchange of information to other Member States. There is also 2005/222, which deals with attacks against information systems, cyber crime and a growing threat in that particular Directive. Those are the ones that we think are important, some of them vital, to opt back in to if the UK Government opts out.

**The Chairman:** Would it be at all reasonable to ask you to give us a list of those?
Frank Mulholland: I would be delighted.

The Chairman: That would be really very helpful to us in our Inquiry; thank you.

Lord Mackenzie of Framwellgate: We were talking, Lord Advocate, about the common definition of offences on mutual recognition. Are these important?

Frank Mulholland: Not in Scotland because we do not look at the actual nomen juris, we look at the underlying conduct. For example, we have seen some requests for the surrender of someone under the European Arrest Warrant for swindling. Of course, that is not an offence in Scotland, but we know what they are talking about; it is fraud, which is an offence in Scotland, so we look at it from that perspective. It is not a particular problem.

Lord Mackenzie of Framwellgate: So you apply common sense?

Frank Mulholland: We apply common sense, yes.

Q271 Viscount Bridgeman: I think we probably know your reply to this but it is a simple question, which is a UK question rather than a Scotland question. Should the UK seek to secure improvements to the EAW by opting out, or could these better be achieved by the adoption and implementation of other measures, such as the ESO, which we have just been talking about? I think there is relevance to Radu in this, is there not? The question is: do we achieve improvements in the EAW better by opting out or by working within the existing system?

Frank Mulholland: In my view, it is common sense that you are better within the tent arguing for improvement than without. If you own a Porsche and you need some improvement somewhere, you do not swap it for a Vespa moped with a view to buying the Porsche back again later. What you do is you repair it and fix it whilst you still have it. Of course, it is down to the influence of the UK Government in Europe. They are well respected. Reading all the submissions, David Anderson, the Terrorist Reviewer, in his dealings with Europe, made the point that in justice and home affairs policing matters the UK Government has great clout and is well respected on the continent. It seems to me that if you are going to improve the European Arrest Warrant in relation to the matters we have discussed, it is much better doing it from within rather than outwith.

Viscount Bridgeman: Do you want to say anything more about the Radu judgment in this context?

Frank Mulholland: Not really. I have already made the point that it demonstrates that the European Court of Justice is not expansionist in not following the Charter of Fundamental Rights and importing that. I have really nothing to add to that.

Q272 The Chairman: The UK Government has chosen not to implement approximately 14 of these police and criminal justice measures, pending their definitive decision on the opt-out. I wonder if the Scottish Government has taken any steps about the implementation of those measures in Scotland. Has it ever, in the past, disagreed with the UK Government’s decisions regarding opting in to police and criminal justice measures, for instance the post-Lisbon ones that have come forward?

Frank Mulholland: The only one we are aware of is human trafficking, which the UK eventually opted in to. The Scottish Government took the view that we should have
immediately opted in to that particular measure. In relation to the 14 or so that they have not opted in to, I do not think we went our own way on those, have we?

**David Dickson:** No.

**Frank Mulholland:** So no, we are in the same position as England and Wales.

**Lord Elystan-Morgan:** What impact, if any, has there been at practitioner level as a result of the United Kingdom not fully implementing the pre-Lisbon asset recovery measures? If these measures are not among the list of measures that the UK seeks to rejoin, assuming the opt-out takes place in the first instance, how will this affect the recovery of the proceeds of crime from other Member States?

**Frank Mulholland:** The fact we have not opted fully in does not have really have an impact on Scotland. We have, under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, the power to restrain property requested by, for example, a foreign court or a foreign investigator seeking to restrain property or where property has been confiscated by a foreign court. I have the power to apply to a Scottish court for a restraint order, freezing that. So it is not a problem in Scotland.

**Lord Elystan-Morgan:** Is that for anywhere in the world or is that confined to Europe?

**Frank Mulholland:** I think it is anywhere in the world but I would not want to give you an absolutely definitive answer. I will put that in the reply to you.

Q273  **The Chairman:** Presumably you would also be affected by whatever decision the Government takes to the present Commission proposals on the table about asset recovery, which are being negotiated in Brussels and which the Government decided not to opt in to—they did not decide to opt out but they decided not to opt in—despite the views of this Committee that they should have done. They retained the possibility to opt in at the adoption stage. I assume that that would also affect you.

**Frank Mulholland:** Our view on proceeds of crime is that we strongly support proceeds of crime, not just domestically but right across the continent and beyond. It is a very valuable measure in relation to combating criminal conduct. You cannot look at it just within your national borders; you have to look at it internationally, because criminal money and capital is not restricted to Scotland or the UK, and we have to cooperate with each other in mutual recognition of decisions of foreign courts. To answer your question directly, yes, we would support opting in fully.

**Lord Rowlands:** The Scottish Government has its test as to what makes a clear and compelling case to opt out. On the basis of listening to your evidence, may I infer that you do not think that compelling case has been made?

**Frank Mulholland:** Not to me; I have not seen it.

**The Chairman:** On that very succinct note, I thank you very much for coming and giving us evidence. It has been valuable indeed and it will help us greatly with the writing of our report, which I hope you will find useful reading.
WEDNESDAY 30 JANUARY 2013

Members present

Lord Bowness (Chairman)
Lord Avebury
Viscount Bridgeman
Lord Hannay of Chiswick
Baroness O’Loan
Lord Rowlands
Lord Sharkey
Lord Stoneham of Droxford

Examination of Witnesses

Michèle Coninsx, President of Eurojust and National Member for Belgium, and Frances Kennah, National Member for the United Kingdom, Eurojust.

Q179 The Chairman: Perhaps I may welcome Michèle Coninsx, the President of Eurojust, and Frances Kennah, the National Member for the United Kingdom on Eurojust, to this evidence session. If I can explain very briefly the position, this is an inquiry which two Sub-Committees of the European Union Committee of the House of Lords—the Justice, Institutions and Consumer Protection and the Home Affairs, Health and Education Sub-Committees—are carrying out into the United Kingdom’s 2014 opt-out decision. You will know that the United Kingdom Government have said at this present stage that they are currently minded to exercise that opt-out.

We have taken a lot of evidence, some of which you may have seen on the website, from many disciplines. We hope, after this session and further evidence sessions, to have a final session with the Home Secretary and the Lord Chancellor on 13 February, and we will publish a report by the end of the parliamentary Session in May. That report is planned to cover the merits or otherwise of the opt-out decision, if that is going to be the decision, what measures the UK should seek to rejoin if the opt-out is exercised, and, of course, the report will be there to inform the House of Lords when a vote is taken, which the Government have promised will take place. We do not know when and we do not know the terms of that vote. That is a matter, in time, for them.
For the record, may I say that, as you probably realise, a verbatim transcript is being taken, which will be posted on the parliamentary website? You will be sent a copy of the transcript. If you wish to make any alterations in the interests of accuracy, please do so, but I warn you that it is published before that process is complete. If there are any points that you wish to make subsequent to this session, please do so.

Madame Coninsx, is there anything you want to say before moving to questions? If you prefer, we can move direct to questions. I would ask that, when you first speak, again for the record and the transcript, you could introduce yourself and describe your office.

I should also tell Members of the Committee that, according to our papers, we have two witnesses, not only Madame President of Eurojust but the National Member for the United Kingdom at Eurojust, Frances Kennah. I have to say to Members that you will not be able to put any questions to Frances Kennah. She has received directions from the Home Office that she cannot answer questions on the record in this inquiry, although she can attend and listen to these proceedings. On a personal basis, she has kindly said that if, for the furtherance of our interest in the matter, we want to ask her questions merely to inform ourselves about what Eurojust and National Members do, we can do that informally. It must be made very clear that that will not be part of the evidence session. So I thank Ms Kennah for being here. I am sorry your journey, in a sense, will not be fulfilled in the way that we hoped that it would be, but we do appreciate that it is not your fault, and I am sure that we may ask questions elsewhere as to why your journey has proved to be somewhat unfruitful.

Baroness O’Loan: Can I ask, Lord Chairman, when this decision was communicated?

The Chairman: This morning, I believe, or yesterday.

Frances Kennah: It was yesterday evening.

Q180 The Chairman: But it should be said that the process and the knowledge that this session was taking place has been in the hands of whoever is responsible for a very long time.

Madame Coninsx, I am afraid that you are going to have to bear the burden of all the questions. Can I perhaps start by asking you, in your opinion, what would be the effect for UK police and law enforcement agencies if the UK ceased to participate in Eurojust, and have you any idea what the operational and financial consequences would be?

Michèle Coninsx: Thank you very much for that question. While Eurojust is an European judicial co-operation body involved with judicial co-ordination, co-operation, facilitation, acceleration of Mutual Legal Assistance requests and the execution of European Arrest Warrants, Eurojust has been involved in the setting-up and monitoring of Joint Investigation Teams. To be out of this exercise means being unable to benefit from these services offered by Eurojust, the judicial co-ordination meetings, the facilitation of Mutual Legal Assistance requests, the acceleration and execution of European Arrest Warrants, with the simultaneous and synchronised co-ordination of European Arrest Warrants in relation to criminal networks, and also the setting-up and funding of Joint Investigation Teams.

The best thing I can do is give you examples of where, for instance, the UK was involved in judicial co-ordination efforts in recent years to see what happened throughout. Thanks to that co-ordination, there was a case opened at Eurojust in 2011—and I have to look at my papers here—which was a trafficking in human beings case starting in the Czech Republic where females were being trafficked and sent to the United Kingdom in order to be put into prostitution activity. It is thanks to the co-ordination between those two countries that we
could put our hands on the 11 ringleaders. That was done throughout the co-ordination effort by setting up a Joint Investigation Team. It was absolutely vital to discuss how both countries were competent, which was the best place to prosecute, what was the best jurisdiction and how to gather and secure the best evidence possible.

This was discussed throughout, and, thanks to the Joint Investigation Teams, all the players were sitting together, eye to eye, in a very simple and effective way to exchange their points of view. Both the UK and the Czech Republic were equally competent but it was important to secure the best evidence ever. That was done throughout the setting-up of the Joint Investigation Team and led, three months later, to the arrest of 11 ringleaders.

What I would say is that you may choose for the bilateral Mutual Legal Assistance where we have five countries involved in a criminal network, and from one country to another you start bilaterally to exchange mutual legal assistance requests. That was the case more than 10 years ago before the existence of Eurojust; that is the omnibus approach, where you go very slowly, step by step. Then you have the high-speed train approach, where you put everybody around a table during a co-ordination effort, where you offer a forum, with interpretation and translation, where you ensure that during one day everybody who is a player has the same, equal image of the criminal network and its activities. Then all together, with all the elements in your hands, you start to establish a strategy. Where is the majority of the evidence gathered? Where can we secure the best evidence? How can we translate the information gathered around the table into tangible, concrete evidence and then decide on a target date of an action? Even on top of this, Eurojust is offering an operational co-ordination centre, which is a possibility in real time for the involved national desks to be in direct contact with the judicial and police authorities of the Member States involved in the action. Very often, 200, 300 or 400 policemen are all working on the spot during the target day and we from Eurojust are monitoring the actions taken on the spot. This is the high-speed train approach, where you see that you reach by this action a sharp, shocking effect among the criminals. This is certainly not reached in a bilateral case—the omnibus approach—where it is very lengthy.

Another very good example is the European Arrest Warrant in terrorism-related matters. If there is one priority in the EU that is undeniable, it is terrorism. We had the dramatic bombings in London on 21 July 2005. One of the targets escaped from the United Kingdom, via France, taking the Eurostar. He landed in Italy, where he was arrested in a minimum of time and, via a European Arrest Warrant, surrendered in less than a few weeks. He was sentenced a short while afterwards to a sentence of 40 years’ imprisonment.

Can I make a comparison with another terrorism-related case? Of course I can—in 1995, Rachid Ramda. It took more than 10 years, from November 1995 till December 2005, to get him from the United Kingdom to France for terrorism-related activity.

This is the difference between making use of mutual recognition-based instruments, mutual trust, mutual respect, and of using the old mechanisms of MLA—Mutual Legal Assistance—based on the 1957 and 1959 Conventions. We offer a service and it is up to the customer to make their choice. I know what kind of choice I would make personally.

**Q181 Baroness O’Loan:** I have a very brief supplementary, Lord Chairman. Do you know on how many occasions the UK has been involved in these Joint Investigation Teams over the past, whatever time frame you can put on it? If you could put any figures at all, it would be very useful.
Michèle Coninsx: We have figures for all the years, and in relation to Joint Investigation Teams for the last two years—2011-2012—we had, in total 78 Joint Investigation Teams. In fact, the UK showed the highest level of involvement in this legal instrument, participating in 25 of these Joint Investigation Teams registered at Eurojust—which was 32% of all the Joint Investigation Teams—and it comes at the top of the list of Member States having made use of the Joint Investigation Teams. We have really very precise figures.

Baroness O’Loan: That is very helpful. Thank you very much.

The Chairman: If it is possible—I am not sure, but I do not recall whether we have had those figures—if they are available in the public domain, it would be helpful if perhaps you could let us have those figures.

Michèle Coninsx: I don’t think there is any secret about them, and we have never been not transparent; so we can certainly share these figures directly with you.

The Chairman: I am sure it will be very much appreciated.

Michèle Coninsx: They will appear in the activity report on our activities of 2012. That report will see daylight at the end of April and will be presented to the European Parliament orally in June, but there is no secret about these figures.

The Chairman: Bearing in mind the timetable that we have for producing this, we would be grateful if you were able to let us have those figures because, if we wait for your report, we will have published our own report by then.

Michèle Coninsx: The figures are very relevant and show you very clearly how the UK makes use of all the mutual recognition instruments, the co-ordination meetings and how many cases were launched from the UK and towards the UK within Eurojust.

The Chairman: Thank you very much. May I ask colleagues to be quite brief with their questions because we do need to catch up slightly?

Q182 Lord Hannay of Chiswick: I wonder if we could stand the previous question on its head and ask you—because you have given us a very cogent answer of the benefits to the UK from the operation of Eurojust—what would be the implications for Eurojust if the UK exercised the opt-out and did not ask to rejoin?

Michèle Coninsx: If there is a criminal network where five countries are involved, including the UK, because targets were active in the territory of the UK, we might be able to have a co-ordination meeting easily with all the four EU Member States’ representatives, but we should ask for representation from the UK as if the UK were to be a third state. That is, of course, possible but not that easy, not that simple, and it would certainly have an impact on the effectiveness in going after the criminal network in a short time—for sure.

Lord Hannay of Chiswick: In the same line of questioning, could you characterise how you think it would affect the evolution of Eurojust if the UK was not an active participant in it, not just on the practical ground, which you have answered, but in the emerging culture of an organisation that is developing all the time?

Michèle Coninsx: Indeed. Eurojust has been developing and has evolved since its outset. It is a sum of more than 27 Member States. It is much more than this. Through our annual report, we make a sort of overview of all the issues which show very clearly what is hampering good judicial co-operation and what the solution could be in order to solve practical problems in judicial co-ordination. In that sense, we impact, directly or indirectly, criminal policy at EU level on how to fight organised crime and terrorism effectively. If the
UK is not present any longer, the impact of the UK on that criminal policy will be quite reduced. We can also be asked by the institutions to give our advice from a practical point of view on new instruments. If the UK is not part of that group, it might impact on the correctness or completeness of our advice, of course.

There are lots of examples. I just gave you an example of the co-ordination meeting. But, as to practical examples, by far the most important one is that, in 2007, we had in Italy an instructing judge who was involved in a financing of terrorism case. He had targets in his file spread over four countries—Romania, France, the UK and Portugal. In fact, the case started as, shall we say, a normal case—cigarette smuggling, trafficking in human beings, forgery of identity cards and passports—but during his work the judge found out that a whole ring, a network, was involved in the financing of terrorism and that money retrieved from the criminal activity was being sent through the Maghreb and from there to an al-Qaeda network in other regions.

At a certain moment, he asked Eurojust to be involved in the co-ordinated execution of a European Arrest Warrant against the targets in those four different countries. It took us at Eurojust five days to go through all the European Arrest Warrants to see if the format met with all the conditions, if everything was legally okay and correct. The instructing judge thought that we could manage in one day on 30 October. It was only possible five days later, on 5 November 2007, by pulling all the efforts together and by also including the UK in that exercise. What would have happened if the targets in the UK had been out of the game? We would concentrate on the leaders of a terrorist network in only three countries and miss an opportunity to be as effective in the fourth country. We would lose in any case but especially in the effect of our effort. We would have been co-ordinating and would have done our job, but we would have missed one segment of that terrorist network. That is the most important impact of not being part of this exercise, but, of course, you have the policy matters and the influencing of the legal decision making, which is also, I think, a vital part that you might be missing in the future.

**Q183 Lord Rowlands:** Lord Justice Thomas, one of the most senior extradition judges in Britain, in evidence he gave to the Scott Baker inquiry into the whole process of the European Arrest Warrant and the issues that you are describing, said this: “One of the problems with the way in which a lot of European criminal justice legislation has emerged is that it presupposes a kind of mutual confidence and common standards that actually don’t exist”. You are saying that Eurojust’s experience contradicts that observation.

**Michèle Coninsx:** Are you referring back to Question 4? Is that correct?

**Lord Rowlands:** It was evidence given to the Scott Baker inquiry into the European Arrest Warrant.

**The Chairman:** It was not specifically Question 4, no. Lord Justice Scott Baker conducted an inquiry into extradition.

**Michèle Coninsx:** Extradition.

**The Chairman:** It was extradition generally and our arrangements with America, and also the European Arrest Warrant. It was in the context of evidence to that inquiry that the statement was made that Lord Rowlands has just read.

**Lord Rowlands:** He made this general statement.

**Baroness O’Loan:** I think you should read the statement again.
**Lord Rowlands:** I will read it again: “One of the problems with the way in which a lot of European criminal justice legislation has emerged is that it presupposes a kind of mutual confidence and common standards that actually don’t exist”.

**Michèle Coninsx:** The European Arrest Warrant was one of the effects of the 9/11 attacks. In 2002, the framework decision of 13 June was being launched, and with that I come back to what one of the spokesmen of the Crown Prosecution Service told the House of Commons in 2009. He said that the impact of the European Arrest Warrant was “greatly simplifying and speeding up extradition within the EU since its introduction”. It is the “most effective mutual recognition tool introduced”. I am not saying this; a spokesman of the CPS—the Crown Prosecution Service—is saying this.

I gave you the example of Hussain Osman’s surrender and Rachid Ramda’s extradition. It is true that there are 30 different legal systems and 23 different languages in the EU, but, from a practical point of view, the European Arrest Warrant is an absolute success. It is speeding up, accelerating surrender and is done in a very clear and transparent way.

Going back to the figures of Eurojust, I think those are quite revealing. If there was not trust, there would not be such a huge use made of the European Arrest Warrant. I see that, for the UK only, there were 35 cases concerning the execution of European Arrest Warrants; and I am always talking about figures from the same years—2011-12. The UK was requested in the execution of European Arrest Warrants in 62 cases. If you make a top-10 list in Eurojust, the UK came in fourth for being requested to execute European Arrest Warrants and was second—nearly in the lead—as a requested country in European Arrest Warrants.

There were two so-called topics addressed to Eurojust—one by the High Court of England and Wales—to indicate whether, since the introduction of the European Arrest Warrant, there had been any refusals to surrender on the basis that the Ministry of Justice is not a judicial authority. At that moment, we launched a questionnaire to all the remaining 26 countries to see if that was the case in all the other countries, and we had an answer in a minimum of time.

We had another questionnaire “topic”, as we call them, launched in relation to another request coming from the United Kingdom. This is quite revealing, because all the other countries had not made use of Eurojust in verifying the law and the practice in relation to European Arrest Warrants. On top of this, in two cases in the last year in conflicting EAWs, Eurojust was being requested by the UK to give its opinion; and there were only five cases last year. That means that the UK is obviously making use of European Arrest Warrants to quite a good extent.

**Q184 Lord Avebury:** Is that an increasing trend? Could you say anything about the direction in which it is going? Is the number of requests increasing from year to year? You have given us the figures for 2011-12. Can you say anything about the trends of these cases?

**Michèle Coninsx:** If you look at the figures of Eurojust as a whole, we see that in the beginning, 2002, we had approximately 200 cases. Last year we had 1,441 cases and this year 2012—I am referring back—1,533. So it is steadily increasing. What is most important is that you also see that trend pursued in the co-ordination meetings. Only last year we had an increase of 40% of co-ordination meetings. So that means more and more Member States, based on trust and confidence, are asking for our support, and that means all the support that may be delivered by Eurojust, be it in the co-ordination meetings, the facilitation of mutual assistance requests or in the execution of European Arrest Warrants and the setting-up of JITs. Also for the Joint Investigation Teams do we see that trend. Again, I don’t know
all these figures by heart, but, especially in relation to the funding of JITs, three years ago there were 10 requests for the funding of JITs. There was an increase to 34 in 2010 and last year there were 62. So you see there is an increase. The trend is constantly increasing, and we always say it is quite difficult for us to promote the tasks to be performed and the services offered—

**Lord Hannay of Chiswick:** That is funding from the European budget.

**Michèle Coninsx:** Since a few years we have a JIT funding project. We are funding the JITs at different levels, sponsoring the JITs in relation to hotels—accommodation costs—travel costs, interpretation and translation costs. These seemed to be in earlier days the things that hampered the setting-up of Joint Investigation Teams. It is not only the JIT funding but also the expertise and experience that goes with it that is increasing. Since a few years, we are hosting the secretariat to the JIT expert network. Also, for a few years we have been hosting jointly with Europol the yearly JIT expert meeting re-uniting all the national experts at police and judicial level dealing with JITs. We also have established a JIT manual where we describe the laws and the practice in relation to JITs, and this gradually is leading to more know-how, more expertise and better practice.

It is vital. When an instrument or a tool is not known, it is not being used—not being overused—and now we see gradually that, because of the practice and the service rendered by Eurojust, we attract more and more requests for the setting-up of JITs.

**Q185 Viscount Bridgeman:** I hope this is not coming too early in your presentation, but we heard yesterday that Europol 2, if that is in place on a very tight timetable, could have the effect of taking Europol out of the opt-out regime, too. Does the same facility exist for Eurojust?

**Michèle Coninsx:** Could you please repeat the question?

**Viscount Bridgeman:** As I understand it—and Lord Hannay may be able to help on this—if the new version of Europol is produced in time for November 2014, it could have the effect, because it is taking the thing out of the “pre” regime, of taking it out of the opt-out considerations.

**The Chairman:** We would have the ordinary opt-in/opt-out decision to make—

**Michèle Coninsx:** Yes.

**The Chairman:** —given the existing arrangement, and if it came into force it would replace it?

**Q186 Lord Hannay of Chiswick:** I think the question is whether a post-Lisbon Regulation for Eurojust—which, we understand, it is the Commission’s intention to produce sometime perhaps towards the end of this year—would, of course, create a similar parallel situation. If the British Government were to decide to opt in to that new Regulation, then Eurojust would drop out of the list of pre-Lisbon opt-outs. It would be helpful if you could say what your expectation is about the Commission’s intentions and the timetable.

**Michèle Coninsx:** I would like to have a crystal ball and know what the Commission’s proposals will be. As things stand right now, we have been informed that there will be two proposals for the two different Regulations, and that refers back directly to Articles 85 and 86 of the Lisbon Treaty. Article 85 refers to Eurojust and the reinforcing of Eurojust in its fight against trans-border organised crime. Article 86 concentrates on the European public
prosecutor’s office. As things stand at the moment, we have been informed that there will be
two proposals for those two separate articles.

Then, for the UK, we have two possibilities—Protocols 36 and 21. It is extremely complex,
but I read the papers on several occasions and think I got the message clearly, somewhere,
somehow, that, if you opt out, you can opt in in relation to the Council Decision on
Eurojust, as it stands so far—nothing to worry about. But then, if you do not opt in to that
Council Decision, there is another possibility, another opportunity, and that is to opt in in
the new proposal for the new Regulation on Eurojust, referring back to Article 85. But then
it is all about timing. We do not know what will be proposed. We will not know what will
be the effect of the co-decision, the role of the Council and the European Parliament, and
when that end result will be reached. The timing here is essential because you have time
between June 2014 and 1 December 2014, and there might be a chance that you fall out of
the basket, so to speak, and that is a risk which I think is realistic.

The Chairman: Lord Sharkey, I think maybe your questions have been covered, have they?

Lord Sharkey: I think they have. Madame Coninsx has said that the UK’s use of Eurojust is
significant and that we use it intensively.

Michèle Coninsx: It is true.

The Chairman: Baroness O’Loan, perhaps you can pick up on the European public
prosecutor point.

Q187 Baroness O’Loan: Yes. Again, maybe this is something that you cannot say too
much on, but we wondered about the future development of Eurojust and the relationship
between that and the proposed establishment of the European public prosecutor. If the UK
decides to participate in the European public prosecutor, will that affect its membership of
Eurojust in any way, assuming that it is up to date in Eurojust?

Michèle Coninsx: Again, it is difficult, as things stand at the moment, to have a clear view of
what will be the further developments and the future of Eurojust as such. As things stand at
the moment, Eurojust and the EPP will be two separate things, hence also the envisaged
projections of the Commission to come to the fore with two different proposals on the two
different articles—one on the reinforcement of Eurojust and the other on the establishment
of the EPPO, the European public prosecutor’s office—from Eurojust. As things stand at the
moment and as we have been informed, it seems to be that the EPPO will concentrate on
the Union’s thought on the so-called PIF offences—the protection of financial interests of
the European Union. That means that Eurojust will continue to play its role in the 95% of the
other crimes of the rest of the organised and serious crime matters and terrorism. The
scope of the EPPO is different. Eurojust is concentrating on co-ordination and co-operation,
support of Member States in a horizontal way, and the EPPO will really in a more vertical
way, be dealing with PIF related investigations and prosecutions and bringing to justice, which
is a different thing. There might be a link between those two things but we do not have any
idea of what the model envisaged by the Commission will be.

Of course, we have our own reflection work done at Eurojust from a practical point of view.
We take cases, and we go along the different models and see how the best synergies can be
put in place between all the actors, the Member States—the most important actors, and all
of Europol and Eurojust. But for the moment, I have no idea how it will impact the UK if it
opts out.
The Chairman: I hope colleagues might agree, Viscount Bridgeman particularly, but can I ask that Lord Rowlands put his question and the question that you were going to ask because they are linked, so can we put them together?

Viscount Bridgeman: They are rather more straightforward.

Q188 Lord Rowlands: If the United Kingdom opt out and then seek to opt back in to Eurojust, the Treaty appears to provide that there is an obligation by the Commission to be as positive as possible in its response as long as—and there is a proviso—the application is coherent. If one was creating a coherent application to allow opting back in to Eurojust, what other PCJ measures would be attached to that? What other measures would make up a coherent package, as it were? In other words, how many other measures are connected with Eurojust?

Michèle Coninsx: I think I have already mentioned that the European Arrest Warrant is part of our daily judicial co-operation activity.

Lord Rowlands: That is one, yes.

Michèle Coninsx: Then there are Joint Investigation Teams.

Lord Rowlands: That is two. Europol?

Michèle Coninsx: Equally important as the co-operation with Europol and the Member States would be the fact that we are now associated to focal points, and the Analytical Work Files of Europol. This association for the UK will not be the same any longer. It will have an effect on everything, for sure. You touch on a piece of the puzzle and you mix up all the pieces of the puzzle.

Lord Rowlands: Yes, but you would not say all the 133 measures are attached, would you?

Michèle Coninsx: The 133 measures are a lot, but these are the basic ones. There are lots of other measures we are involved with, like the freezing order, the transfer of criminal proceedings, the asset recovery and the controlled deliveries. These are other aspects of our lives and, of course, these also will be affected.

Lord Rowlands: Interconnected.

Michèle Coninsx: Of course.

Q189 Lord Avebury: Supposing that we have opted out and that we have applied to opt back in to Eurojust, and then a new proposal is tabled on Eurojust at some point down the line, would that abort the negotiations that we were in the process of conducting on opting back in to the original proposal? We would be starting again from scratch, as it were, and coming back in to Eurojust, and there would be no backwash from the fact that we had opted out of Eurojust that would inhibit the consideration of our application to rejoin a new proposal on Eurojust.

Michèle Coninsx: It is difficult for me to answer that question at the moment because we have at Eurojust—

Lord Hannay of Chiswick: I think that question is better put to the two Director Generals of the Commission, who are the people who basically are preparing the proposals and who, I think, will be able to give an answer.
Michèle Coninsx: They are preparing the proposals and monitoring the timing. It is all about the timing of that as well, and it is even difficult for us to evaluate or assess the impact that it will have.

Lord Hannay of Chiswick: But there is, I think, a distinction—perhaps you can confirm—that, if the British Government opted in to a new Commission proposal for Eurojust mark 2, let us say, within the three-month period, that is an unconditional right of the British Government to opt in. They will then be party to the negotiations and to the decision on it and it will not require the say-so of any other European institution. Whereas if the British Government ask to rejoin the present Eurojust, it would have to be adjudged by the Commission on the grounds of coherence and so on. I think that is right, is it not?

Michèle Coninsx: Yes. That is, from my recollection, right, indeed, yes.

The Chairman: Lord Avebury, we are running rather short of time. I think our witness has expressed fairly clear views about the European Arrest Warrant. Do you mind if we pass on to Lord Stoneham for the moment?

Q190 Lord Stoneham of Droxford: Assuming the opt-out is exercised, what is your view on the feasibility of any alternative arrangements for the UK’s continuing involvement with Eurojust? What we are particularly interested in is what happens at the moment with countries like Norway and Switzerland; what sort of facilities do they have with you and how limited is it compared with the full members of Eurojust?

Michèle Coninsx: If you are a full member of Eurojust, you are in the premises of Eurojust and you benefit from all the services that I have been mentioning. Going to the legal basis for the UK once opted out of the Council Decision of Eurojust as such, there is no legal basis foreseen for a country which is within the EU and which cannot, in that sense, be considered as a third state. So what we have in our Council Decision in Article 26 as a possibility is to conclude judicial co-operation agreements with real third states. We have examples in the acts of Eurojust.

We have concluded different judicial co-operation agreements with the United States, Norway, Croatia, Switzerland, with FYROM, and we have just concluded—though not signed yet—with Liechtenstein. It is an ongoing process. Now we will forward a tri-judicial co-operation agreement, fully-fledged, so to speak, where we also have a liaison magistrate or prosecutor based permanently at Eurojust. As a consequence of the conclusion of the judicial co-operation agreement, we have foreseen and generally accept that the liaison prosecutor can occupy the office space and make use of the telecommunication services and that Eurojust might be asking for reimbursement of the costs in that sense. That is roughly it. They may be making use of those kinds of facilities, and that is the case for the Croatian, American and the Norwegian prosecutor. Once you have concluded a judicial co-operation agreement, it facilitates the exchange of personal-related data but you are not considered as being part of the Eurojust national delegations and are not being considered as such.

So I think the first step is to see what the right legal basis is to conclude these kinds of judicial co-operation agreements, as we do with third states on the basis of Article 26. I must be honest, I do not know the right answer just now. If it is possible to conclude judicial agreements, we have the experience, and in that sense you can make use of some office space and the telecommunications system. You are not to exchange personal data with the other EU Member States, but that is roughly it.

The Chairman: Sadly, we must bring this to a close very shortly, but, Baroness O’Loan, I think you have a brief question arising out of this.
Q191 Baroness O’Loan: On a judicial co-operation agreement, do you run Joint Investigation Teams?

Michèle Coninsx: Yes.

Baroness O’Loan: If we have a judicial co-operation agreement and Joint Investigation Teams, what do we not have access to?

Michèle Coninsx: The funding, for instance—

Baroness O’Loan: The funding for the judicial—

Michèle Coninsx: —would not be possible.

Baroness O’Loan: In a wider context, is everything else available by virtue of this agreement—all the things that you were describing to us that your organisation provides?

Michèle Coninsx: It would be rather complicated. If you don’t have the European Arrest Warrant, you should have the extradition, for instance, based on the Convention of 1957. But, if you go through the EAW Framework Decision, the Convention of 1957 is no longer applicable. So what is your legal basis? It is quite difficult to say in one phrase, “It will be that effect”. It will have a multitude of effects. What I can say is that it would make the fight against organised crime extremely complex and quite inefficient, not only for the UK but also for the rest of the European Union, and it will have an impact on security in the UK, for sure.

The Chairman: Thank you very much. That is probably an opportune moment at which to bring the session to a close. Can I thank Madame Coninsx and indeed Ms Kennah for coming to our meeting? Thank you very much indeed, Madame Coninsx, for your very full answers. I am sorry that we do not have more time to pursue some of these issues, but if you could let us have the figures in advance of the publication of your report so that we can refer to them if we wish to in our own report and they can then form part of the evidence, that would be very helpful. Once again, thank you so much for your help, which has been very valuable.
WEDNESDAY 30 JANUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Avebury
Lord Bowness
Viscount Bridgeman
Baroness O’Loan
Lord Rowlands
Lord Sharkey
Lord Stoneham of Droxford

Examination of Witnesses

Françoise Le Bail, Director-General of DG JUSTICE, and Stefano Manservisi, Director-General of DG HOME, European Commission.

Q192  The Chairman: Thank you very much to both Directors-General. I am not sure what the collective noun is in English for Directors-General, but thank you for coming here in your busy schedule to talk to us about this pretty important inquiry, which could have very far-ranging implications, as we would see it, for both the UK and the European Union as a whole.

Perhaps I could begin very briefly by explaining the background to the inquiry we are conducting. The British Government’s current thinking—and that is the key phrase—as you know, is in favour of exercising the Protocol 36 opt-out within the timeframe laid down for its exercise—i.e. the end of May 2014. The Government have promised to consult Parliament before making a final decision to exercise the opt-out. They have stated that they will do so in a way that will enable a vote to be taken in both Houses. We do not know anything more than that about the procedures, and I will not plunge into the horrors of British parliamentary procedure because it is not really relevant to what we are doing here today.

In order to inform the House of Lords’ deliberations but not the House of Commons, although of course our report will be available to the House of Commons too, we launched this inquiry on 1 November last year. It is being conducted as a joint inquiry between two sub-committees because, like you, we have a division that is fairly similar to yours, although not identical, between the Home Affairs, Health and Education Sub-Committee, which I
We received a lot of written evidence by 14 December, which was our cut-off date, and it is on our website. No doubt you will have it available to you when you want to look at it. We are now in the midst of a whole lot of oral evidence sessions, which will run up to 13 February, when we are seeing the Lord Chancellor and the Home Secretary. Meanwhile, those oral sessions cover lawyers, academics, think tanks, NGOs, former and serving police practitioners and prosecutors, and, of course, since we have been in Brussels, a wide range of people such as Europol, Eurojust, the two relevant Committees of the European Parliament, and an informal session with the Council Secretariat. The latter were not able to give any evidence on the record for perfectly understandable reasons, just as I am afraid we will not be able to answer one of your questions, which is what attitude we are going to take, for the same perfectly understandable reason.

After the oral evidence sessions, we aim to publish our report before the end of the current British parliamentary session in May. The report will cover both the merits of the opt-out and which measures the UK should seek to rejoin were it to be exercised. It is intended, as I say, that the report will help the House of Lords in its debate, consideration and vote, for that matter, which is likely but by no means certain to take place before the summer break.

I will go over the formalities. A verbatim transcript will be taken of your evidence. This will be put on the parliamentary website a few days after this evidence session. You will be sent a copy of the transcript to check it for accuracy. We would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us.

There are two choices at this stage. The first is that, if either or both of you would like to make any introductory remarks, that would be entirely welcome to the Committee, but, if you prefer to go straight in to the question and answer session, that is absolutely fine by us.

**Stefano Manservisi**: We can go direct to the questions. We can alternate in replying and complementing each other, a bit like when commentating on a football match. We are representing the same position but we will try to make it a bit livelier. For my part, we can go directly to the questions, if you wish. We have had the opportunity to discuss our assessment several times in a less formal inquiry. We find that there is a mutual interest and the United Kingdom is participating in a certain number of these measures. Apart from taking the rights that are granted by the Treaty, on the substance there is a common ground on which we have an interest in working to maintain what is in the national British interest, but I look at that from the common European interest, which is to keep strong links and then see how to do it according to process. This decision must be taken by the United Kingdom. All our actions are inspired by the substantial assessment that things have so far been working well. I have personally, and I underline personally, very often said that I would prefer the United Kingdom to have opted into many more Acts—they went so far towards building Schengen into this—just to complete the substantial aspect of our assessment. For all the rest, we will do our job based on our role as described by Protocol 36.

**Q193 The Chairman**: Thank you, that is very helpful. I will start with the first question. Let me perhaps explain why in this session we are not putting the question we have put to many of our witnesses, which is: do you believe that the United Kingdom should or should
not exercise the opt-out? We do not think that is a proper question to put to Commission officials. We know that you agree that the decision is for the United Kingdom alone.

When I start off by talking about the procedures that would follow if the United Kingdom did opt out, it is not because I am assuming that it is going to or neglecting the major question of whether or not the opt-out should be exercised, but because I do not think it is appropriate for this session.

It would be helpful if you could start by telling us about the procedures that the Commission and the Council will apply if the UK does exercise the opt-out and does seek to rejoin certain measures. Would the Commission’s decisions—and here I am talking about the Commissioners as well as the Commission services—be taken on a purely technical basis, or would other wider, political considerations be likely to be relevant?

**Stefano Manservisi:** In the description of the procedure as it is done in Protocol 36, and in particular Article 10.5, we make the distinction between two categories. There are the Schengen-related matters, and I refer to them for the sake of completeness, where the entire decision is for the Council only and the Commission is not involved. Assuming we are in this dimension, basically, the Commission does not have a role to play institutionally speaking. There are then the non-Schengen-related matters, or what is outside Schengen, where on the contrary it is the Commission that is assessing whether the conditions are fulfilled or not in order to accept the opt-in and under which conditions. Therefore, this is an examination that the Commission will have to do on technical grounds to assess the feasibility of the composition of the different aspects of the EU legislation.

There are, as you know, some procedural rules. If transitional arrangements are needed, the Commission should indicate what must be done. If it is not convinced that this is doable, there are other procedural rules that apply. Everything is done on the basis of pure technical examination.

There is an issue, which I think will be relevant all the way along in our discussion, and that is the question of coherence. That is not just a nice word in policy terms; it is also enshrined in the Protocol 36 itself, and further in the position of the Court of Justice in the way it is interpreted in EU law. I refer particularly to situations in which you have instruments that are interlinked: for example, re-opting into a possible Framework Decision on the fight against terrorism, which refers many times to, and is interlinked for its— as we say— “effet utile” with, the European Arrest Warrant. It obviously requires an assessment of how this is feasible and coherent if we take this instrument without thinking about the consequence on others where there is possibly not the same re-opting in.

It is technical. It is also at the beginning fairly mechanical, but it is not just a purely mechanical exercise in legal terms. It should require, at the end, an assessment of the balance in order to identify the coherence of the legal issues.

**Q194 The Chairman:** I would like to follow up on one aspect of that before others of my colleagues come in. On the transitional provisions, which are clearly worrying a lot of people when they look at the timeframe: for example, the likely timeframe for processing and legislating on the Europol and Eurojust II proposals, which we think you are going to make in the case of Europol quite soon and in the case of Eurojust not so soon, but which probably have a legislative trajectory that takes them beyond December 2014. The whole transitional thing is clearly there; I cannot say that we yet understand very well how it is likely to work.

When you said that on non-Schengen issues, which most of these will be, it is the Commission that takes the decisions, and that is clear from the Protocol, does that also
apply to the transitional provisions? If you wanted to provide a legal base for transitional arrangements, would the Commission do this on its own?

**Stefano Manservisi:** No. If we had to identify transitional measures, this would be made by Commission proposal to the Council.

**Françoise Le Bail:** And the Council would decide by a qualified majority.

**The Chairman:** The straightforward rejoining which did not require any transitional provisions but would be something on which the Commission would take a binding decision and would say, “The UK has asked to rejoin X; we think that that is coherent, and therefore that should happen”. That will be the decision?

In the case of a transitional arrangement that was necessary because of a gap in the timeframe, that would necessitate the Commission making a proposal to the Council and the Council legislating, but would not require a Parliamentary decision. None of this would require a Parliamentary decision other than post-Lisbon acts.

**Stefano Manservisi:** Yes. But it is obvious that even if European Parliament does not have an institutional role to play in the process concerning Protocol 36, the Commission will keep the Parliament informed, and it is likely that there will also be debates in Parliament about this. As I said at the beginning, there are rules concerning one Member State, however, these rules do not only affect this State, but the whole of the Union. There is also the real dimension in which this appears. That is also relevant for everybody. Even if there is no formal Parliamentary involvement in this decision-making process, certainly there would be a place for discussion.

**The Chairman:** That is very clear. Thank you for that.

**Q195 Lord Sharkey:** You spoke about coherence as being an important element in the assessment that was made. Could you say what the tests are for coherence?

**Stefano Manservisi:** I gave you one example in the Home Affairs area, the Framework Decision on the fight against terrorism, which is linked to the European Arrest Warrant. This is a typical case and quite evident. We could have other examples, but all the discussions are linked to what the actual choices, made at the end of the day by the British Government, will be, because we are in the process of identifying and finalising the list of measures concerned. There are ongoing discussions at a technical level involving a certain number of legal issues that are still not totally agreed between the European Commission and the United Kingdom in identifying the Acts and what the period between 1 June and 1 December 2014 means. What is unknown is the orientation of the British Government at a certain moment concerning the possible lists of measures on which the British Government will decide to ask to re-opt in.

The coherence process is not only a mechanical process. We have to assess the impact that all this has on the functioning of the area of Freedom, Security and Justice. The case I made is an obvious one, because there is an intersection of pieces of legislation. There are other cases which we have to examine in the economy of the system at the end of the day. It is not just a question of having small parts here and there in isolation. It is something that must be assessed on the basis of a real test.

**Q196 Lord Rowlands:** I understand what you have said, but in an earlier discussion somebody raised the point that the Council would have a role in the process, even in the non-Schengen provision. I understood, as it was put to me, that if the United Kingdom
Government and the Commission agreed the package of opt-ins, it nevertheless would have to go to the Council because there would be consequences flowing from those measures that were not opted into. There would be consequences that would bring the matter up to the Council. Is that right or wrong?

**Stefano Manservisi:** No, it is right. The issue is defined in quite a stringent way by Protocol 36, which also contains provisions on the so-called financial impact. I will not repeat the exact wording but, the Protocol is fairly stringent; it is not just a generic provision. This is the case, if for example we consider that there is a financial impact, we have to define what it means and what and whether it must be borne by the United Kingdom in respect of the EU budget or other Member States.

A typical example is that if the United Kingdom, having exercised its opt-out right, comes out of the SIS system and then decides to go back into the SIS system, in the meantime this also implies managing costs, and it means managing a larger IT system, managing flows of information and so on. Therefore, this is a mechanical example, but also something on which we have to take a decision, and in this case this would be a decision that will be taken by the Council.

**Lord Rowlands:** But on non-Schengen issues, if the Commission and the United Kingdom come to a perfectly good agreement that this is the group of measures we will opt into and they are coherent, it does not require the Council to endorse it in any shape or form.

**Françoise Le Bail:** No, it does not. It is the Commission that decides whether the opt-in fulfils the conditions of the Treaty. It is true that, if there were financial consequences, which are presumably less likely to occur in the field of Justice than in the Home Affairs area, the consequences would have to be discussed. But the Treaty is very clear; it is for the Commission to take the decision.

**Q197 Lord Avebury:** Would it be possible to extend your example of the interaction between the Framework Decision on terrorism in the European Arrest Warrant so as to provide a more thorough analysis? You distinguish between the obvious instruments that are subject to coherence and the ones where it is possible that they may be. Is it not possible to extend your example so that you have a comprehensive list of the routes of instruments that are obviously subject to coherence? You could group Europol and Eurojust with the Framework Decision on terrorism in the European Arrest Warrant, I presume, so you would have one large group of instruments that would have to be considered in an application to rejoin as a unit. There may be other units of instruments that would fall into a similar category. There are those which you could obviously identify as subject to the rules of coherence.

**Stefano Manservisi:** It is obvious that we are doing all this for our internal purposes, but the question of coherence in re-opting in is also something that, I guess, will be motivated by the British Government themselves at the moment when they present their willingness and proposal to re-opt in. It is not just to be taken on individual Acts. We can have some technical internal work in order to try and do what you say—i.e. to see what the most likely clusters of measures are that are interacting. That is indeed what we are doing.

This is not a pre-decision that could then be implemented immediately. It is something that is useful to have for our purposes in order to interpret and understand at a certain moment what position will be taken by the British Government in due time. But we are preparing ourselves. That is for sure.
Lord Avebury: It would be very valuable, when we come to decide on opting back in, if it goes that way—indeed, essential—to have a preview so that when Parliament makes these decisions it can see, for example, that it is not possible to opt back into instrument A or B by itself. There are, as you say, these clusters of decisions that have to be taken in common. If we knew that in advance, this might affect the way in which people approach the decision to opt out of the 130 or how we approach opting back into clusters.

The Chairman: I would add this before you reply to it. Would it be unduly naive to draw a conclusion from this that the British Government might be well advised to ensure that their view of coherence and the Commission’s view of coherence between certain instruments was the same before it made a request?

Lord Avebury: Exactly, yes.

Stefano Manservisi: From my point of view, I want to say that we are confronted with a situation where there is clearly a right enshrined in the Treaty that is given without any kind of scrutiny to the British Government. It would not be fair to redefine autonomously a cluster of measures that can orientate a decision in one way or another. We are playing exactly our role. This can be interpreted in political terms. At the beginning you asked about our assessment. Our assessment would be to see what the position taken by the British Government will be, and therefore to try and be helpful at the end of the day. In the discussions that we currently have, we are doing this to prepare ourselves and in conjunction with our colleagues in the British Government, but at the same time I would be a bit hesitant in making this a public representation.

Françoise Le Bail: It would be very difficult to advice on coherence without knowing what the British Government intends to do. You cannot define coherence abstractly. Of course there are a number of decisions that refer explicitly to other instruments. I am thinking, for example, of the Framework Decisions on conflicts of jurisdiction that implies that Eurojust could intervene at some stage. It will be very difficult to draw on this particular Framework Decision without joining Eurojust. I would say these are clear-cut cases. Apart from that, it is very difficult to define coherence in particular in a system where all measures support each other.

The intention of all these measures is to create this European space of Justice, in my particular case. Of course, all these measures create mutual trust, thus allowing mutual recognition. It would be extremely difficult to define coherence in the abstract.

The Chairman: I think it is best to move away from the idea that you should publicly redefine the meaning of coherence. I understand your arguments about that. My supplementary question addressed a rather different proposition, which was: would it not be wise for the British Government to ascertain privately from the Commission whether their view of coherence and the Commission’s view of coherence was consistent, so there would be no coherence problem if and when the British Government made certain requests to rejoin? I am really trying to find out whether the Commission at your level and at the level of Commissioners would be available to the British Government if they wished to go in greater depth into the coherence issue so that there were, in the golden rule of diplomacy, no surprises?

Françoise Le Bail: As long as it is not done in an abstract way.

Q198 Lord Bowness: Many of the witnesses that we have had have emphasised the practical difficulties that would flow from an opt-out and opting back into a variety of
measures and the need to avoid an interregnum. Of course we do not yet know which measures, if any, the British Government will want to opt back into, if they exercise the opt-out. You have mentioned discussions. Can I be very specific? Are you discussing theoretical concepts, which we have just been talking about, or is the British Government actually talking to you about specific measures that they want to opt back into if they exercise that option? If they are not, what is your view about when they should be given the procedures that have to be followed, if we are not going to have this unfortunate interregnum come December 2014?

Françoise Le Bail: The answer to the first question is no.

Stefano Manservisi: I am concerned. The reply is no, there is not—

Lord Bowness: Forgive me for interrupting you. What are you talking about then, because the discussion cannot be very helpful?

Stefano Manservisi: I will cite a couple of examples. First, there is still no agreement on the list entirely. We are still looking at what the list is composed of.

Françoise Le Bail: We have agreed on the list in the Justice area.

Stefano Manservisi: Secondly, there is a small problem, which is the right interpretation of when the re-opt in could be done. Here, we have a discussion that is very concrete and is based on different legal interpretations as to whether it starts from 1 June 2014 or 1 December. There are two positions in legal terms that are now under analysis as to whether this six-month period is really empty or whether it could be filled immediately the day after the opt-out by a list of re-opt ins. This is very concrete matter that can have a certain impact precisely on this interim period. To know the measures on which the British Government want to re-opt in describes a situation with a certain number of legal uncertainties but also with certain elements on which we can build in order to stabilise the situation. If we have six months, as, literally speaking, Protocol 36 says, there is another context and another environment. These are two examples of the things we are discussing.

The Chairman: Does this same argument apply if the British Government, as we believe they probably will, actually trigger the opt-out, let us say in July 2013? You have a similar legal problem but just over a longer period.

Stefano Manservisi: I imagine that, from the British point of view, this is not totally politically innocent in the sense that it also has an impact. Since there was a request to give a couple of examples, I am telling you what kinds of issues are on the table now. We are not discussing general ideological or philosophical issues. There are a number of technicalities, including the issue of what the financial impact could have.

Q199 Lord Bowness: Is there not a great danger that we have spent all this time discussing whether it is June or December and no progress is made in getting agreement on the matters that the Government might want to opt back into? In asking that question I am not suggesting it is your fault, but clearly if the thing is going to be seamless and a great deal of confusion avoided, that has to be resolved. Whether it is June or December, measures have to finish and new ones have to come in; otherwise, we all have a lot of problems.

Stefano Manservisi: Yes.

Françoise Le Bail: But I guess the key issue is to have a decision by the British Government. There is nothing else we can do before that.
The Chairman: You are saying that if they pull the trigger in July 2013, you will form an opinion at that stage as to how best to make use of the intervening period between then and December 2014.

Françoise Le Bail: It very much depends on what they are going to decide. Are they going to decide a block opt-out and together with a list of measures into which they want to opt back in?

Lord Avebury: But should not your pre-planning be based on the assumption that if they make the decision to opt out in July 2013, political forces will compel them to announce which measures they want to opt into at that point, so that you will know in July 2013 which of the measures the British Government think it would be advisable to opt back into and you can start the negotiations at that point, can you not?

Stefano Manservisi: Can we set our minds? Of course we are now already discussing on the basis of a political declaration, which is that we are likely to have a block opt-out. The block opt-out is not decided yet, formally speaking, by the British Government. I think that all the elements are there in order to believe that this is likely to happen.

Equally, if the British Government in July, irrespective of the legal interpretation of what the interim period would mean, say they will opt into this, then of course it will be important because, independent of the legal assessment on what it means—and this is one of the issues that we are discussing—obviously we will start working on this, indeed as we have started working now, on the assumption that this is likely to happen. So there are two dimensions. The formal one triggers procedure in institutional terms. The substantial one at the working level is preparing the ground in order to limit whatever the decision will be in the opt-out and in the re-opt in to do that in the smoothest way. This is our duty in any case. We are not there to create further complexity in a situation that is already complex.

The Chairman: What you have said is very helpful.

Lord Rowlands: What puzzles me about this timescale is that in fact if the British Government is going to bring something before Parliament, they have to bring it before the summer recess. They are going to have to declare their hand in one form or another of what their intentions are in order to get the approval of both Houses. By the end of May, or in June possibly, the British Government will have put on the record what their wish would be. That is quite early. Would it be possible, if constructive negotiations then took place, to reach the almost ideal situation that, even if you have opted out by December 2014, you opt out and opt in almost simultaneously?

Stefano Manservisi: In political terms, yes, but not in legal terms.

Lord Rowlands: If possible.

Q200 The Chairman: Thank you. It is really helpful to have gone into that. This is a very complex area, and we do not underestimate for one minute the fact that you cannot give definitive answers at this stage because the British Government have not revealed their position, both on the opt-out and on the re-opting in. That is a problem which we suffer from like you, since they have not told us either.

I move on to one small point that I would like to ask you. Are you concerned that any of the decisions the Commission may take, either temporary transitional ones or the other decisions they may take on the British request list, may be open to legal challenge?
Stefano Manservisi: Yes. We are perfectly aware of the fact that we are entering into a situation that could legally be very unstable and unclear. There are other aspects. The acquis as it is now is not remaining immobile. It is going on, following its own life, being repealed, modified, and suppressed and so on. Therefore, we are not talking about something that is stable once for all; it is something that can develop. This can create further legal challenge, because we are talking about something that in the meantime could be modified. This implies all sorts of impacts on not only legal instruments but also actions based on certain legal bases like i.e. the FADO database, which is managed by the Council. There are a number of things about which there are concerns in terms of the legal certainty of the situation—in particular in this interim period. Therefore, yes, I can confirm that we are aware of various legal challenges which we will need to face.

Q201 Lord Stoneham of Droxford: I think you have hinted at this, but I wondered if you could clarify how the financial consequences of the opt-out decision for the UK will be decided in the light of Protocol 36.

Stefano Manservisi: Maybe we have some more instruments, but there is, for example, the SIS. I can also give the example of the participation of the United Kingdom in a certain number of databases to exchange information. There are a lot of mechanics developed on the basis of decisions taken at EU level, in particular in the Home Affairs area. That means that they are systems that are plugged into each other and that are partially financed by the EU budget and other things that are intimately connected to that, which are financed by national budgets. On that basis, we have to assess the financial impact as defined by the Protocol, and in quite a restrictive way, and therefore, as it is foreseen, to make the necessary arrangements and proposals that the Commission should make in order to say, “Yes, you can re-opt in, but it will have this impact and therefore the United Kingdom must bear this cost in order to do it”.

The Chairman: But if they do not opt in, say, to the Schengen Information System, they just blow €40 million.

Françoise Le Bail: We must keep in mind that the system has been built to include such a contribution. In the area of Justice, the financial consequences are presumably less obvious, but Eurojust, for example, was built right from the beginning with a British contribution. What will be the mechanical consequences of this? This can go from the size of the building to much broader issues. We will look at this in detail, but it is difficult to assess right now.

The Chairman: I will if I may take the Europol example. If the British Government triggered the opt-out and did not rejoin Europol, there seems to be the assumption in some quarters in London that somehow or other the British would not pay for the Europol budget, which is borne on the European budget. Is that correct?

Stefano Manservisi: There is an issue for Europol, but it is an issue in general about the nature of the European Union budget. The European Union budget is based on an own-resources system. Therefore, once resources are put into the European Union budget, I would say it is not legitimate just to look at the portion that is “financed” by each Member State. The moment there is an own-resources system. I would argue that the decision on the common budget is not to be calculated as a British contribution. All this should be assessed. I would not go so far. I would remain more on operational grounds where these decisions have created an additional impact on those remaining in the system who will then be affected by the UK being out or in.
The example I gave may be a bit mechanical, but I prefer to refer to those examples because they are the ones that are most likely to be affected. For example, they state that their Joint Investigation Teams in Europe are managed by Europol. They are largely based on a British presence and contribution of resources, staff and so on. Suddenly, this is pulled out as a consequence of the opt-out and to not opt in. This will have an impact in this specific action where the economy and effectiveness of the investigation is affected. Suddenly, these staff and means are taken off and must be replaced by somebody else, or suddenly the money that has been spent in forensic activity is totally wasted because we cannot go on.

I refer to this in interpreting it in a stringent way, as Protocol 36 suggests is the impact. I would not go far away from thinking about the British contribution to the budget because, from a European point of view, there is no British contribution at all; there are only EU own-resources.

**Q202 Lord Stoneham of Droxford:** Let me be quite blunt. If we opted out of Eurojust or Europol and then came back asking for a co-operative agreement, you would be in a very strong position to sustain the current financial obligations, would you not?

**Stefano Manservisi:** As far as Europol is concerned, I think we could be in a better position indeed, but I don’t know what the result would be.

**The Chairman:** I think we had better draw a veil of silence over this now, considering the rather remarkable possibility that the United Kingdom could withdraw from Europol and end up still paying for it, which is not quite the same thing as a British contribution. It would be because the European budget would still be financing Europol, and we would be financing the European budget but getting no benefits from it at all. Let us leave that for the moment and move on with Lord Rowlands.

**Lord Rowlands:** I think you have answered my question already. You place the highest importance possible on the idea of coherence in any application for an opt-in package.

**Françoise Le Bail:** Absolutely.

**Q203 Viscount Bridgeman:** This is an attempt to simplify your task. Do you accept the categorisation of some of the pre-Lisbon measures as defunct—that is, no longer of operational value? If so, could you let us have a list of those measures? Does the Commission intend to propose their removal from the EU “statute book” at some stage?

**Françoise Le Bail:** As you know, they are all legal instruments. You cannot say that some are not important and others are important. Nevertheless, we all know that some are of a different magnitude than others.

The second thing is that the Commission will not start an exercise to look specifically at those measures covered by Protocol 36, but we are doing a horizontal and much broader exercise to review the entire EU legislation and to make sure that it is still relevant ("Fitness Check"). We do that regularly and we are re-launching this exercise. That may well fall into that general category of cleaning up.

**Viscount Bridgeman:** In the wider context you talked about, the repeal of measures is a tool.

**Françoise Le Bail:** Indeed. It is a tool, yes, absolutely, which is generally applied.
The Chairman: The same procedure has to be applied as was applied to adopt the measure in question.

Françoise Le Bail: I think it is, yes.

The Chairman: If you were trying to clean the statute book of what the Home Secretary calls “defunct pre-Lisbon measures”, you would have to have the unanimous agreement of the Member States, because they were all adopted by unanimity.

Françoise Le Bail: I cannot exclude this. I would have to check that.

The Chairman: Could you let us know?

Françoise Le Bail: Yes.

The Chairman: Through British eyes, it is not a happy situation that there are items on the statute book that basically have no operational significance whatsoever and do not effectively apply any longer. Certainly, it would be highly desirable that they should be removed. It is also fairly necessary for us to know by what process that can happen. Can it happen on the Commission’s say-so, or does it require—

Françoise Le Bail: I am happy to check that and let you know.

Stefano Manservisi: Legislation is in force until the moment it is repealed. In order to repeal it, we have to make a proposal to do it.

Françoise Le Bail: Of course.

The Chairman: I am merely asking what the decision-making process would be.

Stefano Manservisi: The decision is the one under the current Treaty. Therefore, if it has been adopted by qualified majority, it can be repealed by qualified majority.

Françoise Le Bail: It mirrors the decision.

The Chairman: I thought that was the case.

Stefano Manservisi: In a sense, it is the normal legislative procedure that has as a context instead of proposing something to repeal something. The legal basis prescribes the way to decide. Just to give you an example, this is a moving target. We have the Europol legislation, which is pre-Lisbon. Now we are Lisbonising it with some suggestion of having some synergies with CEPOL. Therefore, we will make a proposal next month, probably when everything is ready, to change this.

The Chairman: February or March.

Stefano Manservisi: It is scheduled in our books by the end of February. I would not put my right hand on that, but it is close to this date.

Q204 Viscount Bridgeman: Is it practicable to ask you to give a list, as the question says, of the nations affected?

Stefano Manservisi: No, I cannot.

The Chairman: Presumably, the ones that you consider to be what Mrs May calls “defunct” in the exercise that you are conducting internally will become publicly known.

Françoise Le Bail: At some stage it will become publicly known, but this is not linked to the Protocol 36. This is a horizontal exercise.
The Chairman: I understand that. Are you going to be doing that in the timescale that we are operating in or not?

Françoise Le Bail: No, I do not think so.

The Chairman: So we will have to rely on the British Government getting it right on what is defunct and what is not. They are offering to give us a list, although they have not yet done so. They have said that they intend to do so, and they had better get it right, I suppose.

Stefano Manservisi: Also because the death certificate is fairly political so far.

The Chairman: I was following your line along quite well until you came to Europol. The new Europol Regulation will be adopted by a qualified majority.

Stefano Manservisi: Yes.

The Chairman: It will contain a provision to repeal the old Europol.

Stefano Manservisi: No, it will repeal everything. It will be a new proposal.

The Chairman: So it is actually slightly different from what you said. In this particular case, the decision to repeal the old Europol legislation would be taken by qualified majority in adopting the new Europol legislation.

Stefano Manservisi: Yes. We do not consider that the present Europol Regulation is defunct. It still exists.

The Chairman: I am sorry. I am not talking about defunct any more; I am talking about the fact that in some circumstances you can have a repeal conducted by a new piece of legislation adopted on a different legal basis.

Stefano Manservisi: Absolutely. We are not cleaning up what we consider is useless or not. We are simply saying that this legal basis test is replaced by another one because it is more suitable.

Lord Bowness: But you would be doing the cleaning-up process under the original voting procedure. Pre-Lisbon, they were all by unanimity. If you are repealing—

Françoise Le Bail: I think we really need to check this. Again, the treaty has changed. We will clarify this for you.

The Chairman: It would be very helpful if you could enlighten us on this because we would not want to get it wrong in any report.

Françoise Le Bail: Absolutely. We will clarify this for you.

Stefano Manservisi: But we have a Treaty in force with a legislative procedure. This is what will be applicable. If there is still the idea that the former third pillar procedure is applicable, it should be stopped, there is now one set of rules in force. There are legislative procedures to repeal, modify or whatever, which are in force and which will guide whatever legislative action we will do to clean up, replace, abolish or whatever. This is what we have in force. Therefore, there can be different majorities according to the different legal arrangements, but the rule in Lisbon is qualified majority and Court of Justice competence. That is it.
Q205 Baroness O’Loan: You may have answered this question already. I just want to be very clear about it. Will the European Parliament be consulted about the Council Decision or about any of the transitional provisions?

Françoise Le Bail: As we said earlier, the applicable provisions do not prescribe a formal role for the European Parliament, but, as you can understand, it is a highly political issue. The Commission will inform the European Parliament of all these developments.

Lord Sharkey: Would the Commission be receptive to any initiative from Member States to amend the European Arrest Warrant? It has been suggested that the UK could make rejoining this measure conditional on such amendments. What would your reaction be to such an approach?

Françoise Le Bail: Our reaction is that we see no appetite from other Member States to reopen the European Arrest Warrant. We do not ourselves have the intention to make any proposal on this. The reasons are simple: the European Arrest Warrant overall works very well. There are some problems relating to the proportionality of Arrest Warrants issued in some Member States that can be sorted out without reopening and renegotiating the whole instrument. We are working very closely with the Polish authorities, for example, to reduce the number of European Arrest Warrants they issue. Our efforts have already shown first results: in the last year they have reduced the number of Arrest Warrants by 20%. There are many ways to adjust the way the European Arrest Warrant functions in practice without reopening it, and it would be wise not to do it.

Lord Sharkey: When you say that there is no appetite among other Member States for reopening it, is there opposition from other Member States to reopening it?

Françoise Le Bail: From some of them, yes. I think the UK authorities have checked with a number of Member States to see if there was any support for that. I do not think there is any support for that.

Lord Sharkey: You do not think there is any support.

Françoise Le Bail: I do not think there is any support for that because, as I say, overall the instrument works very well.

Q206 The Chairman: What is the scope for, in your words, not reopening the Framework Decision of 2002 but adjusting the functioning? You have already spoken to us about the work that you are doing with the Polish authorities on proportionality. There are things like the European Supervision Order, which makes the provision of bail easier and enables people to stay in their home state until the moment of trial is ready. That is a measure which we are pretty distressed to find that the British Government have not actually implemented and which I hope will be remedied.

Could you go a little further on adjusting the functioning? It is likely to be, from all the evidence we are taking, really very important. Although you are absolutely justified in your argument that the European Arrest Warrant has had some extremely positive consequences, there is a history, as you know, of cases with really bad human rights abuses, if one could call them that, that have arisen out of this, and addressing these—and in the timeframe that we are all talking about now—is going to be absolutely crucial. If you wish to persuade the British Government not to challenge the basic decision, a great deal will depend on the ability to “adjust the functioning”.

190
Françoise Le Bail: The first problem I mentioned was proportionality. With guidelines or training of judges we can improve the situation. The Polish authorities, since it was essentially a Polish problem, are very willing to contribute to this exercise. They are aware and we are working on it hand in hand. It has an impact.

On the question of respect of fundamental rights, we have clearly stated in our 2011 report on the European Arrest Warrant that there is already, under the present text, no obligation to surrender if there is a risk of breach of the fundamental rights of the person concerned. I really do not think we need to modify the European Arrest Warrant for this issue.

The Chairman: Are there other areas or not?

Françoise Le Bail: No. I think the main problem was proportionality.

Lord Avebury: What about the rights of suspects?

Françoise Le Bail: First of all, with regard to the rights of suspects, the European Union have adopted a set of procedural rights for which it would be in everybody’s interests that the UK opts in. In relation to our proposed Directive on access to a lawyer, for example, we are proposing to have a lawyer both in the issuing and in the receiving state of the Arrest Warrant. This means that we are really reinforcing the rights of suspects. You will see, when discussing the European Supervision Order, the European Arrest Warrant, and the legislation on procedural rights, how interlinked all this is—to come back to our previous discussion on coherence.

The Chairman: But I am sure you can see how important it is likely to be in the debate in Britain that all this should be visible and seen to be an improvement on the functioning of the European Arrest Warrant in the timeframe that all these decisions are having to be taken—i.e. not somewhere out there in about 10 years’ time.

Françoise Le Bail: Absolutely. Again, the figures we have point in that direction.

Q207 Lord Bowness: How feasible do you think it would be for the United Kingdom to rely on the 1957 Council of Europe Convention on Extradition with reference to Article 31 of the European Arrest Warrant Framework Decision?

Françoise Le Bail: It is an interesting question, because there are a certain number of legal experts who say this is not possible. We are discussing with our legal service. Let us imagine that the Council of Europe Convention applies. What is interesting to see is the difference between both instruments in terms of speed, of mutual trust. The Convention obviously does not give the same guarantees. Therefore, applying the Convention will mean that you will fight international crime at a much lower speed, if I may put it this way, because in the European Arrest Warrant you have many innovations by comparison with the Convention.

Lord Bowness: Quite apart from the practical difficulties, are there legal difficulties? Some witnesses have suggested to us that some Member States have in effect repealed it.

Françoise Le Bail: We have not come to a final decision on this. Again, we have also heard the opinion of some experts who say that this should not be possible because these instruments are no longer applied and the European Arrest Warrant has substituted the Convention.

The Chairman: You do not yet have a firm legal opinion on the view expressed by some people that because European competence has been established under the European Arrest
Warrant, individual Member States no longer have the right to renegotiate in that field. It is the application of the well-known case, which everyone knows about, which establishes external competence. I think it is AETR.40

Françoise Le Bail: Yes.

The Chairman: You do not yet have an opinion as to whether that would in fact preclude bilateral negotiations between an individual Member State and the United Kingdom to restore the Council of Europe operations.

Françoise Le Bail: We have not yet finalised our opinion. We will reach a conclusion soon.

The Chairman: Would you be able to convey what your conclusion is to us?

Françoise Le Bail: Of course, yes.

The Chairman: It would be rather helpful to know what that conclusion is because it could be quite important. If the conclusion is that it cannot be done, we can all save ourselves an awful lot of time chasing around after these will-o’-the-wisps that we are continually being told will provide a wonderful alternative.

Françoise Le Bail: In any case, it will be much less beneficial than the European Arrest Warrant, but that is another issue, I accept.

The Chairman: That is another story, but it would be quite nice to know what the legal perception is.

Françoise Le Bail: Yes.

Q208 Lord Rowlands: Many of those who support the block opt-out present an alternative scenario of negotiated judicial co-operation. We know that you have a negotiated judicial co-operation with the United States and with Norway in the case of Eurojust and other bodies. Would that option of negotiated judicial co-operation be available to the United Kingdom although it was a member of the European Union?

Françoise Le Bail: To negotiate a judicial co-operation agreement as we do with third countries, do you mean?

Lord Rowlands: Yes. At the moment you have negotiated judicial co-operation with third countries. If the United Kingdom said, “We have opted out, but we would now like to negotiate a judicial co-operation agreement like you have with the United States or Norway with Eurojust”, is that a route that is possible or legal in treaty terms?

Françoise Le Bail: We need to check that. We have not formed an opinion yet.

The Chairman: The administrator of Eurojust gave us the impression that she thought the powers for her to negotiate were with third countries. I think she quoted Article 26 of the statutes. She said she did not think that could apply to a Member State, even if it was a member state outside Eurojust as a result of the opt-out. She did not say that it would not be possible to do it; she just said she thought you would have to rejig the statute.

Françoise Le Bail: If the UK was not part of Eurojust, the co-operation agreement between Eurojust and a third country would not cover the UK.

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40 Case 22/70 Commission v Council [1971] ECR 263
Lord Rowlands: But what we are asking is whether the UK could apply to have such a judicial co-operation agreement of that kind.

Françoise Le Bail: With third countries.

Lord Rowlands: No.

The Chairman: No, with Eurojust.

Viscount Bridgeman: With the status of a third country.

The Chairman: Well, not as a third country, but anyway that it could do so. She did not say, “No, that would be impossible”. She did not say that she did not think that the UK could be treated better than a third country in those circumstances. She said that the statute as currently drafted would not enable an agreement between the UK and Eurojust on the legal basis that had been used for the agreements for Eurojust and Norway, Eurojust and Switzerland, or Eurojust and the US. It was not available because it explicitly referred to a third country.

Françoise Le Bail: Yes, I think she is right.

The Chairman: She sounded as if she knew what she was talking about.

Françoise Le Bail: We had a question that pointed in that direction before. If you opt out, you cannot imagine that by renegotiating from an outside position it is going to be the same. That is what I would like to make clear. This is a very important element to take into consideration. We had this discussion about another measure. It will not be the same.

Stefano Manservisi: I will maybe give you just a hint. We have some a sort of legal arrangements with Denmark for the Schengen acquis. Look at this example. It is probably still the best way for Denmark to take part in Schengen, but Denmark does it through an international treaty where this Member State enters into set of legal obligations, but is a rather passive subject of all this. For example, Denmark is not eligible for many things, including much financial support. So the case of Denmark, leaving aside the legal basis to do it, possibly, or not—I leave that to Françoise—and the examination in legal terms, if you look at the substance it is probably a model that you can look at. It is up to you to judge whether this is a satisfactory position in whatever interest is defined as your national interest. This is an example I can give.

Lord Rowlands: The reason I am pressing this is because this is the kind of chorus that is supported or that underpins support for the block opt-out. We are being presented with an alternative scenario, including a host of new agreements outside the terms of the treaty itself.

The Chairman: Does anybody else have any additional questions to put? If not, I would like to thank you very much for sparing some time for us. As usual, we have ended up with a better understanding of this extremely complex subject as a result of your evidence. It would be very helpful if you could give us material on one or two of those detailed points, because it will help us put together a fuller picture. Thank you yet again.
WEDNESDAY 30 JANUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Avebury
Lord Bowness
Viscount Bridgeman
Baroness O’Loan
Lord Rowlands
Lord Sharkey
Lord Stoneham of Droxford

Examination of Witnesses

Claude Moraes MEP, Coordinator S&D, UK, Birgit Sippel MEP, S&D, Germany, Baroness Ludford MEP, ALDE, UK, Anthea McIntyre MEP, ECR, UK, Timothy Kirkhope MEP, ECR, UK, and Monika Hohlmeier MEP, EPP, Germany.

Q163 The Chairman: Perhaps I could begin by giving you a bit of background about the inquiry that we are in the middle of conducting. We have come here to take some evidence from both yourselves in the LIBE Committee and the JURI Committee, which we will be seeing immediately afterwards. The Protocol 36 issues that we are conducting our inquiry on straddle the dividing line between your committee and the justice committee. That is the reason why there are rather a larger number of us around here than normal: we are two sub-committees that also have the same division between justice, the sub-committee that Lord Bowness chairs, and home affairs, which I chair. We are conducting this inquiry in a slightly innovative way, as a joint inquiry.

Obviously, the issue that we are looking into is very important and unusual, and it is likely to have far-ranging implications for the UK and the European Union as a whole. The Home Secretary and the Justice Secretary stated last October on behalf of the Government that their “current thinking” is to trigger the opt-out, but that they have not taken a final decision yet. They have promised not only to consult Parliament but to submit the matter to a vote in both Houses of Parliament, which is a rather unusual procedure whose detailed nature we are not yet very clear about because they have not told us. In order to inform the House of
Lords’ deliberations when that moment comes, and I cannot tell you when it will come because it is in the gift of the Government, we launched an inquiry on 1 November last year—conducted as a joint inquiry, as I have just said to you. We have received a huge amount of written evidence, which is all on our website, and we are now in the middle of taking oral evidence from a whole range of people including, obviously, yourselves but also Commission officials, members of the British Government, a range of lawyers and academics, think tanks, non-governmental organisations and serving and former police practitioners and prosecutors, which we hope will enable us to do what we always try to do, which is to produce evidence-based reports and not just what comes off the top of our heads. The oral evidence sessions will conclude on 13 February, the day when the Home Secretary and the Lord Chancellor, the Minister of Justice, will both appear before the committee, and we are aiming to publish our report just before the end of the current parliamentary Session, which is in May or late April. The report will cover both the merits of the opt-out decision and what measures the UK might seek to rejoin were the British Government to formally decide to exercise the opt-out. Hopefully, our report will be a useful foundation for the House of Lords debate and vote on it, which could take place sometime before the summer break, but not necessarily, since, as you know, the deadline is May 2014.

A debate transcript will be taken of our discussions this morning, and that will go up on the parliamentary website. A few days after this evidence session, you and your colleagues will be sent a copy of the transcript to check it for accuracy, and we should be grateful if you would advise us of any corrections as quickly as possible. If after this session you wish to clarify or amplify any of the points made during the evidence or have any additional points to make, you are very welcome to submit supplementary evidence to us.

I think we should start by offering you, as it were, a choice: if either you speaking on behalf of your colleagues or any of your colleagues would like to make an opening statement on the matters covered by Protocol 36, that will be fine, but if you do not want to do that and prefer to move straight into the questions that we notified you of in advance, that would be as good. Some of our witnesses do one, some do the other; it does not matter. As far as we are concerned, it is your choice. When it comes to answering the questions, it is entirely up to you whether more than one member of the committee wishes to speak on a particular question or whether one of you will speak and then we will move on to the next one. I hope that that is a helpful introduction to the process, which we attach great importance to.

Claude Moraes: Lord Hannay, thank you very much. I am very conscious that this session has to finish at 10.30, so we are quite restricted for time. I am not saying anything there about the length of contribution of the average MEP, but I am conscious that we are all going to have to make fairly short contributions.

Timothy Kirkhope: I wonder if I might just make a point. There are a number of British Members sitting around this table. We have very little time, and I suggest that maybe the British Members may wish to speak for a minute or a minute and a half, a view in a very short time. Most of the time here this morning should be given to colleagues from other countries, because we can have access to you sometimes in a way that they cannot. For the usefulness of this exercise, hearing from colleagues from elsewhere would probably be more useful in the time that you have available. As I say, you have only until 10.30 am, so I suggest, if they agree, that maybe the British political representatives might make a very short comment early on, and then the rest of the debate with perhaps be most usefully deployed in the hands of some of our colleagues from elsewhere.
The Chairman: That is entirely acceptable and seems to be a very good idea. The only point that I would make is that we are equally interested in all of you. The evidence that we are taking is sometimes from British people and sometimes from other members of the European Union; we are seeing the chair of Eurojust this afternoon, who of course is Belgian. You are suggesting that you and each of your British colleagues should have a minute or two to make an opening statement, and then perhaps we could move on to questions, which will bring in everyone. But it is entirely up to you how you structure that. If you would like to move ahead in that way, that is fine.

Claude Moraes: I think that we all have a copy of the questions. Why do we not just go around the table and leave it up to each Member to be as brief as possible? I am conscious that we have to finish at 10.30. To chair our side of it, perhaps we could start, conveniently, with one of our non-British colleagues, Birgit Sippel, who is a member of the S&D group from Germany. Birgit, do you want to make some comments or refer to the questions?

Birgit Sippel: Thank you. I am very happy to be here with you. To be honest, after listening to Mr Cameron’s speech, my first reaction was, “Why should these questions be on the table if the UK is willing to leave the European Union anyway?”. I have to tell you that sometimes, when we have debates with Members from the UK in this area of judicial politics, debates are not very easy and sometimes, as we say in Germany, my hair goes grey. On the other hand, to be fair, we have differences between the judicial systems in the other Member States as well and standards are very different. When talking to citizens in Germany, I find that they accept that in different areas of politics situations are different, but they are often irritated about the extent of the differences that we have, especially in the judicial area. On the other hand, yesterday we had a meeting with our friends from France, and as you know there is a special relationship of 50 years of co-operation between Germany and France. We found that instead of the co-operation that we have had for 50 years, there are many differences and misunderstandings, even between Germany and France. We said that maybe it is necessary to have differences, because if we want to put this forward to citizens to create a common European policy in all the different areas, we need to come from different places to find out what would be best way to go on in future. The work is not easy but in the end it is good to have different views to find the best solution for the future. That is why, yes, instead of getting some grey hairs from time to time from the debates, in the end it is necessary to have everyone on board. I know that it is difficult because the British system is quite different—maybe much more different from the other systems in the EU—but in the end I am sure that we have no chance unless we co-operate and go forward together, and instead of focusing on the difficulties we can take small steps to come to more common standards and to lessen the differences from Member State to Member State. In principle, it is helpful to work together and co-operate. We should not leave anyone outside the debate.

I shall mention a point that is not related to what we are debating today. We debated whether to create a eurozone European institution, but I do not believe that that is a good idea either. Yes, on questions of economic and financial systems we need closer co-operation between those Member States that have the euro, but every decision that is taken has consequences for all the other Member States, so even there I think that we have no choice but to stick together, find ways around all the difficulties and find solutions for all the different starting points that we come from. I hope that through all the debates on this area and on some principled debates, we will find a way to work together in future.

The Chairman: Thank you very much. I think that what you were saying about your talks with the French can be summed up by, “Vive la difference!”, which I believe is the
motto that we might aspire to. There is of course more than one country with a different legal system: Cyprus, Malta and Ireland also have common-law systems, and we manage to have two systems within one country in the form of Scotland, which has a different legal system to England and Wales.

**Timothy Kirkhope**: Lord Hannay, if i may detain you for a moment or two, as a lawyer who is a great fan of common law, although I do not want to get into that this morning, I want to highlight again that we are where we are because we are following under Protocol 36 the absolute need to decide—we have no choice in this—whether or not to opt out of the various measures or to opt in en masse. That is perhaps in a way an invidious situation to be in, but it depends how you interpret it. If it is interpreted as a means of reviewing and revising those measures that are beneficial to the UK but also mutually beneficial, then I have no particular problem with this. Our difficulty is that we have a timescale. We have a process that we have to enter into. As soon as the Houses in Westminster decide to opt out en masse, we then have a comparatively short timespan, as you know, where we have to make some progress in terms of both the opt-out arrangements and the negotiations that are necessary, where there are differences between the Schengen issues and the other issues, to opt back in to those things that are regarded as being mutually beneficial.

I shall answer two or three of your points, if I may. Will there be any consequences, you say, if there is an opt-out, for the role of MEPs scrutinising JHA measures? That would not necessarily be entirely in our hands. I would hope not, incidentally; I hope that our position as Members of the European Parliament—I see one or two quizzical nods around the table here—would in fact be maintained, but it would provide us with a slightly difficult situation, although not exactly a West Lothian one, in terms of the atmospherics. The atmosphere of negotiation and good will that exists in this Parliament would, I suspect, be affected.

How straightforward are negotiations on rejoining likely to be? I would say they would not be straightforward because of the same time as negotiation might possibly be entered into by the UK Government in a willing and positive manner that would require the other side to be equally willing and positive. If noises off, in the UK particularly, are hostile or are defining this as something that it is not—that is, a simple repatriation of powers to the UK—that would be very unhelpful.

Do we expect the European Parliament to be consulted? No, I do not actually think that the European Parliament will get much consultation. There may be some notional consultation, and in individual cases we will certainly be giving advice, but I am not sure that there will be any structure unless you know better.

How important do we consider maintaining the coherence of the overall pre-Lisbon package to be? How interconnected is it? My group has analysed this, and we have come to the conclusion that it is not totally interconnected but there are areas where changes should take place and it would be in the interests of all Europe for that to happen, and areas where, from the point of view of UK interests, that are certainly not connected to others. There are differences here, therefore, and we have to be careful to be sufficiently sophisticated to find them and define them.

As far as we are concerned, the key point is the atmospherics here. If this matter is handled responsibly, even if an opt-out is decided upon, then it is possible for us to reach a sensible diplomatic outcome. As I said, we will hear from other countries which have great concerns about this initiative, and we are concerned about it in that we do not want to see our country’s reputation harmed in the European context and we want to continue our co-
operative level of activity, which is so vital for all our interests in organisations such as Europol, handling the overall fight against major crime and terrorism.

Q166 The Chairman: Thank you. Of course we are not making any assumptions about the attitude of the two Houses of Parliament to the opt-out of decision at this stage; that is what our report is going to address. We do not have any a priori assumptions. On what you said about the European Parliament's involvement, the advice that we have received is the same as you have received—namely, if the British Government asked to join either non-Schengen or Schengen matters, in the case of non-Schengen matters it would come to the Commission and in the case of Schengen matters it would come to the Council, but in neither case would the European Parliament be formally involved unless what was being proposed was a change to the basic EU legislation, which of course would have to be conducted under powers given in the treaty of Lisbon. So I think the advice is the same as yours. However, the whole purpose of this meeting is to short-circuit that problem and find a way in which we, at least, can consult you and your colleagues even if the formal position is as you stated.

Anthea McIntyre: Speaking as a Conservative MEP, it will come as no surprise if I say I believe that we should exercise the opt-out. We go around the arguments of the common-law system and the civil law system, which I am sure in front of this audience I do not need to go into in any detail. The areas that particularly concern me are the process between saying that we as the UK intend to opt and being left in a no-man's-land where we do not have any treaties in place and being left with a gap, which would be very dangerous. A lot of concentration needs to go into that area if we are to opt-out.

If the opt-out is exercised, could that have any consequences? Things always do; the law of unintended consequences seems to prevail in this place. However, I would hope that the UK still remained fully engaged. I am sure in front of this audience I do not need to go into in any detail. The areas that particularly concern me are the process between saying that we as the UK intend to opt and being left in a no-man's-land where we do not have any treaties in place and being left with a gap, which would be very dangerous. A lot of concentration needs to go into that area if we are to opt-out.

Baroness Ludford: Lord Hannay, it is always a pleasure to meet you and your colleagues, and thank you for this session in particular. I would like to take my cue from Anthea but reverse it and say that, speaking as a Liberal Democrat MEP, I believe that there is a lot of benefit from that to the UK and other countries. We have been talking about reviewing that for some time. I wish that we could get on with the review of that and some other measures so that we could have a reform in place and something that was signed up to so that measures like that did not form part of the opt-out. If there is agreement beforehand, then that is not part of it. So I would like more concentration to be put on getting things reformed and agreed before it is too late.
that include eight Directives that, automatically because they are post-Lisbon, include Commission and Court enforcement powers? As Birgit Sippel has said, every Member State has a different legal system; I am no expert but, as I understand it, it is not right to classify all continental systems as of one type and all common law systems of another. That is not to say that there are no sensitivities—there are—but we have to remember that the point of European co-operation is to make those legal, policing and law enforcement systems talk to each other, not to make things uniform. Of course we have to observe subsidiarity and make sure that we are not overharmonising. I always stress that the word “harmony” means to sing together; it does not mean to have one voice. In many areas this is a difficult one to get right. I would not say that there were no risks of difficulties, and perhaps the officials know that even more than we do, but I do not think that they are impossible to overcome.

I also believe that if one is thinking specifically of the pre-2009 measures, which are the object of Protocol 36, and the alleged fear of immediate Commission enforcement action on Framework Decisions that the UK has not implemented, to be honest their hands are going to be so full and their resources so stretched that that is not going to be a top priority and nor is the UK likely to be top of the list. There are a lot of other Member States that have not implemented third pillar pre-2009 measures, partly of course because they were essentially voluntary because there were no enforcement powers, so I am afraid that the pattern of implementation is not a robust one.

That is talking about the legal side, where I think we overemphasise the threat, although I am not saying that there are no difficulties or sensitivities, but they have to be negotiated. On the operational side, in the evidence to your sub-committees you have heard from not only former police intelligence personnel but even serving officers, of the risks of not being part of key measures. We know that there are some pre-2009 measures that have withered on the vine, frankly, and they can be left quietly to disappear, but it is crucial for us to be part of the key measures, including principally the European Arrest Warrant. I would say that it is eminently possible to reform the European Arrest Warrant. There is a Commission handbook and Council guidelines; if the Council simply impressed on all its members to observe the guidelines already developed by the Council, we would make some progress on issues like proportionality. If English courts implemented Section 21 of the Extradition Act 2003, which implements the European Arrest Warrant in the UK, that would empower the judge to refuse surrender—it was a Conservative/Liberal Democrat amendment that defeated the Government in the House of Lords in 2002, and I was there at the time—if European Convention on Human Rights rights would be breached. I have not actually been able to pin down any occasion when that has been used. Claude is quite rightly looking at me so I must stop, but you can see that I am passionate about the subject.

We have a situation where recently, in the past few days, the Prime Minister has emphasised the importance of international and European co-operation on crime and terrorism, against which we have to judge the utility of this. I would say that it is not worth the candle. The loss of political and legislative influence and our credibility and negotiating weight on the measures that we are negotiating now is a key issue that we have to consider. We are going to put an awful lot of effort into exercising the opt-out and the key issue of negotiating the opt-back-in list; there will be a package at Westminster, if I have understood correctly. The hazards of doing this and the incalculable loss to the UK—“unquantifiable” is a much better word to use—could be considerable, and that is what I worry about very much.

Q167 The Chairman: We do not know whether it is going to be a package or not; the Government have not revealed their hand on that. You mentioned the various ways of improving the operation of the European Arrest Warrant. We have been taking quite a bit
of evidence in addition to that which you have mentioned over the European Supervision Order and the provision under it enables you to be bailed in your own native land, as it were, and not surrendered for trial until the trial takes place. The Government have not implemented that, and the date for implementation has now passed. That is an additional matter that we are looking at.

Monika Hohlmeier: I have the impression that at a time of crisis a lot of Member States prefer to be renationalised, because it seems clear to the population that the European Union is not a solution and Governments can do it better themselves with national decisions. It is like that in Germany and even more so in Great Britain; it is like that in Italy and France—everyone tries this. But if the European Union does not show how to work together at a time of crisis, this would weaken our power in the world. It would point in the direction of the United States, Asia or a huge state like China or India.

From the EPP’s point of view, we would prefer Britain to stay and not to opt out but to opt in. Secondly, from a legal point of view, Timothy Kirkhope is right when he says that there is no possibility of not deciding—Great Britain has to decide. June 2014 is the time by when Britain has to decide whether it is opting in or out, and it cannot choose how to opt out—it is a block opt-out. You cannot choose to have one or two things; you have to choose the opt-out completely or not at all.

From the political point of view, I do not think that is very logical to opt out, due to the emotions involved. If you take the atmosphere in our group, I think that we are the group with the strongest relationship with the Tories and this Government but there are emotional colleagues from the other Member States against this special role—“We opt out and Britain tells us what it wants, but only what is useful for Great Britain and not for the European Union”. This causes emotional reactions in the other Member States and among the colleagues from those Member States.

If you opt out first and you want to opt in, you need the approval of the institutions. That will not be fun, because there could be emotions on the other side of the irrational type. I do not like these types of emotional handling, because if I take the decisions of the British Government in recent years, Britain has opted into the European Protection Order, the Directives against people-trafficking, the Directive against child sexual abuse and pornography, the Directive on the European Protection Order, the Directive on the European Investigation Order, the Directive on cybercrime, the Directive on the rights of victims, the TFTP and PNR agreements with the US and the Australia/EU PNR agreement. Then there is the Directive on the fight against fraud affecting the financial interests of the EU, the PIF, but that comes under Article 325 so there is no opt-in or opt-out—it is binding for Britain too. Then there is the proposed Directive on data protection that comes under Article 16 of the Treaty, so again there is no opt-in or opt-out. Then you would have something like a patchwork system, and such systems are not always logical so they cause a lot of problems because you have to try to get special agreements in different fields if you have not opted in. If you do not opt in, there are several fields where you need co-operation even if you have opted out.

I would like to talk about practical consequences. For example, there are many measures related to the minimum penalties. If you opt in, nothing changes in Great Britain because you have already introduced all the minimum penalties so no further decision is needed and nothing changes in this field. However, it changes something in the Schengen Information System, and this is sensible.

Baroness Ludford: Sensitive.
Monika Hohlmeier: Sensitive, sorry. I always get those confused; I am German. You have invested £39 million. If you opt out, how do you get access to it? This will be a very emotional field for a lot of colleagues. There are discussions over whether Romania and Bulgaria should come into this too, so there are a lot of emotional discussions in this field. To opt out would cost money and lead to a lot of problems.

Britain has invested £31 million in the Prüm system for exchanging information. The consequences of opting out of this measure would be that the UK was no longer able to have automatic access to law enforcement databases in other Member States, which could hinder investigations and prosecutions, and the UK would lose its investment.

With regard to the Joint Investigation Teams, if you opt out then you put an end to this type of voluntary co-operation because it is among the 133 measures where the block opt-out will take place.

I would say that the European Arrest Warrant is greatly liked in Great Britain. If you opt out, there could be the possibility for some other Member States to put pressure on Great Britain if they want to opt in, saying, “If you want to opt into the European Arrest Warrant, then you have to give us some other things”. That is what I mean by atmosphere, as Timothy Kirkhope said. There could be irrational moods in the Parliament or even in the Council, because if Great Britain opts in only when you think it is good for you but opts out when you do not like it, imagine if every Member State did that—Italy, France, Greece, Germany; everyone has some wishes. We have to discuss this at the European level and find a solution with minimum standards, not maximum standards. For example, the people working on asylum tried recently to create minimum standards. We have discussed what a minimum standard is, not a maximum standard. That can cause huge problems for a lot of Member States.

If you ask me, I would not opt out if I were Great Britain. There is successful co-operation with Europol; it is a big success story, and it has an excellent general director from Britain. It would not be a very good idea to opt out, especially because there is a brilliant British director of Europol and that would cause a lot of problems for him. Co-operation with Eurojust is also good. We do not want just one European legal system. We have different legal systems—we know this—and we always try to find a standard by which the different legal systems can handle things in their way because we will not have one harmonised legal system. That is not even the goal, I would say, because we know that it is not possible because of the very different traditions. The field of policing, crime and justice is not the best area to opt out, because of the success story between Britain and the European Union. I think that Britain would sustain greater damage than the European Union, but all sides could lose out.

Q168 The Chairman: Thank you. One small point: on the list of opt ins, in the proposed Data Protection Directive was in fact one that the Government could have opted out of but decided not to, and therefore they are participating and it will apply to Britain if and when it is agreed. In every other respect, though, your list of things was absolutely correct.

The points that you and your colleagues have made are very valuable. If you will agree, Chairman, I think that, between you, you have covered a very large number of the questions that we would have asked. There is one question that I would like to ask Lord Rowlands to put to you that has not been touched on so far, but I realise that we have not yet heard from Mr Hidalgo.
Antonio Masip Hidalgo: Thank you for coming. My English is not so good, but I maybe my parliamentary assistant could help me with some sentences. For me this is something emotional. I remember, when I was a student in Bournemouth in the south of England, the day that my English teacher at the Anglo-Continental said, “Just now, General de Gaulle said on the radio a grand ‘Non à Angleterre’”. The teacher was nearly weeping. On the other hand, I have just read the English novelist McEwan who said that at that moment his opinion was that many Conservative people were against Harold Macmillan because he was too close to a union of Europe. I know that you have a problem in your country, but I think and I hope that can solve this problem yourselves, with our help, because we certainly need the United Kingdom in Europe.

I have only two simple questions. No, I do not want an interpreter; I am happy to continue in English. You understand me. As a Spaniard, I am very happy with British policing against terrorism. The collaboration with your country over many years has been very important for the end of terrorism in my country. I want to ask you: if you opt out, will the boss of Europol, Rob Wainwright, have to resign from his post as head of Europol? That is an important question about the collaboration at the top of antiterrorist affairs in Europe.

The second question is this: here in the Parliament we have decided to finish with the exequatur, the regulation on justice in the EU. There was a resolution in the Parliament a couple of months ago. What is the impact in the UK of the possibility of the ending of sentences that cover the whole of Europe, making it easy afterwards for civil offences?

Q169 The Chairman: Thank you very much. I shall ask Lord Rowlands to ask one of the questions that so far has been less covered. However, to answer the first of your questions about Mr Wainwright and his heading up of Europol, that is of course not a matter for the British; he has just been reappointed to a second term of office by the Member States collectively. Would his position be affected if Britain withdrew from Europol? I do not know; very possibly, but of course that would depend whether the British Government asked to rejoin Europol. Then there is the new Europol Regulation that we know is going to be tabled by the Commission within about two months. The British Government will have to decide whether to opt into the new draft Europol Regulation. If they opt into it, then that will be a quite different situation from if they stay out, so I cannot give you a clear answer on that point. I am not sure that I quite understood the second question.

Antonio Masip Hidalgo: The exequatur.

The Chairman: I think that there is a translation problem about what you are asking us.

Antonio Masip Hidalgo: [TRANSLATION] The question refers to what is called the exequatur, a procedure that has to be applied in order for a judgment from one Member State to be applied in another Member State. At the moment that has to be requested but that requisite is going to be done away with; it will no longer be necessary to request. The question referred to the impact of that suppression of the exequatur procedure in Britain—whether this new resolution by the European Parliament has had any effect in Britain and is being talked about.

Lord Bowness: I can only say, Lord Chairman, my part of the Committee agreed and supported that because it is a matter that is applicable in civil law and does not cover the police and criminal matters that we are considering on the question of the opt-out.

The Chairman: I shall ask Lord Rowlands to ask a question that has not been covered at all, about your perception of the role of the European Court of Justice.
Q170 Lord Rowlands: If we review the evidence that we have received to date, especially from those who are backing and supporting the block opt-out, they rest their case heavily on the proposition or assumption that the Court of Justice is going to be in expansionist mood; having collected all this new jurisdiction, it will embark upon an expansionist process that over a long period of time will undermine national jurisdictions. It is difficult to grapple with the argument over whether that is a certainty, a probability or very unlikely. As this is becoming one of the central questions, we would very much welcome your views on that.

Claude Moraes: Might I perhaps answer that question? I did not make any introductory remarks as I was combining these apology and chairmanship roles. I would like to answer that question because it goes to the heart of why you are here. What we are discussing today is the justification for a British block opt-out. That justification goes to the question of why a block opt-out and then this piecemeal approach for individual opt-ins was chosen. What you have heard today in evidence from British and non-British Members is how a piecemeal approach of opting in could cause individual problems, so you have heard that that could provide an incoherent approach—on databases, for example, Britain could perhaps lose out due to incoherence, for political reasons and so on. The heart of the question here, though, and the answer to your question, is whether British Ministers have made the case for a block opt-out. The case was that the European Court of Justice was extending its power, and unfortunately, on habeas corpus and jury trial, the case was a question of British exceptionalism. The problem with that—I speak as a Scottish lawyer who has done English law—is that most other jurisdictions around the European Union, most other legal systems, have these things. As the chairman of this Committee would argue—I have had these discussions with him—when we are trying to jail supercriminals who are fleeing to Spain from the United Kingdom and we are doing the things that British people want us to do to deal with those criminals, we have to examine the practicalities of what we are doing. You have gathered evidence from regional police forces, senior police officers and judges as to whether British Ministers have made the case for exceptionalism. The evidence that I have seen does not make the case. If you extend that to, for example, the iconic European Arrest Warrant—I think that my colleague Mrs McIntyre said that the British newspapers say that the European Arrest Warrant was flawed. In fact you have taken evidence from Scott Baker, who had a review in 2011, which showed that there were problems with trivial cases and proportionality, but said that most of the trivial case problems were with Poland, apart from the Symeou case, which was a dreadful case for the family concerned. This is where you will see the contradictions: you will see our non-British colleagues saying, “Don’t you love the European Arrest Warrant?” So watch these contradictions and then watch the British press. The European Arrest Warrant can actually be a good thing if it is reformed and the Scott Baker review said so, and watch what the think tanks such as the Centre for European Reform are saying, independently judging these things. Are British Ministers making a political case for exceptionalism or are they looking at facts? On the European Arrest Warrant, for example, although there are red lines and it is difficult to negotiate—Theresa May has a difficult case to make on reviewing the Warrant—there is a possible negotiation to be had. Other countries will allow us to reform the European Arrest Warrant because it is a good thing but it will require us to use the European Supervision Order more often, for example, and to deal with practicalities. However, if it is a trade-off between reforming the European Arrest Warrant and just leaving or threatening to dump everything with a block opt-out and then just come in to some piecemeal measures, there will not be the will in Council for reform or to do anything for us unless we start becoming more serious about making the case against exceptionalism. We may be saying, “No, we are special with regard to habeas
corpus and the right to silence”, but there is a right to silence in most EU countries. We have to be less into exceptionalism and all these things.

In answer to your question about the European Court of Justice, I quote the Fresh Start Group and all the analysis of their proposals. I am making not a party political point but a European Parliament point. I have looked at the Fresh Start proposals on Justice and Home Affairs, and they are the ones that have identified these proposals. So it just becomes more difficult in the European Parliament.

My final point is that the British Members, not Members of any particular party but for MEPs, now that we are not in Schengen and we have opted out of immigration and asylum, are now working on the Data Protection Directive and other aspects of justice and home affairs. If we start becoming exceptional in this area, how can MEPs say anything about Justice and Home Affairs in this political context? How can we talk about antiterrorism measures or data measures that will help British people? That is my concern now, although we are not in Schengen and we opt out of immigration and asylum measures, other Member States allow us to have a very full role in Justice and Home Affairs policy. That is the case, and you can see my colleagues nodding. That is the point that I would like to make to you as Members of the House of Lords. I hope you do not mind me making this point.

Baroness Ludford: In answer to that specific question about the Court, I would like to draw attention to a judgment made just yesterday in the case of Radu on the European Arrest Warrant, which was a reference from the Romanian court, which, like most Member States, accepts the jurisdiction of the ECJ. The Court—in my view, disappointingly—made its decision on a very narrow technical basis that had absolutely nil ambition. Unfortunately, it did not follow the British Advocate-General, Eleanor Sharpston, who in her advice to the judges had brought up issues of proportionality, how in its judgment the Court should cover the area of how essential it was to have a proportionality test, and she covered human rights issues where she thought that within the EU we should have a threshold for EAW refusals that was lower than the Strasbourg test—the European Court of Human Rights test—which is a flagrant denial of fair trial or justice. That was good stuff; it would make the EAW more acceptable to its critics and more efficient and streamlined and better operated. My point is that that judgment showed that the Court is rather risk-averse; it is conservative and it stuck to a very technical basis. Perhaps that is a pointer to how the Court is not going to spread its wings.

Timothy Kirkhope: I would add, in answer to Lord Rowlands’s point, that the key thing we have to separate here is those who believe that the European Court of Justice is something that we need to be moving away from in terms of its competences and those who think that those competences might be extended. There is a bit of confusion about this, to be honest with you, and I think that our friends in Westminster have not quite come to a conclusion about what they want in that regard.

Q171 Lord Rowlands: What do you think? Do you think that the Court has a mission?

Timothy Kirkhope: I am afraid I have to say that by and large European institutions always have ambitions; they always want to grow and find ways in which their competences can be extended. That is just a natural thing here, I am afraid. There is the opposite position back in Westminster where there is concern about institutions already in place. Any European institution is already looked at with some suspicion and concern. I have heard all kinds of legal arguments, including what Claude has just very eloquently put to you, but I have heard legal arguments the other way from lawyers as well. I speak as a lawyer myself. This is
European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE)—Oral evidence (QQ 163-171)

confusing and not totally clear. There is ambition there but there is an attitude of mind in London as well.

**Lord Avebury:** So the only evidence that they have for this ambition is that it is part of the innate tendencies of all European institutions to expand their competences? You do not have any solid evidence that the ECJ wants to expand other than that?

**Timothy Kirkhope:** I am sorry, Lord Avebury, that is not very helpful to you, but previous form does help us.

**The Chairman:** I hate to interrupt at this stage but we are keeping your colleagues from the JURI Committee waiting. Alas, we have run out of time but I thank you and your colleagues much for all the help and testimony that you have given us, which is valuable. We hope that you will find our report useful when it appears. I apologise to my colleagues that we have not all played a more active part in this meeting but you have very helpfully covered most of the questions without us actually having to ask them.
Q172 **The Chairman:** Thank you, Mr President. We are particularly grateful to you and your colleagues and your committee for coming to give evidence. Perhaps I can just give a little explanation for what we are doing and why we are doing it, since it differs slightly from the normal form of a House of Lords inquiry. It stems from the Government’s notification that they are currently minded to exercise the opt-out from the police and criminal justice provisions, taking advantage of Protocol 36. They have promised to consult Parliament before they make their final decision, so we have an inquiry conducted by two Sub-Committees of the European Union Committee of the House of Lords: the Justice, Institutions and Consumer Protection Sub-Committee and the Home Affairs, Health and Education Sub-Committee. As in the European Parliament, interests in these matters fall between our two sub-committees, and in the same way I think there is a certain amount between your committee and the LIBE Committee. We have had a lot of written evidence, which some of your colleagues may already have read. It is posted on the website. That evidence has come from lawyers and practitioners, and we are moving towards an evidence session with the Lord Chancellor and the Home Secretary on 13 February. Thereafter we will produce our report before the end of the parliamentary Session in May. Hopefully, that report will cover the merits or otherwise of an opt-out decision and, crucially, the matters that the United Kingdom should seek to opt back into as a consequences of the opt-out, if
indeed it exercises it. Hopefully, it will be an objective report and entirely evidence-based, and it will be there to inform the House when it votes on a Government motion, although we do not know exactly what it will be, any more than we know the matters that they are currently minded to opt back into.

Again, for the record, I must tell you that a verbatim transcript will be made of our proceedings. It is posted on the parliamentary website immediately. We will send you a copy so that if there are any inaccuracies you may correct them. If there are any points that you or your colleagues wish to add after the session, because I know that time is limited, we would be very pleased to receive them. Again for the record, for the purpose of the transcript, if you could introduce yourselves when speaking and answering questions, that would be very helpful. I understand from what you have said, Mr President, that you would like us to move directly to questions rather than you or your colleagues making any opening statements. I therefore ask you the very direct question whether you and your colleagues—you are not all from the UK, which is very good from our point of view—think that the British Government should exercise the opt-out. Why do you think they would want to do that? How extensive a list of measures should we be trying to come back into?

Klaus-Heiner Lehne: Would anyone like to answer first, or shall I start?

Sajjad Karim: Can I invite a non-UK position first?

Klaus-Heiner Lehne: Well, this is a general question so I will give a very general answer. My feeling is that the decision of the UK Government to review the list of opt-outs has something to do with the public mood in the UK, so this is probably a kind of reaction against the background of trying to calm down certain negative feelings towards the EU. That is something that could be done within the structure of the Treaty; you do not need a new Treaty or a renewal of the Treaty. That is probably the reason why it is seen as a first step to have this kind of review and then check if certain opt-ins still make sense and how far the right of opt-out should be executed. On the second aspect, to be very frank, speaking as a convinced European, I think that the list of opt-outs should be as small as possible and the list of opt-ins is as big as possible. That is the way it is. This is a simple answer on a very general question. This is the view of someone not from the UK but who has a strong interest in the UK staying in the EU, with all its rights and possibilities, as a most welcome partner in dealing with all these matters and having common roots in the European Union.

Now, is there anyone else?

Antonio Masip Hidalgo: I am certainly not in the popular group, but I agree with the whole of my Chairman’s speech.

Sajjad Karim: Thank you, Chairman, I am merely going to restate a publicly stated position that I have put on the record before. I am the ECR co-ordinator for the Legal Affairs Committee, and it has been my view that in fact we will not achieve some or any of the stated public aims that we have by undergoing this particular procedure of opting out and then opting back in. That is a position that is considerably different from Westminster—certainly House of Commons—colleagues from my political party, but it is a matter of open public record which is why I restate it now. I think you may have had presented to you a letter that I have previously had published in the Independent newspaper in the UK on the point of the European Arrest Warrant, but making a much broader general point. A general statement of that sort ought to suffice but if you want to prod me further, I am here for a while yet.
Mary Honeyball: It is quite interesting; we seem to have consensus about this around the table, which, given the nature of the questions, is an interesting one. I want to make two very practical points that we need to take on board. The first is that if we opt out of all or any of these, what will happen? I have heard talk of bilateral agreements. If we are talking about 130 particular issues, 130 bilateral agreements seems to be completely ridiculous, and no one has yet convinced me that there is a way of opting out but still maintaining some sort of contact, which everyone seems to think it necessary. If you opt out it does not just go away; it will not work like that. So you may end up having to have an endless number of bilateral agreements. I have heard the Fresh Start Group talk about this at an event where I was on the platform with them, and they seemed to think that this was possible, but it seems a bit of an ask.

The other practical question is: if any of these are opted out of, what happens? What are the arrangements going to be before either opting back in or coming to some other arrangement? This is a recipe for total chaos, and no one has addressed how that chaos will be handled, if at all.

Q173 The Chairman: Perhaps I should say that we have had some suggestions, in evidence here in Brussels, as to how it might be done, but crucially all those are dependent, assuming that you think that that would be a good idea, on there being sufficient time to make these arrangements. Maybe, Mr President, you and your colleagues would like to express a view about some of the specifics that you think are most important to Europe as a whole, bearing in mind the procedure for opting in, which involves either the Commission, which could impose conditions or not, or, as in Schengen cases, Council unanimity. What kind of timetable ought to be followed to ensure that we avoid the kind of interregnum that Mrs Honeyball has been talking about?

Klaus-Heiner Lehne: Mr Bodu wanted to add something.

Sebastian Valentin Bodu: I see from the list of questions that the opt-out procedure is referred to as judicial co-operation on criminal law and police co-operation. As far as I know from reading the press, most of your problems come from internal market regulations and financial regulations, so I see no point—why do you want to opt out from things that do not harm you, unless you just want to send a signal that you just want to step down and be less European? Technically, though, these rules and procedures that you should or should not apply are not from the package that, at least according to the press, is harmful to you.

Q174 Lord Rowlands: In the evidence that we have received to date from those who wish to support a block opt-out, they rest their case heavily on the proposition that the Court of Justice will become an expansionist, federalist court in the field of criminal justice and therefore, over a period of time, may undermine national jurisdictions. They base some of that evidence on the track record of the Court on Single Market issues, saying that it has been integrationist in the internal market and will take the same approach to criminal justice affairs. With your experience of tracking the role of the Court in its previous role, do any of you think that it is a justifiable concern that it will expand in this way?

Klaus-Heiner Lehne: If the legislature expands its competences in this area and makes more legislation in the area of criminal law, it is quite logical that there will be more cases in front of the European Court of Justice. I do not know exactly what our colleagues from the Liberté Publique told you before, but in legal affairs we are extremely careful about expanding our legislation on those issues. We have a lot of respect for different national traditions and we are quite aware that any kind of harmonisation and indeed any European
jurisdiction on this kind of issue may interfere with national traditions. My personal opinion is clear: we should go on in the area of harmonisation of criminal law only if it is absolutely necessary. In principle, we should not do that. If you take a look at the legal basis, Article 83 or whatever, there are already certain limitations on material criminal law. Member States have specific rights when they think that proposed legislation is interfering with their national traditions, and that can be stopped. I am quite aware, from my experience in the country that I know best, that discussion is going on in that direction as well. So there is no automatic expansion in the European Court of Justice’s jurisdiction; it depends completely on the way that our legislation happens. Legislation can happen only if the Parliament and the Council agree, and in Council there is a de facto veto right for each Member State if it does not want to accept a certain material harmonisation in criminal law. They have that opportunity.

Q175 Lord Rowlands: But the case that is made is that this legislation that is already in place—all the pre-Lisbon legislation, which will automatically come under the jurisdiction of the Court of Justice—was drafted and formed as an essentially intergovernmental process, and now we face the prospect of being within the jurisdiction of the Court of Justice. The Court will therefore have these opportunities, particularly as in many cases it is quite loosely drafted, to expand its integrationist approach to criminal law. That is the case that has been presented to us continually, and it is the one that we have to test.

Klaus-Heiner Lehne: No one knows right now what the European Court of Justice will do, for example, in preliminary rulings on this issue. In my view, there is no general tendency by the Court of Justice in the direction of expanding certain opportunities that have been decided by the legislature. Sometimes it is restrictive, and sometimes it goes in the direction of expansion. Probably the best thing would be simply to have the experience, and then the opportunity to get out of it is still open after a negative experience, if that happens. However, I do not see an automatic process in the direction of the Court of Justice going far beyond what is written in legislation. That is not very likely.

The other aspect is that you can reform the existing legislation if certain aspects are problematic, and personally I think that there are lots. My professional background is that I am a lawyer. If I look at the European Arrest Warrant or the way that we are collecting telecommunications data and so on, I am not absolutely convinced that what we are doing there is right in connection with basic rights of the people. I certainly have doubts. If you look at developments over the past years in EU legislation on justice matters—these matters are not the competence of my Committee; they are more Libertés Publiques, but I always take a look at them because of my professional background—we are increasing more and more the opportunities for the state to fight terrorism, crime, money-laundering or whatever, but we are not really thinking about the rights of those people who are touched by this, such as the defendants. This is an imbalance, and one of the problems that I foresee that there will come a time when the constitutional courts that still have reserves—for example, the Federal Constitutional Court of Germany—will reach a point where they will simply say “No, that’s the limit; you cannot go further without creating a balance”.

From that point of view I believe that there is a lot of necessity for reforms and new proposals and for improving existing proposals to make them tight before any situations where they might be challenged before a national constitutional court and where more or less everyone says that there will be a problem. Another aspect is the role of the European Court of Justice in general. My experience at home, and it is probably the same in the UK because people there are not very different in this respect from German people, is that you often see that people do not make a distinction between the Strasbourg Court and the
Luxembourg Court. They get mixed up together but they have completely different backgrounds and very different kinds of professionalism behind them. We have to make this distinction as professionals and legislators, and we must see that many of the dangers that we foresee are probably not in Luxembourg but in Strasbourg. The logical way to try to solve that problem would probably be to think about reforming the structure in Strasbourg to make it more professional, more effective, more legally minded and more foreseeable in the way that it does jurisdiction, and not to concentrate so much on the discussion about what is happening in Luxembourg. My feeling when I speak with the people in Luxembourg—we in legal affairs often have contact with them—is that the vast majority of them are very serious and trying to do a good job. That is the way it is.

**Antonio Masip Hidalgo:** [TRANSLATION] I completely agree with everything that the Chairman has just said. I subscribe to all his words and would like to add one more thing. In response to the direct question about whether the Court of Justice would expand its competences in the post-Lisbon phase, the Court is just an instrument. As a legislator, my main goal in working in Brussels and Strasbourg is the harmonisation of European law. That is our main role.

I should also like to say that we would like the Court of Justice in the medium term to restructure the way in which it works. At the moment, its main language of procedure is French but I believe that in the medium term it should become English. The reason is not only that English is the most widely spoken language: it would help with the length of proceedings, which at the moment is one of the main problems. Agreeing on one single language that everyone accepts would be very beneficial to the people and the justice system. Obviously, if the UK leaves the European Union, the language would not be English in the medium term.

**Sajjad Karim:** I have more of a general point. On the point of either opting back in on the basis of what you opted out of or whether there is to be a period of renegotiation on a piecemeal basis, I suspect that the opportunities for renegotiation will be much more limited than perhaps currently understood in London.

On a secondary issue of the point that was made about the ECJ post-Lisbon, we are undertaking a strong reform process of the institutions, particularly in the European Parliament’s way of legislating in terms of smarter and better regulation, which fundamentally strengthens the role of national parliaments. Therefore, we are inviting national parliaments to go away and review the structures that they have in place in terms of how they link in with our legislation-making procedures. I recognise the strength of your committee in the House of Lords that deals with European Union issues. I very much invite you to take that back to London with a view to inviting the House of Commons to play a much more strident role in the way in which it links in with us.

**Mary Honeyball:** I am a Labour MEP and a substitute on the Legal Affairs Committee. First, I thank our Spanish colleague for suggesting that English becomes the language of the European Court. In a strange way, that links to some of the issues because there appears to be a lot of secrecy. The Court is seen in the UK as something a long way away and we do not like it very much. We are very distrustful of continental legal systems anyway because they are quite different from the way in which certainly England and Wales works.

We have to overcome a lot of hurdles before we even begin to have a sensible conversation about the European Court of Justice. Having said that, I do not think that the Court does itself any favours either. The problem with legal systems very often is that they are opaque
and people do not really understand what they are, so they are seen as being out to get everyone. The European Court has a really bad case of that.

The Court, and perhaps us as well, ought to try to communicate a lot better what goes on in the Court of Justice. There is also always the fear, to which Mr Lehne referred, about the state taking over, individual freedoms being eroded and all of that. It always will be a difficult one. Some helpful communication and perhaps even some monitoring of what goes on in the Court and the decisions taken would be useful. I am not quite sure who would undertake that but I think that there is a real communication issue here.

Certainly, I agree with Saj Karim that more of a role for national parliaments and more engagement would be useful as well. That, too, could help to get over some of these difficulties.

Q176 Viscount Bridgeman: I am a very new Member of this Committee. I would just like to take up a point which Mr Klaus-Heiner Lehne made about the perception of the courts—Strasbourg and Luxembourg. The average man in the street in the UK has no idea what the difference is.

Klaus-Heiner Lehne: It is the same in Germany.

Viscount Bridgeman: I am afraid that he will say rather cynically, “Just one court too many”.

Lord Avebury: I would like to ask Mr Karim if he thinks that the opinion he has expressed is that of the Committee as a whole; namely, that opportunities for renegotiation will be far more limited than people imagine at present. Is that the general impression? In what respect do they think that these opportunities will be limited? Could he amplify that?

Sajjad Karim: I am merely trying to communicate to you the depth of feeling that I am picking up across here from other colleagues in the Parliament, from a variety of nationalities and groups, from the Commission and from conversations with relevant Ministers from other countries who will be representative in the Council. Given this opportunity, I want to ensure that the strength of feeling there is about the terms on which the UK will be dealt with is properly communicated to you. Hopefully, that will, in some way, find its way into the corridors at Westminster and help concentrate people’s minds into a much more focused approach as to how we are going to deal with this issue. I have to be very careful in what I am saying to you.

Lord Rowlands: We have taken evidence on the process. There is a provision in the Treaty that puts an obligation on the Commission to respond positively to requests for opt-ins—I am sure we all know that provision—as long as the opt-ins are coherent. I wonder whether you have any notion of what that concept of coherence means. Presumably, it means that you cannot, say, opt in for Europol without opting in for Eurojust because they are linked. In other words, how many of these measures are interconnected rather than single measures?

Klaus-Heiner Lehne: I have no overview on this issue but probably this rule in the Treaty has a very simple background; simply to avoid opt-ins in disharmonic structures that are connected to each other and not taking only a certain part. It is to avoid taking one positive aspect out of it and not accepting the negative or whatever. Perhaps Europol and Eurojust is such an example.
Very often, the Commission makes proposals as a package. Two or three issues may be a package, which sometimes in negotiations even have a different legal basis or whatever. Even if they have the same legal basis, that may be a package and probably the Commission should have a kind of escape opportunity to say, “Okay, if you opt in, you have to opt in for the package”. But I have absolutely no overview about such issues.

Q177 Lord Hannay of Chiswick: Could I ask you a question about Eurojust and the concept of the European public prosecutor? Some of the evidence that we have received, particularly from those who favour the opt-out and are not particularly favourable to an expansive opt-back-in, argues that Eurojust is a kind of conveyor belt which will lead inevitably to the establishment of a European public prosecutor. That disturbs people, although of course those of us who have studied the Lisbon Treaty know perfectly well that the British position enabling the UK to disassociate itself from a European public prosecutor is quite clear and does not depend on Protocol 36. It is separately built into the Treaty and will not be affected one way or the other by that protocol. Perhaps you or any of your colleagues could say a few words about whether you believe that Eurojust is basically the first stage of a rocket that has got the European public prosecutor on the next stage or whether you think that Eurojust is, as other witnesses have said, a system for the mutual cooperation and recognition of work being done and is not in any way predicated on an inevitable progress to a European public prosecutor.

Klaus-Heiner Lehne: Unless anyone else wants to answer, I would like to do so but I can give only my personal opinion. I think that we will probably have at the end of the year a proposal for the introduction of a European public prosecutor in the structure of Eurojust. That is what I hear from Commissioner Reding. I am not in favour of doing this because I was always, and I still am, against the introduction of a European public prosecutor.

I always imagine that if a European public prosecutor is sitting in front of the Amtsgericht in Düsseldorf, they would probably laugh at him because he will not know anything about the structures or the procedures. He always would need the help of the guys at home. Probably the guys at home in Düsseldorf will have to prepare all the activities of the court. He will just sit there. Mainly, he will put pressure on the work of the public prosecutors at home and on the preparation of the procedure and other aspects. I think that this is not practicable. It makes simply no sense. My personal opinion is that this is nonsense.

However, that does not matter. The Treaty gives the opportunity for such development. The Commissioner is convinced and will probably make a proposal. At the end, we will see how the legislative procedure will work. My feeling is that in Parliament there will be a majority in favour of creating something like this. As regards the Council, I am a little sceptical because my feeling is that probably a big minority, or even a majority, of Member States will have serious doubts on this issue. That is more or less the actual situation.

I am not convinced that we need this. We need a stronger co-ordinating approach. Eurojust should play a stronger role in the co-ordination of national justice structures. There should be opportunities, for example, to press it on the way in which it has to move on certain aspects. The co-ordination role should be improved. But I do not think that we need the structure of a European public prosecutor. As I have said, that is my personal opinion.

My Committee will not be in charge. It just gives an opinion on this issue. The Committee in charge of the European prosecutor will be Libertés Publiques. You have already spoken with those guys in advance. I do not know if they have given an answer on this issue but within the House we have different opinions. Are there any other?
Antonio Masip Hidalgo: I agree with you. Lawyers normally agree on those issues—that is the funny thing—and the others not.

Sajjad Karim: I think that is a fair assessment.

Klaus-Heiner Lehne: It is funny but there is just a minority in the House—four members of the minority in the House on this issue.

Q178 The Chairman: Perhaps I could follow Lord Hannay’s question about the European public prosecutor’s office. A number of our witnesses who favour the opt-out, and probably no opt-in at all, have suggested that the Commission has a plan for a pan-European system of criminal law. For the record, it would be useful if you and your colleagues, in the position that you are in here in Brussels, to tell us whether you have any indications—clearly, you have indications and knowledge, as perhaps we do too about whether or not something will come about as regards the European public prosecutor’s office—about the pan-European criminal system.

Klaus-Heiner Lehne: I have absolutely no information from the Commission that anyone has this intention. There may be someone hidden in a room who I do not know and who I have never seen. But the Commissioner, the Director-General and the Cabinet chief of the Commissioner suggest nothing like that. They have a very careful approach to criminal law. Sometimes they are too strong even from my point of view. But I think that there is absolutely no danger of going in that direction. There is no chance of getting a majority among the Member States to support something like this. Most of the Member States are very reluctant on this issue. Even if in Parliament we may have some committees or people who want more, I do not see any chance that this will happen.

There are some strong legal arguments. For example, on the harmonisation of certain criminal rules, and you set a certain range of penalties or whatever, that will not be enough. It is not only a question of defining criminal activities or creating a range of certain penalties, it is a question of execution, measurement and all the other aspects.

You would probably have to harmonise the system, the procedural laws and the functions. You would have to harmonise the aspects of measurement and execution, and the conditions under which, for example, execution measures could be reduced. I think that it is impossible because it is like harmonising social rules or social insurances within the European Union. That will never happen. Technically, it is not possible. In some crazy minds, that may be but that is not reality. I do not know of anyone at the Commission who is serious about going in that direction. Even the serious people in the House are not going in that direction.

The Chairman: Mr President, thank you very much. Perhaps this is a convenient time for us to bring the meeting to a conclusion. I thank you and your colleagues very much for coming and for giving your evidence, which will form part of our considerations in the production of our report. Thank you again for your time.
The UK derives significant operational benefits from its engagement with Europol.

- The UK is one of the most active and committed members of Europol, sharing large amounts of criminal intelligence and cooperating in hundreds of cross-border investigations of criminals and terrorist groups each year.

- In 2012 the UK sent approximately 4,500 requests for information to Member States and third parties via the Europol network. It received approximately 3,000 requests for information from other Member States or third parties.

- In the last 12 months law enforcement agencies of the UK have been involved in more than 300 of the 600 major operations against serious and organised crime and terrorism supported by Europol. In other words, more than half of Europol's major operations are of relevance to, and considered worthy of participation by UK agencies.

- The UK is extracting high value from Europol's unique intelligence capabilities and the services provided by Europol are important elements of the UK’s strategy to combat organised crime and terrorism.

The decision to opt-out would make it more difficult for UK agencies to investigate crimes with a cross-border element.

- It would mean the disruption of the flow of information between the UK and Europol partners and the possible withdrawal of the UK Liaison Officers from Europol headquarters.

- If this flow of information between Europol and the UK is disrupted, investigative opportunities will be missed with a potential for serious crime to be committed in the UK which could otherwise have been prevented.

- The UK law enforcement community would face a reduced influence in the agency, with the resulting negative impact on operational coordination with European partners.

The Frontex model of cooperation, which includes an ad hoc authorization process for the UK to participate in specific operations, is unlikely to be a workable alternative for cooperation with Europol, due to the difference in scale and nature of operational activity. Europol supports approximately 14,000 cases and 600 major operations annually.

The UK wields strong influence over the development of the EU internal security policy

- A direct consequence of the decision to opt-out may be a loss of British influence and leadership in the further development of Europol and associated areas of interest. Issues of European and international security will continue to affect the interests of the UK irrespective of any decision on opt-out.

The role of the European Court of Justice

- The Court of Justice of the EU does not have jurisdiction to review the validity and proportionality of actions carried out by the police or other law enforcement services of the Member States.
The development of the area of freedom security and justice will respect provisions of national laws and specificities of Member State’s criminal justice systems.

**The Europol Regulation**

- Potential adverse effects of any opt-out decision could be mitigated by joining the negotiations on the future Europol Regulation, which are expected to commence in 2013.

## INTRODUCTION:

Europol is the European law enforcement agency. It was established in 1999 to support the EU Member States in preventing and combating all forms of serious international crime and terrorism. Its role is to help achieve a safer Europe for the benefit of all EU citizens by supporting law enforcement authorities of the Member States through the exchange and analysis of criminal intelligence and the coordination of operational actions.

Europol uses its unique information capabilities and the expertise of over 800 personnel, including Liaison Officers and approximately 100 analysts, to identify and track criminal and terrorist networks in Europe. National law enforcement agencies are represented at Europol by a total of 145 Europol Liaison Officers, who work in conjunction with Europol’s 24/7 operational centre and secure databases. This cooperation has contributed to the disruption of many criminal and terrorist networks, numerous arrests, the recovery of substantial criminal assets and the rescuing of hundreds of victims of crime, including victims of trafficking and abused children. Each year Europol supports approximately 14,000 cross-border law enforcement cases. Amongst those Europol provides active operational, forensic and technical support to around 600 high priority operations.

In 2010 Europol became a fully-fledged European agency, based on the Europol Council Decision (ECD), which is one of the Police and Criminal Justice (PCJ) measures concerned by any UK opt-out decision.

As a consequence of the Treaty of Lisbon, in 2013 the European Commission will present a proposal for a new legal basis for Europol. The new Europol Regulation should be an opportunity to make the Agency better prepared to face the evolving demands of fighting organised crime and terrorism, for example in cyber space. Under the ‘opt-in’ clause the UK will be able to decide whether it intends to participate in the adoption and application of this proposal, either at the commencement of the proposal, or subsequently, prior to the entry into force. Any decision to opt into the new Europol Regulation is also about the operational cooperation which that legislation foresees. If the UK should decide not to participate, its law enforcement community may have a diminished influence on Europol’s development and activities, with the resulting negative impact on its operational cooperation with other European and international partners.

### INDIVIDUAL QUESTIONS RAISED IN THE CALL FOR EVIDENCE

**THE 2014 OPT-OUT DECISION**

6. How much has the UK relied on PCJ measures, such as the EAW, to date? Likewise to what extent have other Member States relied upon the application of these instruments in the United Kingdom?
In Europol’s view, the UK law enforcement community has always been at the forefront of EU police cooperation. **The UK is one of the most active and committed members of Europol**, sharing large amounts of criminal intelligence and cooperating in hundreds of cases a year that involve cross-border investigations.

The UK is statistically the 2nd highest contributor to the Europol Information System (EIS) with a total of **30 000 objects submitted by the UK**, representing 15% of all available data within the EIS. In addition in 2011 approximately **17 000 SIENA messages were exchanged with the UK** via the Europol Secure Information Exchange Network Application (SIENA), which constituted a 30% increase to 2010 and made the UK the third highest user of SIENA after Germany and France.

The International Directorate of SOCA in London hosts the UK Europol National Unit (ENU), which is the liaison body between Europol and the competent authorities of the UK. SOCA is also responsible for the UK Liaison Bureau at Europol which, with 13 members, is one of the biggest and most dynamic Liaison Bureaus. In addition to SOCA staff, the UK Liaison Bureau incorporates representatives of the Metropolitan Police Service, the UK Border Agency, the Scottish Crime and Drug Enforcement Agency, HM Revenue and Customs and the Asset Recovery Office, and therefore allows key regional forces and specialist agencies to bring their cases to Europol. The UK Liaison Officers work closely with Europol analysts and Liaison Officers from the other 26 Member States and twelve other countries and organizations represented at Europol, including i.a. the United States, Canada, Australia and Interpol.

The cooperation between Europol and the UK is mutually beneficial. **In 2012 the UK sent approximately 4 500 requests for information via the Europol secure network, while it received around 3 000 requests for information during the same period.** Among around 600 major operations supported by Europol in the last 12 months, UK law enforcement agencies have been involved in more than **300** - more than half. To Europol this indicates that the UK is playing an increasingly progressive role in extracting optimal value from Europol’s services. In consistently seeking Europol’s assistance in major cases, the British law enforcement community seems to recognise that Europol offers unique support capabilities, not found elsewhere.

See **Annex 1** for concrete operational cases with the UK’s involvement.

**THE POTENTIAL CONSEQUENCES OF EXERCISING THE OPT-OUT**

| 11. What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime? |

Organised crime and terrorism threats are by their nature transnational. Europol’s Organised Crime Threat Assessment (OCTA 2011) found that organised crime is becoming ever more diverse in its methods and structures. The emerging criminal landscape is increasingly marked by highly mobile and flexible groups that operate in multiple jurisdictions and criminal sectors, and are aided, in particular, by widespread, illicit use of the Internet. More than ever before, strong levels of cooperation exist between different organised crime groups, transcending national, ethnic, and business differences. The connection between
terrorism and organised crime networks is also becoming more blurred. These new trends provide a new rationale for the Member States to strive for more effective and coordinated action at the EU level.

In addition to these pan-European observations, the OCTA identified the UK as part of a “North-West” crime hub in which there is a high degree of interdependency between trafficking and other crime activities between the UK and its immediate neighbours France, Belgium and the Netherlands. Furthermore the UK is often a destination country for a variety of trafficked commodities, making cross-border police and customs cooperation indispensable.

The UK certainly derives substantial operational benefits from its engagement in the Area of Freedom Security and Justice, and in particular from its cooperation with Europol. The British law enforcement community has played a leading role in many major transnational criminal investigations supported by Europol. The decision to opt-out of the Europol Council Decision would make it harder for the British police to investigate crimes with a cross-border element.

Should the UK decide to withdraw completely from the Europol Council Decision, all rights and obligations of the UK as a Member State implementing the ECD would expire. These include the right to receive information and analyses concerning the UK, the right to be assisted when conducting national investigations (be it by means of information exchange and analysis reports or by operational, forensic or technical support), the right to receive threat assessments and strategic analyses, the right to benefit from training offered by Europol, the right to post a Liaison Officer at Europol’s headquarters, the obligation to supply information to Europol’s information systems and the obligation to maintain a Europol National Unit. Arrangements designed to mitigate the loss of these rights and obligations could be identified but those would be subject to negotiations with EU partners and limited in scope and effectiveness.

For Europol the main consequence of a British opt-out would be the disruption of the flow of information to and from the UK. The legality of sending information to Europol, and Europol’s storage of such information, would no longer have a supranational legal basis, hence might be regarded as legally problematic from a national perspective. The consequential and transitional arrangements issued by the Council on a proposal from the Commission, for the replacement of the ECD with a Europol Regulation, could be difficult to implement in practice and in any event would not substitute the current level of cooperation between Europol and the UK. Therefore there is a risk that crimes could be committed in the UK by nationals of other Member States or by nationals of third states, which might have been prevented if the opt-out had not been exercised and normal flow of information had been maintained between Europol and the UK.

The British law enforcement community is acutely aware of the fact that organized crime and terrorism are becoming more and more transnational, thus requiring a coordinated, international response. Remaining within Europol’s network of contacts and information exchange is a cost-effective mechanism for international law enforcement cooperation. The

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41 Europol would have to assess whether the organization would be entitled to keep information previously supplied by the UK to its systems.
fact that the UK and certain other Member States such as Denmark and Belgium, have scaled back their bilateral liaison networks while maintaining (or even increasing, in the UK’s case) their Europol Liaison Bureau, attests to this.

In addition to the adverse consequences a UK opt-out would have on Europol, there would also be consequences for the other Member States and the Union as a whole. Firstly, this would come as a result of no longer being able to exchange criminal intelligence with the UK – among the top three most active Member States - via Europol’s secure network. As an active UK connection is present in half of Europol’s most significant operations, a UK opt-out would bear important consequences for other Member States as well. Secondly, the UK traditionally wields strong influence in the development of EU internal security policies would mean losing an important player in shaping European internal security legislation with a track record of not only serving direct British interests but also to raising the overall standard of law enforcement-related policies would have a generally detrimental effect.

For example, in 2010 the Member States adopted the EU policy cycle, which provides for EU level coordination of Member States’ operational cooperation against serious organised crime. Although adopted under the Belgian Presidency, it benefited from active UK engagement and drew inspiration from the concept of intelligence-led policing (ILP), which was promoted during the British Presidency of the EU in 2005.

The UK is also very active in the implementation phase of the EU Policy Cycle. It is the ‘driver’ of two of the eight EMPACT (European Multidisciplinary Platform Against Criminal Threats) projects, which provide the framework for the implementation of policy cycle actions concerning Trafficking in Human Beings (THB) and crime threats emanating from West Africa.

A decision to opt out of the Police and Criminal Justice (PCJ) measures will have an impact on the UK’s position in this area. However, the security threats which such measures seek to address will continue to affect the UK’s interests irrespective of any decision on opt-out so the net effect would be reduced policy and operational influence over issues that pose a significant security threat to the UK.

12. Which, if any, PCJ measures should the Government seek to opt back in to?

From Europol’s perspective the adverse effects of the opt-out decision described above should be mitigated as much as possible and as early as possible, especially by joining negotiations on the new Europol Regulation in 2013.

THE UK’S CURRENT PARTICIPATION IN PCJ MEASURES

7. Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

As regards Europol’s legal instruments, the UK has implemented all of them to the extent it was legally required.

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42 Council doc. 14998/10 COSI 67 ENFOPOL 286 CRIMORG 178 ENFOCUSTOM 89
8. What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

9. If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

The Treaty of Lisbon has brought significant extension of the powers of the Court of Justice of the EU, which is to assume full competence over the entire AFSJ domain (first and former third pillars alike). The only temporary exception exists for former police and criminal justice measures that entered into force before the Treaty of Lisbon, with regard to which, according to Protocol 36, full judicial scrutiny is to come after the end of a five-year transition period from the entry into force of the Treaty of Lisbon.

In practice, this means that regardless of any prior acceptance of its jurisdiction, all national courts or tribunals (not only those whose verdicts are final), will be allowed to refer to the Court of Justice of the EU any questions or issues concerning the interpretation of the Treaties or validity and interpretation of the acts of the institutions, bodies or agencies of the Union (Article 267 of TFEU – preliminary rulings). Similarly, the Commission will be allowed to refer the matter to the Court, if a Member State fails to fulfill its obligation under the Treaties and does not comply with a reasoned opinion within a deadline (Article 258 of TFEU – infringement procedure). Lastly, the European Parliament, the Council or any natural or legal person, alongside the Member States and the European Commission already empowered to do so before the Treaty of Lisbon, will be allowed to trigger legality review of the acts of all bodies, offices or agencies of the EU intended to produce legal effects vis-à-vis third parties (Article 263 of TFEU – legality review).

The Court of Justice of the EU is entrusted with exclusive competence to issue preliminary rulings on the interpretation of the Union law and to pronounce upon the infringements thereof with the exception of the validity or proportionality of operations carried out by the law enforcement services of the Member States, or the exercise of responsibilities incumbent upon the Member States with regard to the maintenance of law and order, and the safeguarding of internal security (Article 276 of TFEU).

National courts may, on their own initiative, raise questions for preliminary rulings to the Court of Justice of the EU. As a matter of principle the assessment of the relevance and necessity to pose a question for preliminary ruling each time falls under the discretion of the national courts that are responsible for ensuring the clarity and certainty of legal provisions. Though sometimes, especially when the act in question would give rise to individual rights, it is the individual who may trigger preliminary reference. There are several criteria to be met before the Court of Justice can assume jurisdiction over the case. The Court of Justice is vested with the power to pronounce upon the validity and interpretation of the acts of the institutions, bodies, offices or agencies of the Union.

**Obligation to respect legal systems of the Member States**

The obligation to respect legal systems of the Member States it is provided for in Article 67 TFEU, as an opening article establishing the AFSJ. It provides that the Union shall respect
fundamental rights and different legal systems and traditions of the Member States. In the event that a Member State would consider a draft to affect fundamental aspects of its criminal justice system, it may request the referral of the draft to the European Council, effectively suspending the whole legislative procedure. In principle, where a draft is adopted, it should be believed that it adequately reflects the Member States’ common approach and that that common approach is compatible with the diversity of legal traditions and systems of those Member States who are to be bound by the legislation.

14. What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?

Frontex model is not a suitable alternative for cooperation

The ‘Frontex model’ has been suggested by some observers as an alternative to full membership of Europol, in case of a UK opt-out. It is therefore worthwhile to explore this cooperation model in comparison to full agency membership.

Although the UK is not bound by the Council Regulation establishing Frontex, it enjoys a special legal status in this agency. This is the result of deciding not to participate in parts of the Schengen Acquis of which Frontex is a development. Nevertheless, due to the importance of the UK for security at the EU’s external borders, Frontex is supposed to facilitate the participation of the UK to operational actions managed by the agency for which the UK is willing to lend its support, in accordance with the modalities to be decided on a case-by-case basis by the Frontex Management Board.

In practical terms the UK must first apply for general participation to operations planned in the Agency’s annual work programme and, as a second stage, the UK must be granted specific authorisation by the Management Board to join a particular operation. The UK delegation is invited to attend the meetings of the Management Board dealing with the preparation of operational actions in which the UK may wish to participate. However, the representatives of the UK are not allowed to vote and therefore have little real influence over the ultimate outcome of the planning exercise. The Management Board needs to consider whether the participation of the UK would contribute to achieving the objective of the operation in question. It also sets out the UK’s financial contribution to the activities to which a request for participation has been made by an absolute majority of its voting members.

In principle the UK, as a non-participating State, is not allowed to benefit from special measures of cooperation such as the increased technical and operational assistance or deployment of a Rapid Border Intervention Team. However, depending on the needs of the other participants, the Agency may try to create an ad hoc solution to streamline mutual action, if needed.

Lastly, UK border guards cannot be deployed as ‘guest officers’ to other participating States, except as observers, whose status is usually dealt with bilaterally between the interested State and the UK.

From Europol’s perspective the so-called ‘Frontex model’ is not a suitable alternative for cooperation for practical reasons, related mainly to the nature
and scale of Europol’s activities. In 2012, Frontex coordinated approximately 25 operations and 3 or 4 simultaneously. In contrast, Europol supported around 14 000 cross-border law enforcement cases and provided active operational, forensic and technical support to approximately 600 police and customs operations. The UK was involved in more than 300 of these operations. Subjecting each and every operation to an explicit authorisation procedure is clearly not an efficient option and would greatly reduce the appetite of UK investigators to cooperate with Europol. Other, less restrictive alternatives are possible in theory but if the Frontex experience is any reliable measure of the expected consensus on such matters from other Member States, all credible options are likely to include significant restrictions based on current arrangements.

**Conclusion**

From Europol’s perspective, the decision to opt-out and (especially) to opt back into the selected acts of the Union within the field of police and judicial cooperation in criminal matters that entered into force before the Treaty of Lisbon, will have to be made in such a way that there is little, if any, interim period during which the Europol Council Decision shall cease to apply to the UK. If such an interim period were to prove unavoidable, cooperation could be bolstered by transitional arrangements decided upon by the Council, even if this would be technically complicated.

From Europol’s perspective any adverse effects of the block opt-out should be mitigated as much as possible and as early as possible, especially by joining the negotiations on the Europol Regulation.

The United Kingdom is a valued and substantial partner of Europol without which Europol would lose a significant amount of expertise, information and assistance, as would consequently the other Member States. Equally, the United Kingdom is likely to find it difficult to replace the unique skills, infrastructure and added value that Europol can provide to its investigations – with the overall result of a lessening of the required concerted and coordinated efforts of all Member States to tackle serious and organized crime, within the Union and beyond.

18 December 2012
ANNEX I: RECENT OPERATIONS SUPPORTED BY EUROPOL AND INVOLVING UK LAW ENFORCEMENT AUTHORITIES

**OPERATION GOLF**

*Background:*

Operation GOLF was a Metropolitan Police Service investigation involving a Romanian criminal group based in the UK and Romania. The criminal group was involved in the trafficking and exploitation of Romanian children. Romanian children were “acquired” in Romania, brought to the UK and then used to produce money by carrying out thefts and begging, mainly in London. Their identities were also used to carry out benefit frauds. From intelligence, the Metropolitan Police Service was aware that the criminal group valued each child at about 20,000 Pounds Sterling. On average, the criminal network made roughly 160,000 Euros of illicit income per annum per child.

The visible criminal activity was taking place in the UK: exploitation of children who were treated badly and abused, thefts and street crime on the streets of London, benefit fraud totalling millions of Pounds. However the group itself was based across several countries, including the UK, Romania, France and Spain.

*The Role of Europol:*

Over a two-year period, Europol was able to support the operation by coordinating operational meetings and facilitating the exchange of intelligence and evidence between the UK, Romania, Spain and France. Europol analysts provided analytical support to national investigators and coordinated simultaneous enforcement activities in several countries. Europol’s powerful IT systems and analytical support enabled the Metropolitan Police Service to identify other significant members of the criminal network based in several EU countries.

*Outcome:*

- 115 arrested: 90 in the UK and 25 in Romania;
- 268 trafficked children identified in the UK;
- 45 children located and rescued;
- The criminal group was disbanded;
- 4 million Pounds Sterling of benefit fraud identified and disrupted in the UK.

**OPERATION APAR**

*Background:*

Operation Apar was a SOCA investigation into a British criminal group based in the UK, Ireland and the south of Spain. The group involved Irish and British nationals who were trafficking cocaine, cannabis and firearms from Spain to the UK, and were also laundering money. The UK investigation started as a money laundering investigation, and Europol was asked to assist.

*Europol Support:*
Europol identified links with an ongoing Irish investigation into the same group. Over the following 18 months, Europol's dedicated analytical work file on suspicious financial transactions was fed with intelligence from police forces in the UK, Ireland and Spain. Europol analysts processed and analysed the information, including large volumes of financial data. Europol organised and coordinated operational meetings and prepared a day of simultaneous action, with raids in all three countries. Europol mobile offices were deployed to Spain, the UK and Ireland so that information gathered during raids and searches could be quickly checked and rapidly exchanged in real time.

**Outcome:**

- 32 arrests after simultaneous dawn raids in the UK, Ireland and on the Costa del Sol in Spain.
- 750 law enforcement officers involved in the operation.

**2012 London Olympics**

- Upon the invitation of the UK authorities, Europol posted four specialists in London for five weeks and deployed two mobile offices to the operational centre.
- This was one of Europol’s largest on-the-spot deployments. The presence of Europol’s team, with their secure connection to Europol’s databases, allowed the UK authorities to run live checks on suspects throughout the Games.
TUESDAY 29 JANUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Avebury
Lord Bowness
Viscount Bridgeman
Baroness O’Loan
Lord Rowlands
Lord Sharkey

Examination of Witness

Rob Wainwright, Director of Europol.

Q132 The Chairman: Thank you very much indeed to you and your colleagues for coming to us for this session to give us evidence on our inquiry, which is into the UK’s 2014 opt-out decision. Basically, we are two sub-committees meeting together, because one of us deals with justice and the other deals with home affairs. All our meetings are joint meetings. We consider this to be a very important matter that may have far-ranging implications both for the UK and the European Union. I would like to begin by just explaining a little of the background to the inquiry.

As you know, the Government’s “current thinking” is in favour of exercising the opt-out, but they have promised to consult Parliament before making a final decision and to have votes in both Houses. In order to inform the House of Lords’ deliberations, we launched this inquiry. It started on 1 November and is being conducted by the two sub-committees that I have mentioned. We received a lot of written evidence—you may have seen some of it as it has been on our website—before the end of last year, and we are now taking oral evidence from lawyers, academics, think tanks, NGOs, as well as from serving and former police practitioners and prosecutors, which will help us draft our report.

After the oral evidence sessions have concluded on 13 February, which is the date when the Home Secretary and the Lord Chancellor will appear before the Committee, we will write our report and we hope to publish it just before the end of the current parliamentary session in May. The report will cover both the merits of the opt-out decision and which
measures the UK should seek to rejoin were it to be exercised. It is intended that the report will inform the House's debate and vote on this matter, which is likely to take place—but it is not certain because that is a matter that is in the Government's hands—before the summer.

A verbatim transcript will be taken of the evidence today. This will be put on the parliamentary website, and a few days after this evidence session you will be sent a copy of the transcript to check it for accuracy. We would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence, or you have any additional points to make, you are very welcome to submit supplementary evidence to us.

You have been a frequent witness for this Committee and we have been very grateful to you in the past for the clear and helpful testimony that you have given to us, so I do not think you need much introduction. If you want to make an opening statement, that would be absolutely fine, but if you want to move straight to questions, that would be just as satisfactory.

**Rob Wainwright:** Thank you very much, my Lord Chairman, and all members of both Committees for giving me the opportunity to give evidence. I am the director of Europol—the European Police Office. We are an agency of some 800 law enforcement officials, criminal intelligence analysts and IT officials based in The Hague. Our primary purpose is to support the competent authorities in the Member States in their fight against organised crime and terrorism. I was appointed in 2009, so I am almost at my four-year mark now as the director. I am joined today by Ben Waites, who works in my private office as a senior policy adviser.

As a general remark, I recognise the importance of this topic, of course, not just for the UK itself and its work in fighting crime, but also for the efficiency of the EU as a whole in prosecuting what is becoming a more challenging task of fighting international crime and terrorism. These considerations of the importance of the UK’s role in that certainly apply to Europol, so I will be drawing on that experience today.

I also understand that this is not a simple issue. In fact I am also sympathetic to government concerns about the possible transfer of sovereignty in this area. It is clear to me that the final executive responsibility for enforcing the law, of course, rests with national authorities. I see that every day in my work. The whole fabric and ethos of Europol, for example, is constructed around the simple logic that we are here to serve and support, certainly not to lead any operational action or govern ourselves.

Having said that, it is undeniable that the demands these days of fighting international crime and terrorism require an ever increasing level of co-operation between the Member States in order that they can meet those demands more successfully. Therefore, at least some, if not the bulk, of these JHA measures add value, and in some cases significantly so, to the work involved in the Member States. Therefore, certain public safety and economic benefits derived by all Member States, not just the UK, from participating in these measures are considerable indeed. In my opinion, as a senior practitioner in this trade, they are certainly considerable enough for one to consider that they might be worthy of offsetting any other concerns that Ministers might have, but of course that is just my personal opinion.

**Q133 The Chairman:** If nobody has any comments on your general remarks, we can go to the questions. What, in your view, would be the effect for UK police and law enforcement agencies if the UK ceased to participate in Europol? What could the
operational and financial consequences of that be? That is, of course, assuming the triggering of the opt-out and non-reinsertion.

Rob Wainwright: In operational terms, it would certainly make it more difficult and more costly for the UK to investigate crimes of an international nature. There is no doubt about that, in my opinion. If they opted out of the Europol Council decision, for example, the UK could choose either to walk away completely or, of course, to negotiate some form of partial re-entry in what would then be a unique arrangement for co-operation with Europol. It is difficult to predict what that outcome might be.

To answer your question about what the implications would be if there was a full opt-out, in simple terms the UK would lose all the rights and obligations that are granted to Member States as laid down in our legal framework.

What does that mean in practice? The UK would no longer have the right to receive information and analysis from Europol. At the moment, we are duty-bound to report to our Member States any information that we think might be of operational strategic value to them. The UK would not have the right to be assisted with national investigations in the way that we do at the moment by providing intelligence support, but also forensic and technical support, for example. It would not receive threat assessments or strategic analysis. It would not benefit from the training offered by Europol, and it would not have the right to post a liaison officer at our headquarters. Stripped back, those are the services that would be denied to the UK.

What would that mean? The most significant loss would be that the UK would be denied access to unique intelligence capabilities at Europol—capabilities that identify serious criminal connections among Member States. This is directly relevant to the UK’s interests in its work against organised crime and terrorism, because without this intelligence, which the UK increasingly relies on at the moment, the capabilities of the UK would, of course, be weakened. It would increase the risk of serious crimes, therefore, going undetected or not prevented in the UK.

To put that in perspective, operational work at Europol shows us that in many fields of organised crime the UK is either an end-destination point for the problem, such as the flow of cocaine or trafficking of human beings, or, unfortunately, one of the Member States that is most at risk from the serious organised crime activity involved. Any diminution of the UK’s capability to deal with those problems would clearly increase public safety risk, in my opinion.

You also mentioned the financial consequences. Of course, if the UK opted out of Europol, it would no longer perhaps have to pay a relevant share of the contribution. I do not think that we are talking about particularly large amounts of money here. The UK’s share is around 16% to 18% of a budget of about €82 million. That is a relatively small amount, taking into account the current portfolio of the UK’s operational work. The UK currently brings through Europol over 1,500 major international investigations against crime and terrorism every year. This is what the UK benefits from, from Europol, by making that contribution.

Most law enforcement authorities in the UK, as indeed in other Member States, have realised the economic efficiency of what they are getting from Europol. Indeed, the UK has instituted changes in its international business to increase its share of work through Europol, resulting, for example, in the doubling of UK casework in the last four years.

Let me end with one more specific financial consequence. In recent years, what we have also seen from the UK, and again other Member States, is them progressively pursuing a policy of closing bilateral police liaison officer posts in Europe and transferring that work through the
UK liaison office at Europol. This is part of a very wide and extensive network in our headquarters in which national bureaux are established in our building from all 27 Member States, and also now 10 other international partners. So the UK has access to a community of about 150 liaison officers from almost 40 countries. It found that it is much more efficient and cost-effective to have access to 40 countries in one place rather than just in one bilateral case. Indeed, it costs three times more on average to establish that post in a bilateral location than it does at Europol.

On the grounds that the requirements of international police co-operation would still have to be met by the UK in the event of the opt-out—it would still not be opting out of the threat from crime and terrorism, of course—the closure of the UK liaison office at Europol, and, indeed, the opting out of Europol as a whole, would have to be compensated for, with at least a partial return to the more expensive and less effective bilateral arrangements.

Q134 Lord Bowness: Mr Wainwright, you described the benefits of Europol to the United Kingdom and what we would lose if we came out. Can I ask you, as it were, the other side of the coin? What would be the immediate and longer-term implications for Europol itself if we were to opt-out?

Rob Wainwright: It would be pretty disastrous, frankly. We rely on our co-operation with all Member States, and I would fight very strongly to prevent any one of them leaving, because the business that we are in is very much about dealing with a globalised threat and relying, therefore, on a concerted effort among an international community to deal with that. Quite simply, we are stronger together if we stay together; it is as simple as that.

In this particular case, the UK is—whichever way you look at it—our No. 1 or No. 2 most important Member State in terms of the volume of intelligence shared and the amount of operational work that is conducted through our agency. To lose that would be a big loss to Europol and it would very much buck the trend that we have at the moment. All Member States, almost without exception, have taken steps in recent years to increase their amount of co-operation through Europol. There is even a scramble to join Europol from non-EU partners. We have already, as I said, liaison bureaux from 10 other countries inside our framework. We have a long line of countries waiting to conclude a co-operation agreement and establish a liaison bureau. This would be the first time that a member sought to leave this club rather than join it. It would certainly go against the international trend.

The biggest losers, though, would be not just Europol but the Member States themselves that we are designed to serve. That is not just the UK but, of course, the others as well. Our operational casework shows that in about 50% of those cases there is a British interest, either a case led by the UK or involving the UK. So, in half of all the work that we do, there is a British dimension. Removing the UK from Europol not only harms the UK but all those other Member States that have a co-operation interest with the UK. Half our casework involves one or more other Member States in every case. That is a lot of business and a lot of going concern for the body of Europol and for all our Member States to lose with the opt-out of the UK.

Lord Bowness: As a matter of interest, are the 10 countries that are not within the 27 all European countries? Would you give us a flavour of other places that are involved?

Rob Wainwright: We have Australia, Canada, Croatia, Iceland, Norway, Switzerland and the United States. We have seven US federal agencies with agents at Europol, for example.
The Chairman: I suppose that, if Britain opted out and did not opt back in again, it would want to become one of those countries. What is the difference between their access and the access of a member?

Rob Wainwright: We would be in uncharted territory. This is not the same as Norway or the United States situation because we would have this unique arrangement whereby the UK would not be a member of Europol but would still be an EU Member State, at least for the time being, in which case a unique legal instrument would have to be negotiated at the European Council to allow the UK some special access. It is very difficult to predict what that instrument might end up looking like. In theory, it is possible that the UK could still have access to a whole range of those services, but there are some things that they would almost certainly not have access to, to which they do at the moment, such as direct access to our databases, which is an entitlement reserved to our full members only. It would not have a full place on the management board of Europol, so it would have less influence over the future development of Europol, and one or two other practical things as well. It is difficult to predict what compensating measures could be taken and how they would work in practice. One should assume that, whatever arrangements are finally negotiated within the political framework that we can imagine will apply, they will be less efficient, less coherent and less extensive than they are now.

Q135 Baroness O’Loan: Mr Wainwright, in answering two short questions you have made a very compelling case for why we must not opt out of the Europol system in particular. The reality, I suppose, is that as we analyse the great failings of the intelligence service operations, which have resulted in terrorist attacks, it is always intelligence handling-related and communications intelligence. So my question is rather different. You have answered it to a degree, but there may be something you wish to add. How significant is the UK police and law enforcement agencies’ use of Europol? Are they using it as much as they could? I would like you to consider it through the range of the agencies that we do have.

Rob Wainwright: There are two very interesting questions there. Let me deal first with how significant the UK’s use is. If you compare it with other Member States, it is very significant. The UK is the largest contributor to our core intelligence system—by some distance. It has doubled the amount of intelligence that it shares with us on an annual basis compared with the situation three years ago. In operational terms, as I said, it initiated 1,500 major cases in 2012. That is the No. 2 highest behind Germany, just to give you some comparison, but that in itself is a 40% increase on the year before. So you get a sense of how rapidly the UK is extending its level of co-operation with Europol, and in some cases that are very significant. I would not want to list many here, because you do not have the time.

I would highlight Operation Rescue, which is still ongoing, which was initiated in 2010. This was a case in which Europol analysis and forensic examination led to the identification of one of the largest child sex abuse networks in the world operating online. Working with the UK authorities especially, we then helped to co-ordinate police action across 32 different countries. In this case, there was in particular a huge UK dividend from that operation, with 240 suspects identified. Half of them have already been arrested, and 60 children, who were victims of this terrible crime, have been identified as well. There are 1,500 cases a year, although not all are on this level, but many of them are highly sophisticated criminal syndicates around the world. This is major work that the UK is involved in.

The UK is picking up the pace of its co-operation. The Serious Organised Crime Agency, for example, as a result of a recent change in policy, now routinely interrogates Europol’s database in every new case that it initiates. We are finding approximately a 10% or 20% hit
rate from that. That means that in new casework that the UK is involved in, at the highest levels of investigating organised crime, in many cases Europol is able to tell the UK something it did not already know, which is that the criminal it is now investigating has links to another criminal syndicate in a different country. That is extremely important intelligence for UK investigators, particularly in important cases.

Q136 Lord Avebury: You said that the UK is the largest contributor to the intelligence system. Presumably there would be a sudden cut-off at the point where we opted out. If we had the intention of opting back in, would there be any method by which the UK intelligence that accumulated during our non-membership of Europol could be put into an escrow account, as it were, and then reinserted into the Europol system if we rejoined?

Rob Wainwright: All that is possible. We would be dismayed at the thought of the UK leaving Europol. We would seek to mitigate that loss as much as possible. What that means, in practice, is that we would find the most pragmatic measures available to retain British intelligence and, indeed, expertise. My fear is that all that would be subject, in the end, to a negotiation in a political field, which would govern all these measures on the opt-out question. My fear, therefore, is that it would influence the efficacy of the arrangements that we eventually found compromised this position, and that it would not be as good as we would like. But anything is possible, in theory at least.

Baroness O’Loan: Perhaps you might have something to say on the other law enforcement agencies.

Rob Wainwright: Yes. What this picture shows, compared with most Member States, is very good. It has become a lot, lot better than in the past two to three years. It is still not at the optimum level—nothing in life is, I suppose. In this case it is because not every major UK law enforcement agency is using us in this way. Particularly in the field of counterterrorism, there is a marked reluctance to involve Europol in that work in a way that I understand, to a certain extent, because of my own previous experience of working in that community and understanding the sensitivity of the matter involved. I also know that Europol has been very successful in supporting major counterterrorist operations, the most recent of which was a terrorist bomb attack in Bulgaria last year. In that case, and in the field of counterterrorism in particular, the UK has more ground to make up than in many others.

Baroness O’Loan: Just to follow through on that particular issue, the link between organised crime and terrorism is very strong. Therefore, is it possible that the United Kingdom’s intelligence agencies, by refusing to engage to the extent that they are not engaging, are making themselves less effective in the counterterrorism activity?

Rob Wainwright: In all these areas there is very little to lose. Our security controls are surprisingly good when people finally have the opportunity to inspect them. Touch wood, we have not had any major security concerns over a 10-year period. What you can gain, of course, is that if SOCA is getting a 10% or 20% hit rate, the intelligence community might not get as much but might get some as well. A simple interrogation of a database, in some cases, will yield a result that the investigator will certainly want to know. I do not think that there is a widespread use of our capabilities that are already bought and paid for, well maintained and now quite rich in the data that they hold. I do not think that there is a systematic use of those databases in the way that all Member States could use.

Baroness O’Loan: That is very helpful. Thank you.
Q137 Lord Rowlands: I wonder whether this might be a convenient moment for you to tell us a bit about the new Directive, because that would be one way in which you could avoid the block opt-out, because if we engaged ourselves in the new Directive, presumably we would eventually join it. Could you tell us, first of all, what is the nature of the revised Directive, and is there anything that you think could be objectionable to prevent us from opting into the revised Directive? Secondly, could you tell us a bit about the timescale of it?

Rob Wainwright: Yes, sure. It will be a Regulation, not a Directive. The timing is such that the Commission is finalising its proposal right now, and the Commission intends to make that proposal in March of this year—so very soon now. What will it contain? I do not think it will contain any revolution of Europol’s legal framework. It will modernise some of our capabilities to receive and exchange information. In the end, we are essentially an information-processing agency. We just need to bring our capabilities up to speed and more in line with modern demands, but I do not think that any of those novelties are particularly controversial, and certainly not to a British audience, in my view.

Lord Rowlands: So there is not going to be a centralising tendency. There is not going to be an increased central power.

Rob Wainwright: No, not in the way that I think you mean—absolutely not. It is more about internal housekeeping. I want to have a more flexible information-processing capability through Europol of the information that we already have the legal right to collect, but that is a different matter. We already have the highest possible standards of data protection, in my view, and we clearly need to maintain that, but I do not think we need to do a lot more work to enhance and further our work in that area.

Lord Rowlands: There will not be any mandate on Member States to do anything specifically different.

Rob Wainwright: That is something that the European Commission has considered. The advice that I have given the Commission is that that, in any way, is unenforceable and is not the most optimum way of ensuring the highest level of co-operation with Member States. I firmly believe in incentives rather than obligations to win over the hearts and minds of what is a very sceptical, conservative law enforcement community that I know very well. Giving them a mandate to share information with Europol will not work, quite simply, so we need to work hard at convincing investigators.

Lord Rowlands: Do you think you have won that argument with the Commission?

Rob Wainwright: I hope so. Let us see what happens in March.

Finally, and I know this is one of the questions that the clerk shared with me in advance, the other novelty that it might bring is the possibility that the Commission will propose a merger between Europol and CEPOL. That might, therefore, lengthen the legislative time frame in this particular case, because that, in particular, will lead to considerable debate in Council and in Parliament. At the moment the relevant committee in the European Parliament has so far expressed a relatively hostile opinion to that possibility. This is important for the timescales of the UK opt-out, because, if the Commission makes a proposal in March, if it contains any elements that will lead to extended political dialogue among the institutions, then it is quite possible that the procedure will not be completed in time to occur within this timeframe of the opt-out expiring in November 2014. Of course, a year from now anyway the European Parliament will suspend its work and new elections will take place. That would constitute another six-month hiatus at least. Depending on the stage of the file reached before then, it might therefore add significant delay and take us outside the window in which
the UK would have the opportunity to opt into any new regulation. This all depends on the timing and, of course, on the nature of the Regulation.

**The Chairman:** Surely not. The UK’s right to opt into a new post-Lisbon regulation is not time-limited and not affected by the block opt-out provision of Protocol 36, just as we have now opted into the human trafficking Directive or whatever it may be.

**Rob Wainwright:** You are right. Excuse me. I was making the assumption, perhaps wrongly, that the UK would exercise its right to wait to see the final agreed text of the Regulation before making its decision.

**The Chairman:** I see, but its initial decision on the new draft Regulation will have to be taken within three months.

**Rob Wainwright:** Yes, absolutely. You are right. It is only if the UK delayed its decision that it might move outside the window.

Q138 **Viscount Bridgeman:** Mr Wainwright, some of our evidence has expressed concern about the nature of Europol’s role and questioned its effectiveness and value for money. In your excellent introduction, you covered most of those points, but do you have anything else to add on its effectiveness and value for money?

**Rob Wainwright:** Yes. I would like to say something. I recognise that all public authorities can increase their efficiency. I also recognise that there is a particularly urgent need at the moment for public authorities to do that in this current economic climate. I am happy to stand by Europol’s record of efficiency in the past few years and to compare that with any law enforcement agency. I would like to share with the Committee a few things of what we have been doing.

Many people criticise the bloated budget of the EU. I am not going to comment on that, but a little known fact is that all the JHA funding measures in the EU account for less than 0.8% of the EU budget. Indeed, Europol’s share of that budget is, again, quite a small fraction of that.

**Baroness O’Loan:** Did you say 0.8% or 8%?

**Rob Wainwright:** The exact figure is 0.77% of the EU budget that is currently devoted to JHA matters. Of that, a very small part goes to the Europol budget.

The Serious Organised Crime Agency is the UK’s nearest equivalent to Europol, and its budget is six times the size. It is difficult to compare apples with pears. I understand that we do not have the operational responsibilities that SOCA has, but we also have to deliver our services to 27 countries, not just to one. As I said, our operational casework has doubled in the last four years. The amount of intelligence we are handling now has tripled over that period, and over that period we have seen no increase in our budget or staffing levels. In fact, this year we have experienced a budget cut, like many other institutions. On top of that, this year we established the new European Cybercrime Centre, which is a very ambitious new project, without any additional funds at all.

All this—the doubling of our work following these new tasks, which has been done with no resource increase at all—has been possible only because of a pretty radical efficiency programme that we have introduced, where we have slashed our admin costs and reduced bureaucracy. I recently announced a major reorganisation of Europol, which has included a 20% reduction in all management posts, for example.
Some of that is evidence of an organisation that has become more efficient. When I arrived as a director, I saw some fat in the organisation, but today we are much leaner—we can go still further—and I would defend our record in the face of anyone.

**Viscount Bridgeman:** I have a supplementary. I hope that this is not shooting anyone else’s fox. Can you tell us anything about any dialogue you have had with senior UK colleagues in the police forces there on this question of the opt-out?

**Rob Wainwright:** Yes, of course. I have discussed it with most of my senior counterparts, the chiefs in SOCA, the Metropolitan Police, and the Chief Constable in Scotland, as part of the new Scottish national police force. Without exception, they are all concerned at the prospect of the UK opting out of this area. All of them expressed a sincere hope that the UK would remain a member of Europol.

**Q139 Lord Rowlands:** How interconnected are the operations of Europol with other measures in the list of 130-odd, including the Schengen Information System? One of the issues that will come up is whether we can just opt into Europol but ignore other measures that might be connected with them. The Commission might charge us for the incoherence—that it is not a coherent package, as it were. Can we opt into Europol and argue that it is coherent in itself, or do we have to opt into some of the other measures to create that coherence?

**Rob Wainwright:** Some among the 130 are directly linked to Europol in setting the confidentiality level, establishing Europol as the central office for combating the counterfeiting of the euro.

**Lord Rowlands:** These are separate measures. Are they some of the 130 or so?

**Rob Wainwright:** For the separate measures, it is generally true that many of the measures work as a package, and they have been developed through the legislative process exactly to contribute to a more coherent whole. It is only with the full utilisation of all those measures that you get the maximum value.

To give you an example, most of Europol’s most successful cases—the very best cases—involves co-operation with Eurojust from the start. That allows us to make sure that both the police and the judicial elements of a complex case are adequately taken care of. Very often, in those cases we are also doing it within the framework of a Joint Investigation Team, because it is the JIT that allows the greatest flexibility of participating member states and supporting agencies such as Europol and Eurojust to respond quickly to the dynamic.

**Lord Rowlands:** You have identified three measures already, which are Europol, Eurojust and the Joint Investigating Teams. Are there any other measures?

**Rob Wainwright:** There is a raft of anti-money-laundering measures that support our work, because we have certain centralising functions in the EU to support that, including financial intelligence work and the work and establishment of the Asset Recovery Offices as well. We have access to the Schengen Information System. We make approximately 600 checks of that each year, which is not enough, in my opinion. We have to do more of that. These are just some of the examples. If you are asking for a number out of the 130, I do not have that for you today. I do not have a specific list, but I can certainly provide you with that.

**Lord Rowlands:** We would welcome it. We do not want everything, but what you and the UK could claim is a coherent request.
Rob Wainwright: Okay. I will send that to the Committee.

The Chairman: That would be very helpful. Obviously, if you could cover in a note things such as your co-operation with Frontex, which I remember you spoke about at some length in our inquiry on the EU Internal Security Strategy and also the EU Drugs Strategy, it would be really helpful for our report.

Rob Wainwright: Of course.

Q140 Lord Sharkey: You have already given us your view on the feasibility of alternative arrangements for the UK’s continuing involvement. You may want to expand on that. You also said that the two key differences between the non-Member states and the Member States were management participation and database access. I assume that “database access” means in and out of the database.

Could you talk a little about the consequences of that lack of access? For example, would that mean in particular that Europol would not share data with the UK about a perceived terrorist threat? I assume that is not the case. I would like to know exactly what this lack of access to the database implies for the UK and for the other Member States.

Rob Wainwright: As I said, because we are in uncharted territory there is no precedent for this. It is very difficult to predict the influence of the political context in which a negotiation would have to take place. It is hard for me to say today what in practice it would mean that the UK would be left with. What I do know is that without being a member of Europol you lose all those rights that I laid out.

The closest possible example is the UK’s current relationship with Frontex, which I know others who have commented on this subject have held up as an example that we might want to follow here. I do not think that it is the best example, because the comparisons are not particularly good as the operational profiles of the two agencies are different. Even if it was, I do not think it is the most encouraging example for the UK to follow either. In that case, the negotiated access that the UK has involves the management board of Frontex giving pre-authorisation on a case-by-case basis every time the UK wants to participate in a Frontex operation. Clearly, that is untenable in the Europol context, where the UK is involved in about 3,000 cases a year. Some sort of class arrangement would have to be made. However, the politics, even around the Frontex settlement, showed that other Member States were not willing, in the end, to grant a wide scope of opportunity and access to the UK. One can assume that something similar would apply here.

To answer your question on the specific things that you raised, only the members of Europol have direct access to Europol’s databases. In practice, that would mean that the UK would make a request for a third-party interrogation of those databases. I do not think it is feasible in any circumstance that if Europol found intelligence that suggested an imminent terrorist threat in the UK, we would not make that available to the UK. That is clearly not going to happen in any future scenario.

In other scenarios, it is difficult for me to get a sense of what exactly would happen. Certainly, I do not think they would be a member of the management board. Certainly, it would probably mean that I would go down in history as the first and last British director of Europol. That, of course, is a minor consideration, apart from the fact that it would symbolise a decline in British influence over the organisation and, indeed, over JHA policy as a whole.
**Lord Sharkey:** Would you tell us again about the data in? Is there a mechanism for accepting data from countries that are not members?

**Rob Wainwright:** Yes.

**Lord Sharkey:** So that would not be a problem. We could still contribute data into the database.

**Rob Wainwright:** Yes.

**Lord Sharkey:** We would simply have to make a formal request to get it out.

**Rob Wainwright:** But non-members have no right to receive data coming back out, unless there is some legal agreement with them.

Q141 **Lord Avebury:** How would the UK's exit from Europol affect the UK's position more widely in the development of EU policy on police and criminal justice? You have just said that it would have some effect on our influence on JHA affairs generally. If you could expand on that, it would be useful.

**Rob Wainwright:** It would have quite an impact because Europol is seen, not only by me, as one of the flagship measures in this area. It is certainly one of the largest agencies and it carries lead responsibilities for implementing key policies and measures in this area, such as all those associated with the new EU policy cycle on organised crime. We are a central pillar in the European Union's fight against organised crime and terrorism. Given this and particularly what everyone sees at the moment to be a particularly strong influence and position that the UK has at Europol, if the UK withdrew from that it would have quite a jarring effect on the EU community. It would certainly be a strongly symbolic gesture of how the UK sees its role in police co-operation in the future. It is difficult to see how that message would be viewed in any other way than strongly negative, frankly. It would certainly affect the UK's reputation as a leading partner in fighting crime and terrorism. Some might even argue that it is a sign of the UK going soft on terrorism and crime. Some would argue that, at least. That would be a remarkable turnaround on the position that the UK has steadily built up over the last 20 to 30 years as the primary player and driver in international police co-operation in the EU.

**Lord Avebury:** Have Ministers asked you for your advice on these matters?

**Rob Wainwright:** Yes. I have had a few informal discussions with the Home Secretary. I also attended a meeting chaired by two ministers on this subject in London a few months ago in which I was asked for my opinion.

Q142 **Baroness O'Loan:** I wanted to follow through on this point. You said that counterterrorist intelligence, if received, would be handed over to the United Kingdom—intelligence about an attack or something—regardless of whether or not we opted in or opted out. I want to clarify, for the record, that most intelligence that might be of a counterterrorist nature is not labelled “intelligence threat about a bomb” or something like that.

**Rob Wainwright:** Of course.

**Baroness O'Loan:** Therefore, although you would be handing over information that is immediately and obviously such a threat, there would be other very significant information that would not make its way to the United Kingdom because they would not have the people doing the searching who would know what they were looking for.
Rob Wainwright: Yes, of course. I was answering that specific question. There is legal provision currently at Europol for the director, on a highly exceptional basis, to pass intelligence about an imminent terrorist threat to any country in the world, but I have done that only once in my time. That tells you what sort of threshold that is. Of course, as your questions seem to imply, the intelligence business is much more complex than that and relies on a daily exchange of intelligence—a gradual build-up of knowledge and understanding about the activities of a terrorist or an organised crime group. It is the pattern of activity and the culture of close co-operation that is most important in ensuring that you have the highest possible capabilities to fight organised crime and terrorism. That would certainly be denuded, but the question is to what extent, and that is difficult.

Q143 The Chairman: I would like to ask you two things. Standing on its head the question we have just been talking about, in which fields do you think the UK, as a continuing member of Europol in the years ahead, would be likely to gain the most benefits? Also, from your own past experience, not only as director of Europol, do you have anything to say about the Anglo-Irish dimension of all this?

Rob Wainwright: If you look at the recent trends in the last three or four years, you will see that the UK’s interest in Europe is on a very sharp upward curve. If it continues to double the amount of intelligence it exchanges with Europol and if it continues to double the amount of international cases it is pursuing through Europol every three or four years, one could see Europol, in 10 years’ time, becoming the primary mechanism for most of the UK’s international business in this area. I do not think that that is an unreasonable statement, based on current predictions. For that to happen and to happen in a way that would most benefit the UK, to make sure that Europol had the right mechanisms to develop to accommodate that kind of work, it needs to continue to have a very strong British hand on its shoulder. Most of Europol’s internal architecture, its current policies and its strategy are very much defined in British terms at the moment—absolutely. That situation is not going to stay the same if the UK is not a member of Europol. Given now the dependency that many UK law enforcement authorities have on Europol, that is a lot to throw away by opting out of the institution.

In Anglo-Irish terms, the level of our co-operation with the UK, and indeed in Ireland, on counterterrorism, is low, as I have said already. Perhaps the dominant security issue in Anglo-Irish terms, therefore, would not be greatly affected in this case. However, the pattern also shows a growing level of invested confidence and trust in Europol by Member States. The sensitivity of the intelligence that we are dealing with today is of a much higher order than even three years ago across all Member States. One can also perhaps foresee that in the future, even in this area, the UK will become more open in its dealings with Europol, and as a result derive more benefits, also in counterterrorist terms. For the moment, that is a future prospect rather than a current scenario.

Q144 The Chairman: I would like to move on to the next question: how significant are other EU instruments for co-operation among law enforcement authorities, such as the Joint Investigation Teams, which you mentioned earlier? Are they being utilised as much as they could be? Could they operate more efficiently, which obviously also means cost-efficiently? Are any of them no longer of any operational value at all?

Rob Wainwright: The use and efficiency of the Joint Investigation Team have greatly improved in the last two years. Until then it was a much underused instrument, for reasons that I never fully understood. Now the picture is much better, and the number of Joint Investigation Teams that are established is relatively high. Europol is involved in many of
those. We are involved in approximately 30 each year, of which the UK is a participant in nine, on average. That gives you the scale of our involvement. I would highlight the Joint Investigation Teams, and, of course, Europol and Eurojust. There is also a raft of information systems, which in their own way provide operational value to their users, and certainly the Schengen Information System, which the UK does not yet fully utilise and have access to.

On the continent, the Schengen Information System is absolutely a bedrock of policing around Europe. The interconnection of national police databases across the European Union brings daily benefit of a considerable nature to police forces across Europe. It allows a Belgian traffic police officer to stop a car on a highway outside Brussels, with a German plate perhaps, to interrogate his Belgian system, for it to be automatically linked to the German and other European systems and for him to see that the owner of that car is a child sex offender wanted in Germany. That is something he would not have seen if he had access only to his own national databases. Therefore, he would have allowed that individual to go on his way. That is the latent power of the system that is used in that way on an everyday basis.

There is another dimension to why the UK is still not ready to access the Schengen Information System. In the context of the opt-out, it is particularly important that the UK retains the possibility of being a member of the system in the future. The new European Criminal Records Information System derives similar benefits for the UK. All this, really, is about responding to the increasing cross-border dimensions on most criminal threats that we are dealing with. Again, it is perhaps not wise that I list all the systems here today. I will do that in my written answer to you.

I would reserve one word on the European Arrest Warrant. Europol does not have a direct role to play in the administration of the arrest warrants. I am perhaps not the most informed observer, although I was responsible for the UK’s work in this area in my previous job in the Serious Organised Crime Agency. The European Arrest Warrant is certainly one, if not the most important, of the current instruments for police forces across Europe. That is certainly the opinion that I have formed from the community of senior practitioners I work with across Europe.

For the UK, and indeed for most Member States, the primary value is in public safety. It would be quite hard to forgo what is by far the simplest, quickest and cheapest extradition system that the UK has ever had to forcibly remove thousands of serious criminals from the streets of the UK and which is a public safety benefit. There are elements of the European Arrest Warrant that do not work effectively, particularly in terms of proportionality, and that needs to be changed. Some of those subjects of the warrant are not as serious as others, but there are many who are: those who are terrorist suspects and who are wanted for murder and serious crimes. The European Arrest Warrant allows the UK and other authorities to remove them from the streets in a very quick and effective way.

Lord Rowlands: From your observations about Schengen, can I infer that we should be a full member of Schengen?

The Chairman: No, the SIS.

Rob Wainwright: No, but we should have full access to the Schengen Information System.

Lord Rowlands: But you do not see the case for—

Rob Wainwright: No.
The Chairman: We are due to become fully involved in SIS II. I cannot remember when. Can you remember?

Rob Wainwright: Yes. It also depends on when SIS II itself will be ready. It might even be this year, but I do not know.

The Chairman: It has been running quite a few years behind.

Rob Wainwright: Indeed.

Q145 Baroness O’Loan: Mr Wainwright, you described throughout your evidence to us very significantly enhanced levels of activity in your organisation by other Member States. You have also described different levels of state interaction with your agency. You have also described budget cuts. Can your agency be as efficient as it needs to be to protect Europe with the level of budget that you currently hold?

Rob Wainwright: My job is to make sure that it is as efficient as it can be, given the resources that we are given.

Baroness O’Loan: That is not the question I asked you. Maybe you cannot answer the other question.

Rob Wainwright: I know that the threat from organised crime especially is larger and more difficult to tackle than it was even two years ago. I also know that that threat is generally underappreciated by the public and by many Ministers. We are not doing as much as the threat deserves, certainly, but that is within the context of a similar statement that any public sector official could say about their own particular area.

Baroness O’Loan: Given the costs of investigation by Member States, running into millions of pounds in these cases, your budget is actually very small.

Rob Wainwright: Indeed.

Baroness O’Loan: And the provision of the material that you might provide might reduce significantly the costs of an individual investigation. That is the only reason why I asked the question, which is about the efficiency of protection of the United Kingdom against the crime of terrorism.

Rob Wainwright: I am always very pleased when I hear influential people in public life saying things like that, because I would make the case for that as well.

Q146 The Chairman: We talked about the future Europol Regulation and the issue of Europol and CEPOL. Do you have any concerns about the idea of a merger if the Commission were to opt for that? What would be the likely consequences for the presence of CEPOL in the UK if they opted for a merger?

Rob Wainwright: I am not highly enthusiastic about it. That is not to say that I do not support it. It is certainly not to say that we would not make a very good job of integrating CEPOL into our organisation, if that was the decision. Of course, that is for legislators to decide. I am not highly enthusiastic. The concern I would have is to make sure, therefore, that if any merger went ahead it went ahead on certain terms. The terms would have to ensure, for example, that it did not detract Europol from its core operational work; that it led to the development of a European training scheme that was broadly consistent with our current mandate—i.e. that we would not be expected to become experts in something that we are currently not—and that we would have to invest many millions and years of time in
getting there. It would have to be a pragmatic merger in trying, as much as possible, to link
the two mandates.

Most importantly, it must be accompanied by the necessary budgetary resources; otherwise
I would be in an even weaker position than I currently am to do my day job of fighting
organised crime and terrorism. Frankly, the experience that we have suffered during the last
year, in the end unsuccessfully bidding for adequate resources to establish our new
European Cybercrime Centre, does not fill me with any great optimism in this current
budgetary climate that any such merger would be accompanied by any equivalent budgetary
resource. If the deal is to take another large task but still no more funds, then I would rather
not have it at all.

The Chairman: Could you give us a rough idea of the amount that you, as Europol,
contribute to CEPOL’s activities—training courses and so on—in their present form?

Rob Wainwright: Around 40% to 50% of their training courses are relevant to our work
and might involve a Europol speaker. There are also some courses that are specifically
designed to increase police officers’ knowledge of Europol. We have an online programme
that does just that already. We are not alien; we are not unfamiliar with each other’s work.
It is also true to say that CEPOL is a relatively small body of just 30 or so people. It would
not be a great logistical challenge to integrate it into Europol.

This depends on the purpose of the merger. If the purpose of the merger is to save money,
it is going to put more pressure on our resource. If the purpose of the merger is to develop
a different concept of European police training, that brings in other dimensions. At the
moment, CEPOL is a secretariat for a network of national police training colleges. It is very
important that you realise that. The idea of the European training scheme that is now
advanced by the Commission conceives of a different thing—of something that centralises
police training more in the EU. That would bring longer-term consequences for the
resources needed, for example, to build a European police academy. If that was the proposal,
it would require much more effort and finance than is currently allocated in this space.

The Chairman: Would it, in your view, be a better deal?

Rob Wainwright: I can see at least one attraction, which is that it would probably lead to
generally higher levels of awareness and understanding of the value of European police co-
operation mechanisms. We have 2 million law enforcement officers in Europe, give or take,
and very few of them even know about the work of Europol and other institutions, and even
fewer who use us on a regular basis. Part of the problem that I see in this conservative
police community in Europe is an inward-looking-ness in the way in which they prosecute
their crimes based on tradition and culture, which is out of step with the modern reality of
how the criminal threat works. We need to lift their eyes over the horizon and we need
them to think in better terms about European co-operation. A police academy of one
description or another that over a generation trained the future leaders of police agencies to
think more directly about Europe and the value of international police co-operation would
bring benefits to Europol but also to the national forces.

Q147 Baroness O’Loan: The question of CEPOL and what you do with CEPOL is
obviously an issue. Is there any other agency or organisation with which CEPOL might more
productively be united? I am wondering about EUPFOR in the European Union, because that
is the kind of training organisation that operates outside Europe. Do you think there is
anywhere else you could locate it rather than Europe?
Rob Wainwright: No, I do not think so. The most defining characteristic of CEPOL is not that it is a training academy but that it is in the JHA space. If there is to be a merger, Europol is the only credible alternative, in my view.

Lord Bowness: Before we close, for the record could you outline briefly the difference between the functions of Europol and Interpol, because sometimes we hear people say, “Do we need anything? We are already part of Interpol.”?

Rob Wainwright: Of course. First of all, we are constituted in very different terms. Europol is a part of the European Union. We are regulated as an EU agency in terms of our budget, our legal statute and our accountability. Interpol has nothing to do with that. Our mandate, on one level, is similar in that both organisations support Member States in the fight against different forms of crime, but in terms of the particular services we provide we are quite different. Interpol’s services are designed to provide an everyday, high-volume business service to police forces in the exchange of evidence in police work. Europol’s work is really focused more narrowly on the most serious forms of crime and terrorism. As such, therefore, our systems are designed in a way to accommodate the exchange and analysis of intelligence and sensitive information much more than Interpol’s, which operates at a lower level of sensitivity but at a broader level of work. So there is higher volume and less sensitivity in the case of Interpol. Of course, then there is the obvious final difference of geography between a community of 27 Member States, in one case, and 190 in another.

The Chairman: Presumably, there are also implications from the state of the rule of law in the member states of one organisation as opposed to the member states of another.

Rob Wainwright: Of course. The scope for developing a greater coherence of concerted action and policy in the European Union is much greater than it is across a jurisdiction of 190. We have managed, therefore, to develop our work in a much deeper and richer way than Interpol perhaps has the opportunity to do.

The Chairman: Thank you very much. If none of my colleagues has any more questions, can I thank you for having come to Brussels for this session? It has been of great value to us, as always when we take evidence from you. We tend to leave the session wiser than when we came into it. If you could provide us with the material that you said you would reasonably promptly—we will be starting the drafting process around the middle to the end of February—it would be really helpful. Thank you very much.
(A) Which other JHA measures covered by Protocol 36 are highly interdependent with the Europol Council Decision, and should therefore be considered with it as a “coherent package” of measures?

From the JHA acquis, the following instruments are directly connected with the Europol Council Decision (ECD) as they are part of the “Europol acquis”. The UK would be obliged to opt into these measures as well, should it decide to opt back into the ECD:

- Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol’s relations with partners, including the exchange of personal data and classified information;
- Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements;
- Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files;

It remains to be assessed whether other legal acts, which have been drawn up and agreed on by the Europol Management Board (MB) and endorsed by the Council (such as the MB Decision of 4 June 2009 on the conditions related to the processing of data on the basis of Art.10(4) ECD (2009/1010/JHA)) would also explicitly have to be opted into. This is a technical question upon which the Council Legal Service would have to advise. In any case, the Europol Council Decision should be seen as the primary instrument sitting on top of an acquis of implementing legislation. The UK, when opting into the ECD, would also have to opt into all implementing acts of the ECD, in as far an opt-in into these implementing acts would be legally necessary.

A further series of instruments are strongly interconnected with Europol’s work. It is very difficult to assess the consequences of an opt-out out of these instruments. In order to do so, one would have to look at the effects intended by these instruments.

**Effects of JHA instruments in general**

These instruments typically oblige MS to take certain actions at national level, for example to set up national structures for EU-wide cooperation and/or to criminalise certain activities. They further oblige MS to cooperate with other MS, EU institutions and agencies in JHA matters as identified in the individual instrument, for example by supplying information to the above actor and respond to requests from another MS to provide certain services. Such instruments give participating MS the possibility to benefit from information provided and to benefit from the provision of mechanisms in which two or more MS can cooperate. If the UK were to opt out of these instruments, it would no longer be obliged to (continue to) implement them at national level. These instruments would no longer bind the UK and its obligations vis-à-vis other MS and EU institutions would cease to exist. Conversely, rights stemming from these instruments could no longer be invoked by the UK.

**Effect of JHA instruments on Europol**
Europol itself, in most cases, is only indirectly affected by these instruments. Exceptions would include instruments which assign Europol specific rights and/or obligations, such as:

- the Schengen acquis, under which, in conjunction with an enabling clause in the ECD, Europol is authorised to have access to the Schengen Information System (SIS);
- Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (the EU Mutual Legal Assistance (MLA) Convention provides for the establishment of JITs, which may include participants from Europol);
- Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams (which is directly related to the MLA Convention mentioned above);

Some of the measures listed under (B) below also explicitly mention the involvement of Europol as a participant in various cooperation networks and mechanisms.

(B) Which other JHA measures covered by Protocol 36 are of particular value and importance in fighting crime at EU level, based on the professional experience of Europol’s Director and staff?

A comprehensive answer to this question would be beyond Europol’s competence. Europol can, however, highlight certain instruments which play a particular role in European policing. This list aims to highlight the most important measures, and should not be construed as an implicit criticism of the measures which are not listed:

- Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union;
- Various measures relating to financial crime and corruption, including money laundering and asset recovery:
  - Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information;
  - Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
  - Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;
  - Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence;
Europol—Supplementary written evidence

- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders;
- Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime;
- Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption;

- Various measures relating to the protection of the euro currency (in addition to Council Decision 2005/511/JHA of 12 July 2005, mentioned under (A) above):
  - Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;
  - Council Decision 2001/887/JHA of 6 December 2001 on the protection of the Euro against counterfeiting;
  - Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;

- Various drug criminalisation measures:
  - Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties;
  - Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA;
  - Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2;
  - Council Decision 2008/206/JHA of 3 March 2008 defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions.
- Council Decision 2000/375/JHA to combat child pornography on the internet;
Europol—Supplementary written evidence

- Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (the so-called “Swedish Initiative”);
- Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States;
- Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime;

(C) Overview of Europol’s cooperation with Frontex.

Reference is made to the “Strategic Review of Europol cooperation with FRONTEX” (The Hague, 23 November 2012, document reference 636880), a copy of which is attached, which was endorsed by the Europol Management Board at its 11-12 December 2012 meeting.

Reference is also made to Europol’s written evidence in response to question 14 of the Committee’s original call for evidence (pages 7 and 8, document reference 640256).

14 February 2013
Annex 1: Strategic Review of Europol cooperation with FRONTEX, Management Board Meeting, 11-12 December 2012

Aim

The Europol Management Board was informed at its meeting on 1-2 February 2012 about Europol’s plan to review the cooperation with specific third parties, including FRONTEX, in line with the External Strategy 2010-2014.

This document provides an overview of cooperation between Europol and FRONTEX and outlines Europol’s key strategic and operational interests in its relationship with the border agency. This review takes place after the entry into force of the FRONTEX amended Regulation, which considerably reinforces the Agency’s mandate and capacity, and after the Commission’s legislative proposal on EUROSUR, which provides FRONTEX with new significant capabilities.

FRONTEX activities and tasks

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (FRONTEX) was established by Council Regulations 2007/2004 and 863/2007, revised by Regulation 1168/2011 of 25 October 2011. FRONTEX’s main objective is to promote, coordinate and develop the integrated management of the external borders of the EU (sea land and air). It has the following areas of activity:

- **Joint Operations**: to plan, coordinate, carry out and evaluate joint operations (JO) and pilot projects (PP) with Member States (MS) conducted with FRONTEX’s own teams of European Border Guard Teams-EBGT (mainly seconded staff) and “guest officers” contributed directly by MS.

- **Rapid response capability**: to assist MS under exceptional migratory pressure, by providing urgent short-term support through EBGT and technical equipment from across the EU provided by FRONTEX or by MS. MS normally have a legal obligation to make their border guards available for deployment at the request of FRONTEX. However, the host MS remain ultimately responsible for the control and surveillance of their external borders.

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43 The new Regulation strengthens FRONTEX’s capacities in a number of areas:

- **Operational capacity**: co-leading role to FRONTEX by facilitating operational implementation. Stronger role to coordinate and organise joint return operations.
- **Possibility to buy or lease technical equipment**, including in co-ownership with MS.
- **Centralised technical equipment pool** and a mechanism to provide for more formalised arrangements for MS contribution and deployment of equipment.
- **More systematic and formalised mechanisms for secondment of border guards to EBGT** (formerly known as RABITS and new types of officers (FRONTEX coordination officer-FCO).
- **Improved operational planning, evaluation and reporting mechanisms**.
- **Limited capacity to process personal data** collected during joint operation, joint return operations, pilot projects and rapid interventions.
- **Improved risk analysis and assessment capabilities**.
- **Reinforced external role** with the possibility for FRONTEX to launch technical assistance projects and deploy liaison officers in third countries.
Europol—Supplementary written evidence

- **Training & Research**: assist MS with training of border guards on control and surveillance techniques, removal of third-country illegal immigrants, fundamental rights, access to international protection and asylum procedures; development of common training standards and specialist tools (e.g. Common Core Curriculum). FRONTEX also monitors and contributes to the development of scientific research relevant to its field of activity.

- **Risk Analysis**: collate and analyze intelligence on the situation at the external borders. The 2011 Regulation includes an assessment (different from the Schengen evaluation) of MS' capacity to face upcoming challenges (present and future threats and pressures). This should be integrated into FRONTEX regular analytical products in 2013, together with a new Tailored Risk Assessment aimed at assessing specific risks identified in the Annual Risk Analysis (ARA).

- **Return**: in compliance with EU return policy to ensure the coordination or the organisation of joint return operations (JRO) and identify best practices.

- **Information sharing environment**: as a basis for risk analysis and situational awareness for border control authorities, including the Information and Coordination Network (2005/267/EC) and European border surveillance system (EUROSUR).

**Main aspects of Europol-FRONTEX cooperation**

**Current framework**

On 28 March 2008, FRONTEX and Europol signed a Strategic Cooperation Agreement (EDOC-#212639) essentially for the exchange of strategic and technical information. Article 3 of the agreement mentioned in very general terms the areas of criminality to which it applied, with reference “in particular to traffic in human beings and illegal immigrant smuggling”.

In October 2009, FRONTEX and Europol agreed a Cooperation Plan (EDOC-#391667) “to establish synergies and complementarities when implementing respective mandates”. The Plan covered the following elements:

- **alignment of operational activities**: concept for structured operational cooperation, provision of information from JO, AWFs-JO interaction and analytical assessments;
- **issues of confidentiality and security**;
- **institutional and strategic cooperation**: work programmes, staff exchange and liaison officers;
- **external relations**: information about negotiations and cooperation activities with third countries;
- **information and communication technology**: secured networks, business applications, interoperability, sharing of expertise, etc.

The FRONTEX-Europol relationship has been partly subsumed into the wider process of JHA inter-agency cooperation. The Scorecard on implementation of the JHA Agencies report44 contains a list of bilateral and multilateral cooperation initiatives. However, this process cannot provide an overall strategic outlook for bilateral cooperation. It is also

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44 EDOC-#581618-Scorecard – Implementation of the JHA Agencies report
based on the assumption that “all agencies have their specific mandate with distinctive responsibilities and capabilities”, which obviates existing difficulties related to overlaps in mandates and blurred competencies.

**Support to FRONTEX Joint Operations**

Europol has been supporting FRONTEX Joint Operations in all three domains - air, sea and land external borders - although most activities have focused on air borders. In most cases, Europol’s support consists of staff deployment with the Mobile Office and database checks. But, it can also include: joint planning (during the risk assessment phase); fact-finding missions; processing and assessment of personal or operational data; strategic analysis on trends and patterns of illegal immigration; or contribution to debriefing questionnaires.

- **Exchange of data**: the data gathered during FRONTEX JO that is normally provided to Europol are migrants’ interviews containing potential references to Organized Crime Groups (OCGs), which are generally sent via ENUs for cross-checking in Europol databases. Its operational value, in terms of hits generated with ongoing or closed investigations, varies depending on the JO. In general, data from air JO seem more relevant. Data received from MS is often not identified as being related to FRONTEX. This lack of tagging complicates the evaluation for assessment and statistical purposes.

- **Europol support to JO**: Europol support to JO generally depends on FRONTEX operational needs or requests from MS or EU Institutions. In the context of the future operational agreement between FRONTEX and Europol, both agencies could reach an understanding on a concept for operational cooperation defining the parameters and objectives for mutual participation in respective operations, for example along Policy Cycle priorities. This could include contingency plans for Europol support to FRONTEX in case of emergencies, like sudden arrivals of large numbers of immigrants, where the EU and MS are likely to request operational support from JHA Agencies.

**Data processing**

Under its revised Regulation, FRONTEX has a limited right to process personal data (PD) collected by MS during operational activities. This is limited to “personal data regarding persons who are suspected, on reasonable grounds, by the competent authorities of the Member States of involvement in cross-border criminal activities, in facilitating illegal migration activities or in human trafficking activities” (Art. 11c2). FRONTEX is still developing its own mechanisms and procedures for handling PD, but the understanding is that PD will be transmitted from International Coordination Centres (ICCs) in MS to the FRONTEX Situation Centre (FSC), which will carry out the accreditation and validation of the information. The FRONTEX Risk Analysis Unit (RAU), will then select it for transmission “on a case-by-case” basis to Europol or use it for the preparation of risk analyses (Art. 11c3). There will be no automatism in the system and the

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45 Joint Operations (JO) usually follow a standard procedure: risk assessment is conducted by FRONTEX’s Risk Analysis Unit (RAU) and a project proposal is forwarded to the Executive Director. The proposal is approved following an evaluation of the Tasking and Coordination Group. A planning meeting is then organised with the potential supporting countries and the project manager finalizes the operational plan with their input (respecting a predominant role for the host country). Finally, the relevant unit in FRONTEX (Sea, Land or Air) coordinates planning of the JO and a period of gathering information follows.
PD will have to be deleted as soon as it has been transmitted to Europol. The term of storage shall in any event not exceed three months after the date of its collection. In this context, three issues are of relevance for Europol:

- **Direct access to data**: while limitations imposed on FRONTEX to process PD effectively preclude it from undertaking any in-depth analysis, it may add an additional filter to information transmitted from MS. For Europol, it is important to achieve a qualitative improvement of data inflows and receive from FRONTEX a complete set of raw data, with more contextual information, to allow cross-matching and operational analysis. Under the new FRONTEX data processing system, Europol will presumably continue to receive data via ENUs, so Europol should ensure that information from ICCs in MS is transmitted simultaneously to FRONTEX and to ENUs for onward transfer to Europol.

- **Central depository concept**: Europol should ensure that it remains the single point at EU level for PD storage and checking.

- **Two-way exchange of PD**: FRONTEX has no explicit legal basis allowing reception of PD from Europol. Should FRONTEX actually wish to receive PD from Europol, this will require careful evaluation in the context of discussions on the operational agreement, not least given the implications in terms of data protection.

**Cross-border crimes at the external borders**

The amended FRONTEX Regulation mentions cross-border criminal activities in very wide terms.46 FRONTEX makes a flexible interpretation of this provision and considers itself competent to deal with all cross-border crimes on the EU external borders, not just trafficking in human beings (THB) or facilitated illegal immigration. However, FRONTEX lacks a clear mandate to fight OC and the essential tools to do so (processing of PD, criminal analysis, investigation capacity, etc). Therefore, for FRONTEX fighting OC “is not a task, but an objective”. In this context, managing the relationship between FRONTEX and Europol requires constant attention to the delineation of respective roles and responsibilities, in particular when it comes to secondary movements within the EU of facilitated illegal immigration.

FRONTEX core business in this area is to deal with the most visible part of cross-border criminal activity, such as interdiction operations, facilitators in third-countries or minor offences at the external borders. One area of FRONTEX specialisation is migration control measures in areas beyond MS territories even at strategic distance, part of a broader trend of extra-territorialisation of the EU border management strategy.

- **Risk analysis and criminal analysis**: Europol has a unique role as the single EU agency conducting criminal analysis. So far, FRONTEX risk analysis products have had a strategic nature. Still, FRONTEX is developing its operational portfolio in this area, e.g. through increased cooperation with customs authorities, using its platform of Focal

46 Art. 11c 2: “Such further processing of personal data by the Agency shall be limited to personal data regarding persons who are suspected, on reasonable grounds, by the competent authorities of the Member States of involvement in cross-border criminal activities, in facilitating illegal migration activities or in human trafficking activities as defined in points (a) and (b) of Article 1(1) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence”.

247
Points\textsuperscript{47} in MS or deploying its Mobile Unit to support local LEAs to gather evidence against facilitators. One recommendation of the Annual Risk Assessment (ARA) 2012 is that FRONTEX will use information provided through EUROSUR “to exploit and contribute to the early detection and more efficient intelligence collection on cross-border criminality and terrorism impacting internal security”. Therefore, while the analysis of intelligence and data on OC does not necessarily give FRONTEX a role in criminal analysis, in the mid-term there is certain risk of duplication.

- **Criminal investigations**: according to FRONTEX amended Regulation, PD “shall not be used by the Agency for the purpose of investigations, which remain under the responsibility of the competent authorities” of MS. Therefore, criminal investigation marks a clear functional dividing line between both agencies: Europol’s focus is on criminal analysis and investigation systems, while FRONTEX rather deal with control systems.

**European Border Surveillance System (EUROSUR)**

**4.1. General background**

On 12 December 2011, the Commission proposed a Regulation establishing the European Border Surveillance System (EUROSUR), currently under parliamentary procedure. EUROSUR has a three-fold objective: 1) Establish a common framework for information exchange and operational cooperation between national authorities of MS and FRONTEX. 2) Provide MS and FRONTEX with the infrastructure and tools needed to improve their situational awareness and reaction capability to detect and prevent irregular migration and “cross-border crime”; this includes promoting interoperability and uniform border surveillance standards. 3) **Protect and save lives** of migrants at the external borders.

The EUROSUR proposal further reinforces FRONTEX capacities to tackle organized crime at the external borders and potentially opens new avenues for co-operation with Europol. Of particular relevance is the establishment of a common framework for information exchange and operational cooperation between MS and FRONTEX. This should provide MS’ law enforcement agents and EU agencies (including Europol) with the infrastructure and tools needed to improve their situational awareness and reaction capability to detect and prevent irregular migration and cross-border crime. The possibility for MS to share information with one, several or all stakeholders, should enable Europol to receive relevant information. This is important to prevent compartmented information or an asymmetric system for information exchange between FRONTEX and EUROPOL.

Also the establishment and maintenance of a European situational picture provides an important added value to all agencies active in the fight against cross-border criminality. This should provide them with a graphical interface presenting real-time data to achieve situational awareness and support the reaction capability.

For Europol it is particularly important that information systems remain overall coherent. In this regard, the Commission proposal puts emphasis on **promoting the interoperability**

\textsuperscript{47} To implement the Integrated Border Management Concept (IBM) at the EU external borders, FRONTEX can establish a permanent system of Focal Points at hot spots at land borders and use them as platforms for JO and information gathering in the framework of a multiannual programme.
of information and technology and to make best use of existing information, capabilities and systems available in other EU agencies to the extent possible.

4.2. Europol priorities

- **Direct access**: given its mandate and activities, especially in the field of maritime trafficking, as well as organized crime patterns, Europol requires access to maritime surveillance systems and networks. In this regard, direct connectivity to the EUROSUR network was deemed necessary, especially in the context of the development of the Common Information Sharing Environment for surveillance of the EU maritime domain (CISE). Europol should remain part of the wider user community of maritime surveillance systems and continue to play a leading role in the law enforcement function within them to avoid duplications and blurring of mandates. This can be achieved at operational level in MS, by continuing to provide relevant information on organized crime to Europol within the framework of EUROSUR.

- **Interoperability**: the development of EUROSUR should be done in a way that guarantees the interoperability and inter-connectivity of SIENA to the EUROSUR network. In this regard, the EIS should remain the reference system for exchange and storage of criminal intelligence and PD.

- **Cooperation**: in the context of the future operational agreement between FRONTEX and Europol, both agencies should explore opportunities for cooperation on risk analysis and exchange of surveillance data in areas of common interest, including the potential contribution of Europol to the European situational picture.

Proposed way forward

General considerations
FRONTEX is steadily evolving from a co-ordinating and supporting body into an operational agency in its own right. However, FRONTEX is also adapting to the organizational transformations brought by its new Regulation, especially the handling of Personal Data and the need to establish its own Data Protection regime. While the Agency has been considerably reinforced with new operational tools and a nascent “joint planning staff”, it is also facing operational and institutional challenges. The development of EUROSUR and other related initiatives (Smart Borders; future operational management of large-scale IT systems in the area of Home Affairs, etc) will continue to influence the development of FRONTEX. In this situation of flux, any Europol strategy vis-à-vis FRONTEX will have to remain flexible and adapt to changing circumstances.

At strategic level, the FRONTEX-Europol relationship is governed by general principles of JHA inter-agency cooperation, which seek to identify complementarities based on a “natural division of tasks”. However, there is also a potential risk of overlap in mandates and activities, especially in the context of a rapidly evolving regulatory framework. To prevent such risk, Europol and FRONTEX should engage in a real strategic cooperation partnership, where both Agencies jointly support each other in their respective core business activities, in line with Policy Cycle priorities. This is best achieved by reaching an understanding on an operational cooperation agreement.

At operational level, the FRONTEX-Europol relationship is based on a cooperative approach in numerous areas, albeit often on an ad-hoc basis. The overall dynamic is one
where Europol analysis supports FRONTEX activities, especially in Joint Operations, and
where FRONTEX provides intelligence and data to Europol for cross-matching and further
analysis. In the context of EMPACT priorities, FRONTEX is co-driver for one priority
(facilitated illegal immigration, together with Italy) and actively participates in two
Operational Action Plans (Western Balkans and trafficking in human beings). This offers
opportunities for aligning respective operational priorities. Assuming a functional distribution
of tasks where Europol does investigations and FRONTEX does interdiction and control,
Europol can provide profiles/trends/patterns, which can help FRONTEX to identify
targets/routes/modi operandi of illegal migrants and facilitators.

Strategy implementation

- **Operational agreement**: FRONTEX and Europol have decided to upgrade the
current strategic agreement by concluding an operational agreement. This should include
inter alia, provisions on the exchange/transmission of personal data; support to
operations; cooperation in the field of risk analysis and strategic intelligence. But, it
should also contain a developed vision for a higher level of cooperation between the two
agencies and information on the strategic requirements and expectations of each agency
with respect to the other.

While preparatory contacts between both agencies have taken place at different levels,
formal negotiations have not yet started. One reason is FRONTEX need to develop and
implement new processes deriving from its amended regulation before engaging into
negotiations on an operational agreement with Europol. However, it is expected that
negotiations can start in the first half of 2013.

- **Secure line and SIENA connection**: Europol and FRONTEX are in the last stages of
signing a **Memorandum of Understanding (MoU) and a bilateral agreement**, which
should allow for a more active FRONTEX participation in operations against
facilitated illegal immigration and trafficking in human beings. The MoU provides the basis
for the establishment of a secure line between both agencies, which has already been
ordered. The bilateral agreement details the services and applications available through
the secure line, including access to SIENA.

- **EMPACT priorities**: the Policy Cycle is at the heart of Europol’s response in the fight
against serious and organized crime and the 2013 SOCTA will offer further opportunities
for cooperation and engagement between both agencies, where Europol can support
FRONTEX and “driver” Member States, with analysis, expertise, project coordination
and facilities. The 2013 SOCTA should improve our overall understanding of the impact
the financial and economic crisis is having on internal security, including on facilitated
illegal immigration.

- **Liaison arrangements**: as a means of developing closer working arrangements,
FRONTEX could send experts to Europol to be associated to analysis activities in areas
relevant to its mandate.48

48 Art.14(8) ECD: third party representatives may be “associated to the activities of the analysis group”; Art. 1(c) of the
related MB Decision (EDOC#327732) specifies: «'association' of third party's experts with the activities of an analysis group
means that these experts shall be entitled to attend analysis group’s meetings, (...) to receive (...) analysis results which
concern the EU body (...) they represent». This means no direct access to the database is possible as would be the case for
a SNE.
• **Awareness raising and institutional relationship:** this could include an exchange programme between Europol and FRONTEX; awareness seminars at respective HQs to improve knowledge of respective activities.

• **Involvement of HENUs and FRONTEX National Contact Points (NCP):** participation of FRONTEX at HENUs meetings could be considered. The exchange/transmission of PD will have an impact in the role of ENUs (especially with regard to EUROSUR). Therefore cooperation at operational level between ENUs and FRONTEX National Contact Points could be further developed.

The Management Board is invited to discuss the strategic review of Europol’s partnership with FRONTEX and endorse the proposed approach. Thereafter MB delegates are encouraged to promote and uphold the strategic principles involved in their cooperation with national counterparts in the Management Board of Frontex.

*23 November 2012*
Faculty of Advocates —Written evidence

1. Should the Government exercise its block opt-out?

No. The Faculty has concerns regarding the loss of measures that are essential for the investigation and prosecution of serious crime in Scotland. In particular, the European Arrest Warrant has proved to be a highly effective vehicle for the delivery of suspected criminals; both those who have fled this country and those from abroad who have sought refuge here. The absence of such a mechanism would, inevitably, result in the UK encountering greater difficulty in repatriating suspects from abroad. Worse still, the UK could become something of a bolt-hole for criminals engaged in organized crime or terrorism. The Faculty expects that further difficulties could arise with the loss of access to vital databases and shared intelligence-gathering resources.

The Faculty does not regard the measures as being indicative of a desire to harmonise European police and criminal justice procedures; rather, they are designed to assist in the effective operation of domestic criminal justice systems.

2. What are the likely financial consequences of exercising the opt-out?

By virtue of Article 10(4) of Protocol 36, the UK may be required to bear “the direct financial consequences” of any decision to exercise the opt-out. Given the extent of the measures to which the opt-out would apply and the urgency with which administrative modifications would have to be made, it is conceivable that those consequences could be substantial.

3. What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

The Faculty is reluctant to comment on political matters. However, any delay resulting from a re-negotiation of the more important measures might well have an adverse impact on the effective operation of the Scottish criminal justice system and, therefore, the public interest. The Faculty fears that other countries within the EU, unimpressed with the exercise of the opt-out, might not rush to allow the UK to opt back in on an a la carte basis. In this regard it is significant that the unanimity of the Council, or the Schengen states, as the case may be, is required before a particular measure may be adopted by, and applied to, the UK.

The UK’s current participation in PCJ measures

4. Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

There seems little doubt that the European Arrest Warrant (EAW) is the most important of the pre-Lisbon measures and its benefits will be well known to the Committee. The majority of the remaining measures seek to provide assistance in terms of the practicalities of increased co-operation, such as the exchange of information and access to intelligence.
The Faculty is not aware of any disadvantages resulting from the present arrangements. It is undoubtedly true that some of the measures are redundant; but the Faculty believes there is no need to “throw the baby out with the bath-water”. An exercise of the opt-out, for reasons that are not clear and probably predicated on political anxiety rather than legal analysis, jeopardises the practical benefit of increased co-operation in this field.

The Faculty considers that the better way forward in this field is to allow the process of evolution to continue. For example, the UK has signed up to new provisions which stem from the Lisbon measures and is content to be bound by them.

5. In her 15 October statement the Home Secretary stated that “… some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

The Faculty cannot assist with an exhaustive evaluation of the 130 or so pre-Lisbon measures but would hope that the UK Government sets out in detail which of the measures is defunct or less than useful.

More importantly, the Government must explain the thinking behind its desire to jettison useful measures such as the EAW - to the undoubted detriment of the UK’s Policing and criminal justice – for the sake of clearing out obsolete or ineffective measures.

6. How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?

The Faculty is aware that on 25 October 2012 the Scottish Cabinet Secretary for Justice, Mr. Kenneth Macaskill MSP, advised the Scottish Parliament that, “since the beginning of 2004 between sixty and seventy persons have been returned to Scotland under a European Arrest Warrant”. This was said represent an increase in the number of persons being returned to Scotland to face justice. The Faculty is concerned that the UK Government’s proposal was made without any prior intimation to the Scottish Government.

The Faculty is aware that the Prosecution Service in Scotland has taken advantage of other pre-Lisbon arrangements such as the sharing of intelligence and information, and that the measures can be of use to the Defence in criminal trials. For example, previous convictions of a witness from mainland Europe can now be obtained almost at the press of a button without causing undue delay.

7. Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

The Faculty is unaware of any failure to implement any Pre-Lisbon measures.

8. What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?
The major practical effect of the Court of Justice (CJEU) having jurisdiction is to enable preliminary rulings to be requested where a question arises as to the validity or interpretation of any of the pre-Lisbon measures.

The Faculty’s understanding is that, once a reference is made, the proceedings before the national court are to be suspended. Although the CJEU is obliged to act with the ‘minimum of delay’ the Faculty is concerned that such delays will impact on statutory time limits that apply in Scotland. For example, an accused in a serious criminal matter can be remanded in custody for a maximum of 140 days. With 27 member states under the jurisdiction of the CJEU, there will be a huge increase in the Court’s workload. The Faculty hopes that there are sufficient resources in place to cope with this expansion.

The Faculty is also concerned that some of the Judges of the CJEU might be largely unfamiliar with the practice, and practicalities, of criminal justice, far less the nuances of the Scottish legal system.

A wider potential concern relates to the wide-ranging effect of preliminary rulings. As well as binding the national court hearing the case in which the decision is given, the system of precedent favoured, and developed, by the CJEU will result in other national courts being encouraged to rely on such rulings. However, the Faculty understands that while the CJEU will be able to accept the request for a preliminary ruling regarding pre-Lisbon matters, the effect of Article 9 of Protocol 36 (which preserves the legal effects of pre-Lisbon measures) is to ensure that the Court will not be able to increase their legal effects.

9. If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

It appears that Commission will, essentially, perform a policing role to ensure that CJEU judgments are given effect and its powers are significant, not least the power to impose a lump sum or penalty. The Faculty believes that, although such a role may not be popular with Governments, it is essential to ensure that the law is applied fairly.

As to the benefits and drawbacks of increased CJEU involvement, the benefit of subjecting the UK to the jurisdiction of the CJEU in this area is the ability to obtain a ruling and so clarification as to the meaning of a particular provision of EU law. Further, the reference may be made by “any court or tribunal” – so there is no need to exhaust the appeal process before such clarification is obtained. The primary drawbacks are firstly, that the ruling may not be one which suits the UK Government and, secondly, as discussed above the referral may cause delay at whatever stage it is made, as the proceedings are suspended pending the ruling of the CJEU (although an expedited referral procedure and, in the case of AFSJ measures, urgent referral procedure is available).

The potential consequences of exercising the opt-out

10. The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?
Faculty of Advocates — Written evidence

The Faculty believes that the EAW system has been very effective. There have been relatively minor issues with extraditions from this country for relatively trivial offences, but any difficulties are not incapable of being resolved over time.

11. What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?

Other agencies are better able to comment on the direct implications of opt-out.

12. Which, if any, PCJ measures should the Government seek to opt back in to?

Some measures, such as the EAW and the facility to share intelligence, are of vital importance and should therefore be prioritized. In general terms, the Faculty submits that there are five factors that are relevant to decisions on opting back into pre-Lisbon measures, and indeed any new measures, namely:

1. Whether the measure is necessary in the interests of the effective investigation, prosecution and punishment of crime in the context of free movement of persons and capital.

2. Whether the measure protects and promotes the rights of the citizens. It would be a strong reason not to opt into a measure which might be justified in the interests of the effective investigation, prosecution and punishment that it does not adequately protect and promote the rights of citizens. On the other hand, it would be a good reason to opt into a measure that it does promote and enhance the rights of citizens where those are not or cannot be adequately secured through domestic measures alone.

3. Whether the measure goes to the grain of our domestic law or, on the other hand, involves innovations which would not cohere with our own law or would, when applied in our own law, result in anomalies or difficulties, or would result in a system which, looked at overall, achieve the purposes of the criminal justice system.

4. Whether the measure is adequately resourced (including, where the measure impacts directly on the citizen, by the provision of legal aid where appropriate).

5. Whether the measure creates a situation in which relevant domestic proceedings are liable to be adversely affected by delay resulting from references to the CJEU.

13. How straightforward would it be for the Government to opt back in to specific PCJ measures on a case-by-case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?

The Faculty has no view on this matter, which is largely a political issue.

14. What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?
The Faculty is not well-placed to offer evidence on this matter and trusts that the UK Government explores the issue in great detail in advance of any decision.

15. Is Article 276 TFEU, which states that the Court of Justice has no jurisdiction to review the validity or proportionality of operations regarding the maintenance of law and order and the safeguarding of internal security, relevant to the decision on the opt-out?

The CJEU only has jurisdiction in relation to matters of EU law. Particularly in relation to its preliminary ruling jurisdiction, it does not rule on the validity or proportionality of internal measures; rather its role is limited to interpreting and determining the validity of a provision of EU law. On one view, Article 276 TFEU does not do any more than remind the CJEU of the limits of its jurisdiction, and so its relevance might be thought of as being more political than legal. Although, the CJEU has on occasion held that powers retained by the Member States have to be exercised in a manner consistent with EU law, Article 276 TFEU may be regarded an ‘added safeguard’ against the CJEU’s review of internal measures.

16. If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area?

There are very close pre-existing ties between the Republic of Ireland and the UK and there is no reason to suspect that these would not continue.

21 December 2012
Faculty of Advocates, Bar Council of England and Wales, Law Society of England and Wales and Law Society of Scotland—Oral evidence (QQ 46-61)

Faculty of Advocates, Bar Council of England and Wales, Law Society of England and Wales and Law Society of Scotland—Oral evidence (QQ 46-61)

Submission can be found under Bar Council of England and Wales
About Fair Trials International

Fair Trials International (Fair Trials) is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice and provides advice and assistance to people arrested across the globe. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused. Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our law reform work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights.

Fair Trials is particularly active in the field of EU criminal justice policy. We work closely with the European Commission and Members of the European Parliament to develop measures to protect basic defence rights so that every person suspected or accused of a criminal offence in Europe receives a fair trial.

Context of this inquiry

1. Fair Trials has long been active in the field of EU criminal justice policy through our ‘Justice in Europe’ campaign, which calls on Europe to work together to improve protection for basic fair trial rights. We are working closely with the European Commission and Members of the European Parliament to develop strong legal measures to safeguard the defence rights of people suspected or accused of a criminal offence in Europe. We have also worked to build consensus on the need for reforms to end unnecessary and unjust pre-trial detention in the EU and to improve the operation of existing and proposed judicial cooperation measures, including the European Arrest Warrant and European Investigation Order. This work is informed by our Legal Experts Advisory Panel, a network of almost 100 experts in criminal justice and human rights from 24 Member States.

2. Fair Trials welcomes this opportunity to present its views on the UK’s 2014 opt-out decision (Protocol 36) to the Justice, Institutions and Consumer Protection and the Home Affairs, Health and Education Sub-Committees of the House of Lords Select Committee on the European Union. The issues raised are complex, but important for the millions of British citizens who live, travel and work in EU countries. The inquiry is an opportunity to bring clarity and coherence to the politically divisive issues that the opt-out decision raises. In July 2012, Fair Trials published a Q&A on the UK’s 2014 opt-out decision, with the aim of explaining the key issues in simple terms and setting out Fair Trials’ position (See Annex I).49

3. We do not consider this to be an “all or nothing” decision as it has sometimes been portrayed. First, a full opt-out from all EU laws on crime and policing is not possible. Even if the UK decides to opt out of all EU laws adopted pre-Lisbon, it will still be bound by laws it has opted into since. These include the directives on the right to interpretation and translation and on the right to information in criminal proceedings. Secondly, the

provisions of Protocol 36 make it likely that the UK could decide to opt out and then opt back in to certain measures.50

4. The Home Secretary has stated that the Government’s current thinking is that the UK will opt out of all the pre-Lisbon measures and negotiate to opt back in to individual measures that it is in the national interest to re-join.51 It has undertaken to facilitate a debate and vote in each House of Parliament before a decision is made, although it is not yet clear what form this vote will take. Given this approach, the main focus of this submission is on whether the UK Government should select to opt back into the European Arrest Warrant (EAW) in its current form.

European Arrest Warrant

5. UK police and law enforcement authorities have made it clear that they want to remain a part of the EAW system.52 They have highlighted how the EAW has speeded up the extradition procedure, meaning that extradition requests issued by the UK to other EU Member States are dealt with quickly. They have also highlighted that it has facilitated the swift removal from the UK of people suspected or convicted of criminal offences in other EU countries to stand trial or serve their sentences.

6. Opting out of the EAW would mean that the UK’s extradition arrangements with other EU countries would be governed by the Council of Europe’s Convention on Extradition.53 Extraditions between the UK and Council of Europe members (as well as other signatories to the Convention, like the United States) who are not part of the EU currently take place within the framework of this treaty. All Member States are a party to it, but the system is different and it is a slower procedure than the EAW. Despite this, we believe that other Member States will continue to wish to engage in effective extradition arrangements with the UK, whether or not we remain a part of the EAW system.54

7. Fair Trials fully accepts the need for a fair and effective system of extradition within the EU. In an EU without borders, effective justice policy depends on efficient cooperation in transnational cases. However, we see numerous cases of injustice resulting from the overly rigid nature of the EAW system and its inability to safeguard fundamental rights and the principle of proportionality. See Annex 2 for some examples of these cases.

8. There is now widespread recognition of the need to reform the EAW. There have been three inquiries into the UK’s extradition laws in the UK and concrete reforms to the

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50 For commentary on this point see e.g. Steve Peers, “The UK’s planned ‘block opt-out’ from EU justice and policing measures in 2014”, Statewatch analysis 2012, available at http://www.statewatch.org/analyses/no-199-uk-opt-out.pdf : ‘The UK has the option, ‘at any time afterwards’, of notifying its wish to opt back in to the pre-Lisbon third pillar acts which ‘have ceased to apply to it’ (Article 10(5)). (...) it should be emphasised at the outset that in the large majority of cases, the UK will not need the consent of other Member States to opt back in to these acts.’
51 Announcement by Theresa May in the House of Commons, 15 October 2012, available at http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121015/debtext/121015-0001.htm#1210154000006 (Column 35)
52 See for example remarks by Bill Hughes CBE QPM, Former Director-General of the Serious Organised Crime Agency, at the Law Society on 29 November 2012
54 In 2011 for example, the UK received 6,760 EAWs from other Member States and surrendered 999 people (Council of the European Union Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2011)
EAW Framework Decision have been recommended. In June 2011, MEPs held a plenary debate on EAW reform in the European Parliament. Action to address the problems with the EAW Framework Decision was supported by MEPs from a wide political base and demonstrated a growing consensus on key areas for reform. The Commission has also expressed its concerns, acknowledging that there is “considerable room for improvement in the operation of the EAW system.”

9. As well as reform to the UK’s own implementing legislation, the Extradition Act 2003, there are a number of amendments required to the Framework Decision and we recommend the following:

**Proportionality:** A proportionality test should be introduced. Fair Trials sees numerous cases of extradition requests for minor offences and where the circumstances of the suspects and their families make the effect of extradition disproportionate.

**Protection of fundamental rights:** Courts in executing states should be given a greater opportunity, when alerted to a real risk of rights infringements, to seek further information and guarantees from the issuing state (and, ultimately, the power to refuse surrender if their concerns are not satisfactorily dealt with).

**Removal of warrants:** The Framework Decision should be amended to require states to remove an EAW where this has been properly refused by an executing authority. The lack of remedies available to people in this position, who risk re-arrest and imprisonment each time they cross an EU border and are therefore virtual prisoners in their home state, is unacceptable.

**Deferred extradition** should be permitted where a case is not “trial ready”. Fair Trials sees numerous cases where people are extradited under an EAW before any decision has been made to prosecute and are then held for months in prison under extremely difficult conditions awaiting trial. Fair Trials also hopes that greater use will be made of the European Supervision Order to address this problem.

10. We hope that the UK will lead the growing calls for sensible reforms to the EAW system in Europe. Given the severe human impact of unjust extradition, we do not believe that the UK should opt into the EAW in its current form. From 2014, the European Commission will have important powers to take the action needed to ensure that Member States comply with the EAW. Sensible reform now would ensure Member States could not be subject to such proceedings if their national law allows for a higher level of protection of basic rights than the EAW Framework Decision. We welcome the Home Secretary’s announcement that the Government will seek to work with the...
European Commission and EU Member States to consider which changes should be made to the EAW.\(^{59}\)

11. The EAW has been operating now for eight years and it would be the sign of a mature law-maker to review the legislation and introduce changes to address problems. This could be achieved by a legislative proposal from the Commission or through amendments to the Framework Decision initiated by Member States.\(^{60}\) We believe that the EU Court could also provide the legal certainty needed as to the human rights considerations which Member States must take into account when operating the EAW. The recent Advocate-General Opinion in the *Radu* case, for example, if followed by the Court, provides much needed confirmation of the need for national courts to consider both proportionality and human rights issues in EAW cases.

**Defence rights in the EU**

12. The mutual cooperation instruments introduced in an effort to create an “area of justice, freedom and security” within Europe are based on the principle of “mutual recognition”. Mutual recognition means that if one EU country makes a decision (for example that a person must be extradited to face a criminal trial or serve a sentence), that decision will be respected and applied throughout the EU. However, mutual recognition instruments such as the EAW have demonstrated that there is not yet a sound basis for mutual trust, not least because basic fair trial rights are not adequately protected in many EU countries.

13. The number of prosecutorial measures that are part of the opt-out decision mean that it is vital that the level of mutual trust is increased. Sadly, until recently, the UK has done little to support EU initiatives in this area, preventing EU defence rights protections being passed under the Lisbon Treaty to accompany the EAW. This was a mistake and has contributed to the injustice caused by the EAW. The reforms brought about in the 1980s to police procedure and practice mean that the UK has excellent practice to contribute and there are clear benefits to us in ensuring that fair trial rights, taken for granted in the UK, are protected in every EU Member State.

14. In recognition of the fact that fair trial rights are not adequately safeguarded in many EU countries, the EU adopted the Roadmap on procedural defence rights (the *Roadmap*) in 2009. This gave a mandate for a series of laws designed to ensure better protection of defence rights in Europe. The first two laws under the Roadmap, guaranteeing the right to interpretation and translation in criminal proceedings and to information on arrest, have now been passed. The UK opted in to these laws, which as post-Lisbon measures will continue to bind it regardless of the 2014 decision. Disappointingly, the UK has chosen not to opt in to the third law under the Roadmap, which will provide the right for suspects to access a lawyer on arrest.

**The European Supervision Order**

15. We believe that the UK has also failed to implement the European Supervision Order (ESO), a Framework Decision passed under the Lisbon Treaty which was supposed to

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\(^{60}\) Under the Lisbon Treaty, the backing of seven Member States is needed to initiate legislation.
have been implemented by all Member States by 1st December 2012. The ESO lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. This could have a huge impact on people arrested abroad, who are often denied bail simply because they are nonnationals. Unless the ESO is implemented into UK law, it will not be available to the many British citizens who may spend months or years in foreign prison awaiting trial away from home, often in horrendous conditions.

16. The Government has attributed this failure to comply with its EU obligations to the fact that “the UK’s future participation in those measures within the scope of the 2014 decision, which includes this measure, is still being considered.” The EU criminal justice system will not stand still for two years while the UK considers the opt-out decision. The ESO is an important measure, and it highlights the need to consider all 130 laws subject to the opt-out decision and not just those that assist prosecutors and law enforcement officers.

Jurisdiction of the Court of Justice of the European Union

17. Much has been made of the effect that the CJEU’s expanded jurisdiction in 2014 will have on the UK if it were to remain a part of pre-Lisbon crime and policing laws. This topic was not covered in detail in our Q&A published in June.

18. Arguments have been made that ‘the CJEU has a long history of extending the remit of the EU institutions through judicial activism’ and that it has ‘radically changed the meaning and scope of EU rules’. Some fear that, due to an apparent failure of the Court to agree with Member States’ submissions in a number of cases, the CJEU has an agenda that is alien to national legal systems and that this will force UK courts to apply laws in a manner that is not consistent with the statute books. There is a particular concern that the UK will be disproportionately affected by the CJEU’s judgments due to its common law system.

19. The Court’s judgments provide little evidence to support these views. Many cases have in fact had a positive effect on both British citizens and on the national interest. In the case of Cowan, for example, a British citizen subject to a violent assault on the Paris metro was able to claim compensation as a recipient of services, bringing about a change in French domestic law which had previously limited such claims to French nationals. In cases involving criminal law, the Court has shown reluctance to interfere with Member

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62 Written response to Dominic Raab MP’s question to the Secretary of State for Justice, HC Deb, 1 November 2012, c398W


64 See e.g. Open Europe, “An unavoidable choice: More or less EU control over UK policing and criminal law”, available at http://www.openeurope.org.uk/Content/Documents/PDFs/JHA2014choice.pdf

65 See e.g. Case C-127/08 Metock and others v Minister for Justice, Equality and Law Reform, judgment of 25 July 2008. The concept of direct effect has been instrumental in breaking down trade barriers within the EU and creating the internal market which has been of enormous benefit to the UK.

66 Case C-186/87 Ian William Cowan, Judgment of 2.2.1989
States’ domestic law. In relation to the EAW, it has upheld provisions of national law in several cases.

20. The CJEU is the EU’s highest court. National courts refer questions to it on the validity and interpretation of EU laws and its rulings help to ensure laws are applied consistently by Member States throughout the EU. The Court’s judgments can provide welcome clarity on provisions of EU law, as demonstrated by the Radu case. From December 2014, the CJEU will be able to hear references on EU crime and policing laws from all national courts. The CJEU also enforces EU law by ruling on infringement actions brought against EU countries by the European Commission for failure to implement EU laws or apply them consistently with fundamental rights. The UK courts have acknowledged the benefit of the role of the CJEU in this area. In a recent decision, a UK Supreme Court justice commented that the inability of the court to refer a question to the CJEU made it difficult to interpret unclear points of EU law.

Recommendations and conclusions

21. Fair Trials recommends that the UK uses the 2014 decision as an opportunity to build on the growing consensus for reform of the EAW to create a fair and effective system of extradition within Europe. Unless these flaws are remedied by CJEU case law, we believe that the UK should not opt into the EAW without first securing political commitment to key reforms to the European legislation that created the EAW.

22. There is a danger that the opt-out decision will focus on picking and choosing those measures that are perceived to combat cross-border crime without building a sound basis for the trust needed to underpin mutual recognition measures like the EAW. Such measures will not operate fairly unless they are accompanied by effective guarantees of basic fair trial rights. The UK should play a constructive role in the ongoing debates on important procedural rights measures such as the directive on the right to access a lawyer. The UK should also implement the European Supervision Order, which could prevent Britons being detained for months or years pending trial in other EU Member States. These measures will guarantee respect for the rights of the thousands of Britons exercising their right of free movement across the EU every year.

23. Fair Trials welcomes the role that the CJEU can play both in improving the consistency of the application of EU law and ensuring that measures are applied in conformity with basic fair trial standards. The case-law shows that it can provide helpful interpretation on

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68 See e.g. Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad, judgment of 3 May 2007, in which the CJEU agreed with the Member States that it was not contrary to the principle of legality for Article 2(2) of the EAW Framework Decision to abandon double criminality checks in respect of the Framework List offences. See also Case C-123/08 Wolzenburg, judgment of 6 October 2009, in which the Court found that the Dutch law laying down a five-year minimum residence requirement before a non-national could benefit from the protection offered by Article 4(6) EAW was justified.

69 The UK and 8 other countries have blocked national courts from referring questions on pre-Lisbon EU crimes and policing laws until 2014. From December 2014, the countries will no longer be able to stop their courts making these references.

70 The only exception will be for the UK and Ireland, for those EU laws that they have chosen not to participate in, or (in the UK’s case) opted out of as part of the 2014 decision.

71 Assange v The Swedish Prosecution Authority, [2012] UKSC 22, dissenting judgment of Lady Hale, paras. 179 and 185
unclear points of EU law to ensure accurate and consistent implementation in all Member States. The UK has an excellent record of implementing and complying with EU measures, and it is important to recognise the benefits that the extended jurisdiction of the CJEU could bring, both to UK citizens and to the courts by enabling them to refer questions of interpretation.

14 December 2012
Annex 1

The UK’s right to opt out of EU crime and policing laws from December 2014

Frequently Asked Questions

July 2012

Working for a world where everyone’s right to a fair trial is respected, whatever their nationality, wherever they are accused.

Context

The debate on a possible UK opt-out of EU crime and policing laws in 2014 is set to heat up, as the UK prepares to decide on our future participation in a raft of EU laws. These include the European Arrest Warrant, a fast-track system of extradition that has revolutionised the way wanted persons are moved from state to state, removing many safeguards.

The opt-out decision will impact on how UK police, prosecutors and courts work with partners across Europe to investigate crime, extradite people, share criminal records, exchange evidence and liaise with Europol and similar EU bodies. The issues raised are complex, but important for the millions of British citizens who live, travel and work in other EU countries.

With the deadline a year before the date currently scheduled for a general election, this looks set to be a big party-political issue. Coalition tension is foreseen, with the Liberal Democrats’ pro-EU stance meeting pressure from many Conservatives who demand the “repatriation of powers” from the EU and from Europe’s regional courts at Strasbourg and Luxembourg. As one think-tank has observed: “The Conservatives and Liberal Democrats have long held opposing views on the [European Arrest Warrant] that will be difficult to climb down from and will make the collective decision very tough”. 72

The Government has not yet expressed its position on the 2014 issue, but has promised a vote in Parliament before it decides. Those seeking a full opt-out say we could opt back into laws “deemed vital”. 73 Yet the consequences of such an approach are legally, financially and operationally unclear, as the Lord Chancellor and others have acknowledged 74.

In reality, however, this is less about repatriating powers from Brussels than about degrees of future participation in a system already in place. As we explain, a total opt-out is legally impossible, leaving aside its possible merits or drawbacks. The UK should, in our view, make its future participation conditional on securing reforms to the European Arrest Warrant, a law that is currently undermining justice and wasting resources. The 2014 choice offers a narrow window of opportunity to build on the growing consensus for this reform.

This paper seeks to explain the key issues in simple terms. It concludes that the key question for the Government is: how does the UK ensure effective cooperation in the fight against crime across EU borders, without sacrificing rights and liberties in the process?

72 Open Europe blog post 21 March 2012
73 Letter to David Cameron “Repatriate powers on crime and policing” published Telegraph 6 February 2012
74 Evidence to Lords EU Justice and Institutions Sub-Committee 18 January 2012
Q1 What is the opt-out decision about?

Two things: (1) how far the UK carries on participating in EU laws on crime and policing; and (2) how far it will accept the jurisdiction of the Court of Justice of the EU (EU Court) over how it applies those laws and how they are enforced.

The Lisbon Treaty\(^75\) changed the way EU laws on crime and policing are made and enforced at EU level, but some of the changes only take effect in the UK from December 2014 – a grace period that the UK wanted. Any of these EU laws the UK is participating in as at December 2014 will fall under the EU Court's jurisdiction, so the European Commission will be able to take infringement proceedings in that Court if the UK fails to apply the laws properly. The UK negotiated a protocol giving it five years to decide if it wanted this. It must notify the EU of any opt-out decision by no later than 1 June 2014 and this decision would take effect from December 2014. We explain more about the EU Court’s role later (Q8). We also explain why a complete opt-out of all EU crime and policing laws is not an option, as the opt-out only covers laws passed before Lisbon – for laws the UK has chosen to take part in since Lisbon, the EU Court’s jurisdiction cannot be opted out of. We give examples of these under Q5 below.

Q2 What are the principles underlying EU crime and policing laws?

Free movement and open borders

In the late 1990s border controls were lifted between many EU countries and this process has continued since, with EU law now guaranteeing free movement for all EU citizens inside the EU area. Even where border controls still operate (like the UK and Ireland), EU citizens have an automatic right to enter if they show a valid passport on arrival. Police and prosecutors understandably needed new powers to co-operate across borders, so that criminals cannot exploit open borders to escape justice or commit further offences.

Mutual recognition

Terror attacks in the United States led to rapid consensus among EU countries that faster, simpler cooperation across borders was needed and the way to achieve this was through “mutual recognition” of prosecutors’ and judges’ decisions across the EU, without delay or red tape. So, if a judge in one EU country wanted a suspect or convict extradited there, other countries had to cooperate and extradite the person, with very little discretion to say “no” or raise questions.

The underlying assumption was that, although EU countries had their own laws and procedures, they all complied with human rights, including the rights not to be tortured or treated in an inhuman or degrading way and to receive a fair trial. This assumption is, at best, optimistic: fundamental rights are not protected to acceptable standards in many parts of the EU despite all EU countries belonging to the European Convention on Human Rights.

Subsidiarity

\(^75\) (in force as of December 2009)
The laws the EU can make on crime and policing are limited by the principle of “subsidiarity”: laws can only be made where countries acting alone could not achieve the same result. So, for example, we have EU laws enabling judges and police to cooperate on extradition requests and laws on evidence exchange and prisoner transfers. We also have EU laws on the basic procedural rights of suspects, defendants and crime victims, introduced in belated recognition that “mutual recognition” requires a stronger foundation of rights protection.

The EU also has limited powers to make substantive (as distinct from procedural) criminal law – in other words, to outlaw certain types of conduct and lay down sanctions for very serious crime with a cross-border dimension. Under the Lisbon Treaty this covers crimes like terrorism, trafficking in human beings, cyber-crime and organised crime. None of this stops the UK from making its own crime and policing laws. So, if the UK wants to make laws giving greater rights to crime suspects or victims than those laid down by EU law, it can. There are legal question marks over what happens when the UK makes a law that directly conflicts with an EU law. The UK would be in breach of EU law by doing so but there are currently no enforcement procedures the EU could bring to stop this.

Q3 How are EU crime and policing laws made?

Before the Lisbon Treaty, the EU used “framework decisions” to make crime and policing laws intended to have effect in all EU countries. After Lisbon, laws in this area are made in the form of “directives”, using a different decision-making process.

Framework decisions and directives both require member states to achieve particular results without dictating the means of achieving them. But directives, unlike framework decisions, allow the European Commission to bring infringement proceedings against EU countries that fail to transpose them into domestic law. The other big difference is that framework decisions could only be passed by unanimous vote of all EU countries (meaning a single state could block new laws they did not want); whereas directives are decided by a qualified majority. Finally, Members of the European Parliament had no binding voting powers on framework decisions, but do vote on directives and could in theory block them.

Due to the powers the EU Court has to enforce directives and ensure EU countries apply them in accordance with their terms and with fundamental rights, the UK wanted a right to choose whether to participate at all in post-Lisbon directives on crime and policing. It therefore negotiated an individual opt-in right, for every new directive proposed. The way this works is explained under Q5 and Q6.

Q4 What are the main examples of pre-Lisbon laws on crime and policing?

- European Arrest Warrant Affects thousands each year and has generated high profile cases of injustice. In operation for 8 years, it has speeded up extradition and limited powers

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76 There were also Conventions – but these only operated when Member States accepted them.
77 This is separate to the 2014 opt-out – it will continue indefinitely and applies to Ireland as well as the UK.
78 There are over 100 such laws: a full list is contained in a letter of 21 December 2011 from the Home Secretary, available at p 24ff of a report by Open Europe: “An unavoidable choice” http://www.openeurope.org.uk/Content/Documents/Pdfs/JHA2014choice.pdf
of refusal. It has resulted in big increases in extradition requests, with some countries using it for minor as well as serious crimes.

- **European Supervision Order** Comes into force in December 2012. Could have a huge impact by preventing thousands of people not convicted of any crime from spending months or years in prison awaiting trial, allowing them instead to be bailed back home until trial. Could be good news for many UK citizens awaiting trial in other EU states. Currently, most do not get bail, simply because they are non-nationals.

- **Prisoner transfer law** Will simplify the way countries transfer convicted prisoners who are from other EU countries back to their home state to serve remaining sentence. Premised on the need to improve rehabilitation prospects, it would allow the UK to transfer EU nationals from other states back home with minimum red tape. It would also mean UK prisoners in other EU countries could be transferred home more easily.

- **Exchange of criminal records data** ECRIS (the European Criminal Records Information System) enables the sharing of criminal records data across EU borders. Every EU country has a central authority that stores the criminal records of its citizens and sends these to other countries on request.

- **Financial penalties law** This allows fines of €70 or more, imposed in one country, to be enforced in another. Potentially a good alternative to extradition in less serious cases, but under-used.

- **Europol, Eurojust, police/prosecution cooperation** EU laws cover how the UK and other EU countries work with these bodies, sharing information on criminal records, transmitting extradition requests and helping coordinate complex cross-border investigations.

**Q5 What about crime and policing laws made since Lisbon?**

- **Defence rights** Two directives have been adopted in this area and two more are planned. The first will ensure that anyone facing charges in an EU country gets access to interpretation and translation if needed. The second guarantees that suspects receive information about their basic legal rights and the charges against them. They come into force in 2013 and 2014. Further laws on the right to legal advice and protections for vulnerable suspects (like children or disabled people) are under discussion.

- **European Investigation Order (EIO)** Likely to be adopted in late 2012, the EIO will introduce major changes to the system by which evidence is obtained and shared between EU countries in criminal cases. “Requests” for evidence or investigations will become “orders” that other EU countries must comply with, by fixed deadlines.

**Q6 What approach has the UK taken to EU crime and justice laws?**

Essentially, a pick-and-choose one. Pre-Lisbon, the UK voted in favour of law enforcement measures like the European Arrest Warrant but, along with a few other countries, vetoed a law protecting defence rights. Post-Lisbon, there is no longer a veto, but a protocol to the

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79 (notably, Poland, Romania and Hungary)
Lisbon Treaty now lets the UK (and Ireland) choose whether to opt in or stay out of new proposed EU laws, on a case-by-case basis. Any new EU law proposed can be opted into within 3 months of being proposed\(^{80}\): once “in”, the UK can negotiate on the text, but has no right to opt out once the measure is adopted. So far, it has decided as follows\(^{81}\):

- **Defence rights:** The UK opted into the two directives on defence rights in recognition that, though it complied with them already, many EU countries did not. More recently, the UK has chosen not to opt into a proposed law guaranteeing suspects the right to legal advice and representation and the right to contact consular officials and family members on arrest, stating that the measure goes further than necessary. It has signalled that it might choose to participate after the directive has been adopted into EU law – an option also available under the special UK (and Irish) protocols.

- **European Investigation Order (EIO):** The Home Secretary told Parliament in 2010 that the UK would opt into this law and would benefit from its more streamlined system for cross-border evidence sharing. She warned that if we did not opt in, our own evidence requests would be sidelined, once other EU countries were using the EIO.

**Q7** In 2014, can we opt out of laws we have opted into since the Lisbon Treaty?

No. Even if we opt out of all EU laws adopted pre-Lisbon, there is no way we can opt out of laws we have opted into since. This means we stay in the EIO (assuming it gets adopted) and the defence rights laws (above) even if we opt out of all pre-Lisbon laws and do not opt into any more EU laws.

**Q8** What is the Court of Justice of the EU?

There is confusion in some quarters about the EU Court. Based in Luxembourg, it is the EU’s highest court. National courts refer questions to it on the validity and interpretation of EU laws. Its rulings help to ensure laws are applied consistently in all EU countries. The Court’s role has evolved as EU countries have conferred more powers onto the EU. It originally dealt with laws on trade, agriculture and the internal market. Now it also deals with social policy, environment, judicial cooperation and other areas. The UK and 8 other countries have blocked national courts from referring questions on pre-Lisbon EU crime and policing laws, at least until 2014.

The EU Court also enforces EU law, by ruling on infringement actions brought against EU countries by the European Commission for failure to implement EU laws or apply them consistently with fundamental rights like free movement and non-discrimination and general principles of EU law such as proportionality. A key role is thus to ensure fundamental rights are observed in areas that fall within its jurisdiction. Its decisions are binding on all EU member states.

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\(^{80}\) Alternatively, even if the UK does not opt in during these first three months, it can notify the Commission after the law’s adoption that it wants to participate.

\(^{81}\) The UK has also opted into new Directives on child sex abuse and on people-trafficking; as well as a proposed Directive on the rights of crime victims.
The EU Court’s role in the area of EU crime and policing laws will expand when changes brought in by the Lisbon Treaty take effect. From December 2014, its jurisdiction to take references and to rule on infringements will apply to all EU countries uniformly: countries can no longer stop their courts making references and all will be subject to potential infringement proceedings. The only exception will be for the UK and Ireland, for those EU laws that they have chosen not to participate in, or (in the UK’s case) opted out of in December 2014 and not opted back into after that.

The EU Court is different to the European Court of Human Rights, which is based in Strasbourg and has jurisdiction over all 47 Council of Europe countries, not just the 27 EU countries. The Strasbourg Court hears complaints about violations of the rights enshrined in the European Convention on Human Rights. It can award compensation to individuals whose human rights have been infringed, whereas the EU Court has no similar power.

**Q9 Can the UK avoid the EU Court’s jurisdiction by using the bloc opt-out?**

Not completely. The UK cannot opt out of those EU laws on crime and policing adopted since the Lisbon Treaty that it has chosen to participate in. So, the EU Court will be able to rule on infringement cases brought by the European Commission in relation to these laws where, for example, the UK fails to implement a directive properly or apply it in accordance with EU principles or fundamental rights. This could happen either when an individual brings infringements to the Commission’s attention or when the Commission acts on its own initiative. UK Courts will also be free to refer interpretation questions to the EU Court on these post-Lisbon laws, as soon as they are in force.

This contrasts with the position on pre-Lisbon laws like the European Arrest Warrant: the EU Court will only have jurisdiction over how the UK applies these laws after the transition period ends in December 2014, assuming we stay in them (or opt back into them, after an opt-out in December 2014).

**Q10 Could the EU Court interfere in UK police operations?**

The Lisbon Treaty says the EU Court cannot review the “validity or proportionality” of operations by national police or other law enforcement bodies, or the actions they take to maintain law and order and safeguard national security. So, if the Met Police decided to arrest everyone at a demonstration, the EU Court could not rule against the UK and hold that the police acted illegally or excessively.

**Q11 Must we accept a European Public Prosecutor, if we do not opt out en bloc?**

No. Under the Lisbon Treaty, establishing this office would need unanimity among all EU states. Failing unanimity, if nine states or more want it, it could operate just among those. Even if this happened, the UK could never be forced to relinquish any power to a European Public Prosecutor. No legislative proposal for this office exists as yet. The role is intended for prosecuting serious frauds on the EU institutions, but could be expanded by agreement.

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82 The European Union Act 2011 in fact says the UK cannot join the European Public Prosecutor project without a referendum and an Act of Parliament.
Q12  So, what happens if we opt out of all the measures we can opt out of?

The UK will still have to pass domestic laws enacting the EU measures it has opted into post-Lisbon, plus any future laws it opts into. The UK will be under the jurisdiction of the EU Court in any infringement case brought by the European Commission concerning those laws, once adopted. UK Courts will no longer be barred from referring interpretation questions on these laws to the EU Court. (UK Courts already do this in other areas of law.)

Q13  Can we opt out, then selectively opt back into the laws we want?

Yes, but only if the European Commission (or for some laws, the European Council) agrees: conditions can be attached and there could be financial consequences. The detail would need approval and this could take several months. The UK might not get its own way on everything. James Brokenshire, Minister for Crime and Security, has stated: “We believe that the Commission would attach conditions, for instance, they might only allow us to join groups of related measures, some of which we might like and others we might not.”

Q14  How does all this affect the European Arrest Warrant?

At Fair Trials International we have highlighted many cases where people have been extradited under this system, despite serious risks of rights violations. Yet it would be wrong to say that these problems can only be solved by leaving the Arrest Warrant system. Opting out would mean going back to the system of extradition in use before the EAW (and still used by other non EU countries in Europe). EU countries, when dealing with the UK on extradition, would have to apply a different system to the one they use for other EU states. Senior police officers say this would cause delays and could risk the UK’s own extradition requests going to the bottom of the pile when other EU countries are operating the fast-track Arrest Warrant system with its strict deadlines.

An alternative is to fix the EAW’s defects. There have now been three inquiries into our extradition laws and concrete reforms to the Arrest Warrant have been recommended, some of which need law changes at EU level – changes the UK could not influence unless it remained “in”. The European Commission and many MEPs have also acknowledged that there is room for improvement in this law. One obvious solution is for the UK to condition its future participation on EAW reform in key areas recommended by review bodies and other experts. Building in a proportionality test to stop the misuse of the Arrest Warrant for trivial cases is one area where consensus should be possible.

Q15  Would opting out “repatriate powers” to the UK?

By its very nature, cross-border crime requires a coordinated system where all countries work to the same rules. Similarly, the EU is an area where 27 countries have different legal systems, but the same obligations to safeguard rights. So it makes sense that EU countries “pool” their sovereignty, making decisions collectively through the EU institutions, on areas like extradition, prisoner transfer, bail decisions between EU states and exchanging criminal records data. This is an area where EU laws meet the “subsidiarity” test discussed earlier.

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83 The Commission saw the key problem as disproportionate use of EAWs for minor crime. It inserted a clearer proportionality guideline in the (non-binding) Handbook for issuing EAWs applicable to countries wishing to issue EAWs. The Commission has said it does not rule out legislative change if this does not solve the problem.

84 Fair Trials International has prepared a briefing on necessary amendments to the EAW framework decision.
So, whilst a full opt-out of pre-Lisbon laws would leave the UK free of obligations to comply with these, other systems would have to be introduced to take their place, where necessary to enable the authorities to tackle crime and cooperate with other EU countries properly in cases with a cross-border element.

Whether we choose a bloc opt-out or not, for any future proposals on EU crime and policing laws, the UK government will always have the right to choose whether to participate (opt in) (see above, Q6). This does not change in 2014. If the UK opts into a new law, it can take part in EU level negotiations on what the law says. The UK’s elected MEPs will also have the right to debate and vote on the laws. Finally, the UK will have the right to vote in the European Council, on whether to adopt the final text. Under Lisbon rules, no country has the power of veto. A 2014 opt-out would not change this.

Finally as discussed above, we cannot opt out in 2014 of the laws we have chosen to take part in, since Lisbon. So the issue is less about repatriation of powers than about degrees of future participation in an EU-wide legal system already in place. Under this system, the UK and other EU countries have pooled their collective sovereignty, to make and enforce laws on cross-border crime and policing together at EU level. The real question is whether continuing to take part in that system serves our national interest better than going it alone (to the extent that that is possible).

Q16 What is Fair Trials International’s position?

Our work involves helping people who are facing charges in other countries to protect their fair trial rights. We use the lessons learned from hundreds of cases, many involving British citizens, to analyse the wider issues, both domestically and at EU level. We look at every EU law in the field of crime and policing from this standpoint. Where EU laws undermine fair trial rights, we lobby for reform. Where EU laws can improve the protection of UK citizens facing charges elsewhere in Europe, we support their adoption. We have criticised some EU justice measures for failing to protect fundamental rights and for blindly trusting all EU countries to uphold rights. For example, we have highlighted flaws in the European Arrest Warrant and the proposed European Investigation Order.

We have welcomed and promoted EU laws designed to protect basic defence rights like access to a lawyer and an interpreter and alternatives to lengthy pre-trial detention. These laws should help British people – millions of whom live, work and holiday in other EU countries every year – to feel confident that they are not leaving their rights at home when they travel. But in practice, this will only happen if the standards laid down in EU laws are actually complied with by all EU countries, in line with human rights standards. The EU Court has an important role here. In addition to its enforcement powers, a further advantage would be that the UK would be free to seek rulings that an EU law goes beyond the proper legal remit of EU law-making as agreed by treaty. This is an important safeguard of national sovereignty and the subsidiarity principle.

Conclusion

- The UK cannot “go it alone” on crime and justice. In a Europe without borders, millions of Britons will continue travelling for business, study or pleasure, long after 2014. The need for law enforcers to cooperate across borders will not change. The UK could benefit from continuing to take part in EU criminal justice cooperation
while also building stronger safeguards for defence rights. This would help strengthen the rights of British citizens facing extradition to, or trial in, another EU country.

- The UK is not the only member state to have concerns over the European Arrest Warrant, the proposed Investigation Order, and the insufficient protection for fair trial rights and civil liberties in much of the EU today. Other countries like Germany, the Netherlands and Ireland are also suffering the effects of a flawed extradition system with no proportionality test and have seen public concern about the effects of appalling pre-trial detention conditions endured by their citizens, following extradition. The UK should work with like-minded states to build a consensus for reform, using the momentum of its 2014 deadline to push this agenda forward.

- Whatever decision is taken, the UK will remain subject to the rulings of the EU Court on the EU crime and policing laws we cannot opt out of. In the worst of all worlds, the UK will opt out en bloc from those measures it can opt out of, then opt back in, but only to prosecution measures like the European Arrest Warrant and not other measures that could lessen its worst effects: measures like the European Supervision Order. This would be a wasted opportunity. Instead the UK should now work with the rest of the EU to fix what is not working, most importantly, the European Arrest Warrant. It should also use its influence to push for better standards on fair trial rights and pre-trial detention, promoting alternatives to remand in custody in suitable cases. The emphasis should be on ensuring effective cooperation, without sacrificing rights and liberties in the process.

Annex 2

The European Arrest Warrant – Cases of Injustice

Wanted for a crime he could not have committed – Edmond Arapi

Edmond’s case highlights:

- The danger of placing complete confidence in the fair trial safeguards of requesting countries, merely on the basis that they are legally bound to comply with Article 6 ECHR.
- The need for legal representation in the issuing State.

Edmond Arapi was tried and convicted in his absence of killing Marcello Miguel Espana Castillo in Genoa, Italy in October 2004. He was given a sentence of 19 years, later reduced to 16 years on appeal. Edmond had no idea that he was wanted for a crime or that the trial or appeal even took place. In fact, Edmond had not left the UK at all between the years of 2000 to 2006. On 26 October 2004, the day that Castillo was murdered in Genoa, Edmond was at work at Café Davide in Trentham, Staffordshire, UK and attending classes to gain a chef’s qualification. Edmond was arrested in June 2009 at Gatwick Airport on an EAW from Italy, while he was on his way back from a family holiday in Albania. It was the first he knew of the charges against him in Italy.

There was a raft of contradictory expert evidence about whether Edmond would be entitled to a full retrial after extradition to Italy, and whether his alibi evidence (and the witnesses he would need to testify about his activities and whereabouts on the day of the murder) would
be admitted at any trial. Appeals had been exhausted in Italy (again, without Edmond’s knowledge – they were attended on his behalf by a public defence lawyer and the conviction had been upheld).

It seemed far from clear that Italian law guaranteed a re-trial for defendants tried in absentia, where the conviction had been appealed. It was clear that Edmond risked being held for years on remand awaiting trial, as Italy has one of the worst records in Europe for delays in the justice system. Nevertheless, having heard conflicting evidence on Italian procedural law, the English court ordered his extradition on 9 April 2010.

FTI worked extensively on Edmond’s case; attempting to persuade the Italian authorities to withdraw the EAW, working with Albanian lawyers to help establish the identity of the real perpetrator, and raising the profile of his case with the public and politicians.

On 15 June 2010, the day the appeal against his extradition order was to be heard at the High Court, the Italian authorities decided to withdraw the EAW, admitting that they had sought Edmond in error. They provided information indicating that Edmond’s fingerprints did not match those at the crime scene. If Edmond had been provided with legal representation in Italy from the outset, then the fact that he was the victim of mistaken identity could have been discovered much sooner. Edmond narrowly avoided being separated from his wife and children, including a newborn son, and spending months or years in an Italian prison awaiting a retrial.

**Acquitted in 1989, yet British grandmother was still wanted 20 years on – Deborah Dark**

*Deborah’s case highlights: the need for EAWs to be removed immediately by issuing States once an executing State has declined to execute*

In 1989, Deborah Dark was arrested in France on suspicion of drug related offences and held in custody for eight and a half months. Her trial took place later in 1989 and the court acquitted her of all charges. She was released from jail and returned to the UK. The prosecutor appealed against the decision without notifying Deborah or her French lawyer. The appeal was heard in 1990 with no one there to present Deborah’s defence. The court found her guilty and sentenced Deborah to six years’ imprisonment. Again, she was not informed that an appeal had taken place, nor notified that her acquittal had been overturned. As far as she was concerned she had been found not guilty of all charges and was free to start rebuilding her life. In April 2005, fifteen years after the conviction on appeal, an EAW was issued by the French authorities for Deborah to be returned to France to serve her sentence. She was not informed about this.

In 2007, Deborah was arrested at gunpoint in Turkey, while on a package holiday with a friend. The police released her, unable to explain the reasons for her arrest. Upon her return to the UK, she went to a police station and tried to find out the reasons for her arrest. She was told that she was not subject to an arrest warrant. In 2008 Deborah travelled to Spain to visit her father who had retired there. On trying to return to the UK, she was arrested and taken into custody in Spain, where she faced extradition to France. Deborah refused to consent to the extradition, and was granted an extradition hearing. After one month in custody, the Spanish court refused to extradite Deborah on the grounds of unreasonable delay and the significant passage of time. Deborah was released from prison and took a flight back to the UK. However, her ordeal was not over.

On arrival in the UK, Deborah was arrested again – this time by the British police at Gatwick airport. Once again, she refused to consent to the extradition and was released on
Fair Trials International—Written evidence

bail pending another extradition hearing. The English court refused the extradition in April 2009 due to the passage of time. As there is no provision for the withdrawal of the EAW by the issuing State in such situations, Deborah spent years as an effective prisoner in the UK – feeling unable to leave the country due to the risk of being re-arrested on the same EAW. In May 2010, after FTI helped build public and political support for Deborah’s case, France finally agreed to remove the EAW, but only after Deborah had spent three years as an effective prisoner in the UK due to the risk of re-arrest.

Extradited after a grossly unfair trial – Garry Mann

Garry’s case highlights: the need for courts to exercise discretion to refuse extradition on human rights grounds

Garry Mann, a 51-year-old former fireman from Kent, went to Portugal during the Euro 2004 football tournament. On 15 June 2004, while Garry was with friends in a bar in Albufeira, a riot took place in a nearby street. Garry was arrested along with other suspects some four hours after the alleged offences. He was tried and convicted, less than 48 hours after his arrest. He had no time to prepare his defence and standards of interpretation at the trial were grossly inadequate. The proceedings were interpreted by a hairdresser who was an acquaintance of the judge’s wife.

He was convicted following a widely publicised trial in Albufeira and sentenced to two years’ imprisonment on 16 June 2004. On 18 June 2004 he voluntarily agreed to be deported and was told that, provided he did not return to Portugal for a year, he would not have to serve the sentence.

Back in the UK, Garry tried unsuccessfully to appeal his conviction. In October 2004 he lodged an appeal to the Constitutional Court in Lisbon but heard nothing from the Court. Separately, the UK police applied for a worldwide football banning order against Garry on the basis of the Portuguese conviction, but in 2005 an English Court held he had been denied a fair trial in Portugal and refused to make the banning order.

Garry was astonished when in 2009 he was arrested on an EAW, alleging he was wanted in Portugal to serve a two year prison sentence. In August 2009 an English court ordered his extradition to Portugal.

The case was heard by the English High Court in March 2010. Lord Justice Moses described the case as an "embarrassment" and said: "If there was a case for mediation or grown up people getting their heads together then this is it." The judge said that new evidence from the Foreign and Commonwealth Office "lends force to his belief that a serious injustice" had been committed against Mr Mann. Despite this, there were no available legal grounds upon which to refuse Garry’s extradition.

Garry was surrendered to prison in Portugal in May 2010. He was transferred back to the UK in May 2011 and was finally released in August.

Student extradited to horrendous prison conditions – Andrew Symeou

Andrew’s case highlights: the need for courts to exercise discretion to refuse extradition on human rights grounds

FTI client, Andrew Symeou, tried and failed to resist extradition to Greece on Article 3 grounds. After extradition, Andrew spent a harrowing 11 months on remand in custody in Greece: his trial commenced recently but has been adjourned twice due to unavailability of
qualified interpreters and court strikes. He has described to his parents the conditions he was held in: a university student with no previous criminal record who still lived with his parents, he spent his 21st birthday in a notoriously dangerous prison, Korydallos. His father Frank described some of the conditions in his oral evidence to the Committee on 1 February. The conditions included:

- filthy and overcrowded cells;
- sharing cells with up to 5 others including prisoners convicted of rape and murder;
- violence among prisoners: one was beaten to death over a drug debt;
- violent rioting;
- cockroaches in cell, fleas in bedding, prison infested with rats and mice shower room floor covered in excrement.

This description conforms with information contained in the numerous expert reports placed before the court in Andrew’s Article 3 challenge to extradition. The Committee for the Prevention of Torture (CPT) had reported the previous year that “persons deprived of their liberty in Greece run a real risk of being ill-treated”. Amnesty International and other human rights NGOs had similarly criticized Greece’s prisons in the harshest terms. This evidence was held insufficient as a bar to extradition, because Andrew could not prove that any of this would happen to him: and because in any case mistreatment was sometimes part of the European detention culture:

[T]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries.\(^{85}\)

In hindsight, it is difficult to know what more Andrew Symeou could have done to bring the risk he faced to the court’s attention and invoke his Article 3 rights before his extradition. He had never been to Greece before he went there as a student on his first holiday without his parents. He had not even been arrested or questioned by police in Zante and had no firsthand experience of Greek police procedures, remand facilities or prison conditions, before his extradition. The same is true of the majority of people extradited under the EAW system.

Information about the conditions Andrew was held in on remand was set out in detail in affidavit evidence from a solicitor who had visited him, as well as from Fair Trials International’s caseworker, in support of another recent challenge on Article 3 grounds. Again, it was held that the test was not met and extradition was ordered.\(^{86}\) Following numerous delays due to prosecution errors, Andrew was finally released pending trial in June 2010. His four-year ordeal finally came to an end on 17 June 2011, when he was acquitted by a Greek court.

Extradited before being charged – Michael Turner and Jason McGoldrick

*Michael and Jason’s case highlights: the need for the wide variation in standards of procedural rights protections across the EU to be taken into account in EAW proceedings.*

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\(^{85}\) Symeou v Public Prosecutor’s Office at Court of Appeals, Patras, Greece [2009] EWHC 897 (Admin) at para 65

\(^{86}\) Herdman and ors v City of Westminster Magistrates Court [2010] EWHC 1533 (Admin)
Hungarian authorities sought the extradition of Michael Turner (right), a 27 year old British national from Dorset, and business partner Jason McGoldrick (37), following the failure of their business venture in Budapest.

Michael was extradited to Hungary under an EAW on 2 November 2009 and was held in prison for four months, during which time he was interviewed only once by police. He was released from jail on 26 February 2010 and was allowed to return to the UK, but was requested to return for further police interviews in April.

The EAW is intended to be used to extradite people to serve a prison sentence or for the purposes of a criminal prosecution. In Michael’s case, however, an extradition took place even though no decision had yet been made to prosecute him. This improper use of the EAW subjected Michael and Jason to four unnecessary months in prison in extremely difficult conditions.

Michael’s father, Mark Turner, has described how the pair were held in separate parts of a former KGB prison and were not allowed to contact family members or consular officials. Michael had to share a cell with three other prisoners and was only allowed out of the cell for one hour a day. Two weeks into his detention Michael was wearing the same clothes in which he had been arrested and had not been allowed to have a shower or clean his teeth. Prison officers refused to allow him to open parcels from his family containing basic items like toothpaste. Hungary’s investigation is still ongoing with charges neither brought nor dropped against Michael.

Disproportionate use of the EAW – Patrick Connor

*Patrick’s case highlights: the need for a proportionality test to stop EAWs being issued for minor offences resulting in wasted costs and unduly harsh effects on individuals’ lives.*

Patrick Connor (not his real name) was just 18 when he went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. Patrick himself had no counterfeit currency on him or in his belongings when arrested and has no idea how the notes came to be on his two friends and in their rented apartment — in total, the police found 100 euros in two notes of 50. The boys were held in a cell for three nights. On the fourth day they appeared in court and had a hearing lasting less than an hour, at the end of which they were told they were free to leave but might receive a letter from the authorities later. They returned to the UK and heard no more about it until four years later when, as Patrick was studying in his room at university, officers from the Serious Organised Crime Agency arrested him on an EAW.

Patrick was extradited to Spain and held on remand in a maximum security prison in Madrid. Other inmates told him he might be in prison for up to two years waiting for a trial. Under immense pressure and fearing for his future, he decided to plead guilty, even though several grounds of defence were available and he would have preferred to fight the case on home ground, on bail, and with a good lawyer he could communicate with in English. None of this was possible, and he ended up spending nine weeks in prison before coming home to recommence his university career, his future blighted by a criminal record.

Wanted in another country for exceeding his overdraft limit – Mikolaj Kowalski

*Mr Kowalski’s case highlights: the need for proportionality checks to stop EAWs being issued for minor offences.*
Mikolaj Kowalski (not his real name), a Polish schoolteacher and grandfather who lives in Bristol, was sought on an EAW to face trial for “theft” in Poland. The alleged offence referred to a period in 2000 when Mr Kowalski withdrew money from his bank taking him over the agreed overdraft limit. The entire debt was repaid to the bank after it repossessed and sold his home. In 2004, he moved with his family to the UK where he has lived ever since.

On 23 July 2010, with no prior notice, British police arrested Mr Kowalski pursuant to the EAW. He was threatened with a criminal trial for a debt he paid off many years ago. Mr Kowalski has numerous health problems, having suffered three strokes in the past two years. He was very worried about being sent to prison in Poland and being separated from his family, including his wife who cares for him and who herself has serious disabilities. Thankfully, in April 2011 the English court decided Mr Kowalski’s extradition should not go ahead due to his health problems. The EAW remains in place and he is unable to leave the UK.

**Extradited in breach of double jeopardy – Alan Hickey**

*Alan’s case illustrates: the need for early access to legal advice in both jurisdictions in extradition cases*

Alan Hickey, a lorry driver from London, was convicted in France of people-trafficking and sentenced to serve 18 months in prison in December 2009. Alan pleaded guilty to this offence after the judge told him orally that if he did so, he would be free sooner, whereas if he pleaded not guilty, he would spend years in pre-trial detention. While he was in prison in France, Alan found out that Belgium had issued an EAW seeking his surrender from France to stand trial for people-trafficking “with aggravating circumstances” and as part of a criminal conspiracy.

Alan was not given clear information about whom he was meant to have conspired with or when or where the conspiracy was meant to have taken place. He was concerned that the Belgian charges related to the same matter for which he had already been sentenced in France. This would mean that extradition should be barred on “double jeopardy” grounds. However, given the lack of information about the charges in Belgium, Alan’s French lawyer did not raise this issue at the extradition hearing. Alan’s extradition was ordered before any further information could be gathered from Belgium.

Meanwhile in Belgium, hearings began in Alan’s absence. Fair Trials International found a lawyer to act for Alan in Belgium on a pro bono basis, to represent him in his absence and to try and uncover more information about the Belgian case. If we had not intervened, a court-appointed lawyer assigned to represent Alan in his absence would have had no chance to take instructions from him. Worryingly, even once instructed, Alan’s lawyer was only granted limited access to the case file: only two hours to read 17 boxes of prosecution documents.

Alan’s lawyer managed to get his trial delayed until after his surrender to Belgium. Once released from France and in Belgium, Alan’s concerns about double jeopardy were vindicated. The judge at Alan’s trial found that some of the Belgian charges arose from the same events for which he was convicted in France. Alan pleaded guilty to the other offence and was given a suspended sentence.

Alan’s extradition in breach of the double jeopardy rule could have been avoided if he had been provided with effective legal representation in both France and Belgium from an early stage.
Q32 The Chairman: If you are all happy to proceed, I would like to begin by welcoming Professor Spencer, Professor Peers and Dr Hinarejos to our session this morning, giving us evidence for our inquiry into the UK’s 2014 opt-out decision. The Committee consider this to be a very important matter that may have far-ranging implications for the UK and the European Union.
I would like to begin by briefly explaining the background to the inquiry. The Government’s “current thinking” is in favour of exercising the opt-out but they have promised to consult Parliament before making a final decision. In order to inform the House of Lords’s deliberations we—which are two Committees who are sitting together as one for this inquiry, the Sub-Committee on Justice, Institutions and Consumer Protection and the Sub-Committee on Home Affairs, Health and Education—have received a great deal of written evidence, which is now on our website, and we are now taking oral evidence from lawyers, academics, think-tanks and non-governmental organisations as well as from serving and former police practitioners and prosecutors, which we hope will help to provide the evidence base for our inquiry.

After the evidence oral sessions have concluded on 13 February with the Committee meeting with the Home Secretary and the Lord Chancellor and Justice Secretary, we hope to publish our report just before the end of the current parliamentary session in May of this year. The report will cover both the merits of the opt-out decision and which measures the UK might seek to re-join were that opt-out to be exercised. It is intended, as I say and repeat this, that the report will inform the House of Lords’ own debate and vote on this matter, which is likely to take place before the summer recess but not certain. That is a matter that will be in the hands of the Government.

As you know, the session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of your evidence and this will be put on the parliamentary website. A few days after the evidence session you will be sent a copy of the transcript to check for accuracy and we would be grateful if you could advise us of any corrections as quickly as possible. If after this session you wish to clarify or amplify any points made during your evidence or have any additional points to make you are very welcome to submit supplementary evidence to us.

It would be a help to us if you could very briefly introduce yourselves. If you wish to make any opening initial statements that will be fine, but equally it would be entirely acceptable if you wish to move straight into questions. Could I now pass the ball to you?

Professor Spencer: Thank you, my Lord Chairman. I am Professor John Spencer, Law Faculty, University of Cambridge. This is Professor Steve Peers, University of Essex. This is my Cambridge colleague, Dr Alicia Hinarejos. We would like to say how we got into this in the first place.

I am Deputy Director of the Cambridge Centre for European Legal Studies and also President of ECLA UK, the European Criminal Law Association UK. Various interested parties suggested to us that it was urgently necessary to consider this opt-out for fear that the country might sleepwalk into exercising it without considering the implications. We organised, in May last year, a closed seminar attended by practitioners, judges, police officers, prosecutors and academics, and civil servants as observers, not participating. It was as a result of the discussions there and incited by people at it that we decided to conduct a study and we wrote this report, which I think Members of your Committee have copies of. That is our background.

Q33 The Chairman: Thank you very much for that. Indeed, your report has been made available for all Members of the Committee and I am sure has been very valuable background material.
I would like to start with the first question and in so doing mention my own declaration of an interest as a member of the advisory board of the Centre for European Reform and a member of the Future of Europe Forum, which is being established this week. Could I ask whether you believe that the Government should exercise the opt-out? If they do, what would their grounds for exercising it be, in your view, and how extensive a list of the measures covered by the opt-out in the circumstances of them triggering it should the Government try to opt back into?

Professor Spencer: My Lord Chairman, the first part of that question is easy. We emphatically think the Government should not exercise the opt-out. This is because we think the reasons that have been put forward in various quarters for doing it are not convincing.

Some people say it should be done as the first step to EU exit, but we do not think, supposing we were wishing to exit from the EU, this would be a sensible first step because it would only cut us off from a certain part of the EU in criminal justice matters. Some have said it is necessary to preserve the common law from the influence of continental Europe. We do not think that is a plausible reason because the body of instruments here do not pose any threat to the common law. Some people have said the opt-out must be exercised to save us from the federalist ambitions of an activist CJEU. We do not accept that because we do not think that the CJEU has federalist ambitions and, even if it did, we do not see, in the measures we are talking about, any material that could be used for that purpose.

Arguments have been given saying we should use our opt-out in order to disentangle ourselves from measures that are out of date or defunct, but in our view the measures that are out of date or defunct, if useless, are harmless and the cost in time and trouble of exercising the opt-out is not justified by that reason. We have seen in the Government’s official evidence that a reason was given—the Third Pillar measures, the subject of the Protocol 36 opt-out, were drafted without the thought that they might ever come before the Court and are therefore not appropriate for discussion in a court, but we do not find that a plausible argument because from way back it has been possible for those Member States who so wish to make preliminary references to the CJEU in respect of these instruments and a number have done so. There is already a small body of case law from the CJEU on them. Lastly, we see the Government’s evidence says some of these measures, being ill-drafted, are capable of an expansive interpretation. We note that they do not give any examples and we cannot think of any.

The Chairman: Do either of your two colleagues wish to add any points on the answer to that question? I notice that you have not said anything about reinsertions, but perhaps Professor Peers will have something to say on that.

Professor Peers: I think if we were to opt out, which of course we do not think is advisable, then we should try to opt to go back into as much as possible. In particular there is a shortlist of what is only a minority of the pre-Lisbon measures, about 44 of them, which I think represent the core of what we ought to opt back into. That list of 44 measures would compromise all the measures on mutual recognition in criminal matters with other Member States and on the exchange of information in policing cases and on the agencies, the European Police College, Europol and Eurojust. By opting back into only a minority we could preserve the large majority of the important aspects of our relationships with other Member States if we were to consider exercising the opt-out. The easier way to maintain our relationship in this area is simply not to exercise the opt-out at all.
Dr Alicia Hinarejos, University of Cambridge; Professor John Spencer, University of Cambridge; and Professor Steve Peers, University of Essex—Oral evidence (QQ 32-45)

**The Chairman:** Have you written down on a piece of paper what that list is?

**Professor Peers:** I have, yes. Should I pass it up to you?

**The Chairman:** I think if you were to put that at our disposal that would be a helpful aide-memoire for the future. I have had a request for you to speak up a bit. I am afraid we are a very large Committee in a very large room so some of the audibility is suffering a little bit.

**Q34 Lord Bowness:** Professor Spencer has touched on some part of this question, but some of our evidence has emphasised that if we exercise the opt-out that will protect the UK from what some people perceive as the Commission’s ambitions for a pan-EU criminal law code, enforced by the European public prosecutor. Perhaps you might just like to expand specifically upon those points. I should also add that I may be deemed to have an interest as a solicitor and notary public.

**Professor Spencer:** The notion of a plan for a pan-European criminal law code is a Euro-myth. No such plan exists; no such plan is overtly in anybody’s mind at the moment. There has been discussed for many years a proposal to have a European public prosecutor charged with prosecuting for frauds on the Community budget. This was first floated back in 1997 by a group called the *Corpus Juris* group—a group of academics of which I was part—and as part of this proposal we said the European public prosecutor should have a mini-code of offences of fraud on the Community budget, which should be applicable in all Member States. This notion was picked up by the Eurosceptic press in this country as the plan from Brussels to enforce EU-wide general criminal law code, which it was not. I am afraid the idea that such a plan exists has become eradicably embedded in the mentalities of many Eurosceptics, and you keep seeing references to it in blogs, on websites, and in letters to the press. Even if there were such a plan, there is nothing in any of these Protocol 36 measures that contribute towards it; quite the opposite, a large body of them are mutual recognition measures designed to try to enable the Member States’ diverse legal systems to continue to work co-operatively while maintaining their diversity. This mutual recognition idea was basically a British invention put forward to preclude the case for having any kind of pan-European criminal code.

In addition to that of course, the UK is protected by Protocol 21, and we are not involved in any future criminal measures.

**The Chairman:** Could you just explain Protocol 21 as you go along, please?

**Professor Spencer:** One of the protocols to the treaties puts the UK and the Republic of Ireland in a special position in that future EU police, justice and home affairs measures generally do not bind the UK or the Republic of Ireland unless we take the step of opting-in. In fact, we have opted-in to quite a number, but if any were coming along that we thought threatened our legal system, the UK is protected by not exercising its right to opt-in. First of all, we do not believe that there is a Commission ambition for a pan-European criminal law code, and secondly, if there were, we do not see how exercising this opt-out would have anything to do with it.

**Q35 The Chairman:** I just want to get beyond any possible doubt. Have any of the pre-Lisbon—that is to say the ones covered by the opt-out measures—in fact undermined the common law system in any way, in your opinion?

**Professor Spencer:** Not at all. Some of the measures are designed to try to provide uniformity of approach to certain types of anti-social act. There is a body of these instruments that require all Member States to punish, with a certain minimum-maximum
degree of penalty, certain types of misbehaviour, as people smuggling, online child pornography, and so on. None of those threaten the common law in any way because we already punish all the things that are mentioned with at least the degree of severity these instruments require. Some of these instruments require Member States to assume extraterritorial jurisdiction over these offences, but I think that all but one of these instruments allow a Member State that objects very much to extraterritorial jurisdiction to decline to have it. So insofar as it is a feature of the common law not to have extraterritorial jurisdiction, that feature is protected.

A central feature of all these instruments requiring Member States to punish things is a requirement that they extend criminal liability to legal persons. That is actually an invention of the common law and a cultural transfer in the opposite direction and contrary to the legal traditions of a number of continental Member States. So, no, we do not see how any of these existing measures pose any threat to the common law at all; if anything, they involve cultural transfers in the other direction.

Q36 Lord Dykes: In your opening remarks you referred to those suggestions made by some people—in the evidence we have had as well—about the so-called judicial activism of the CJEU, and that it is really a kind of “political corps” because it pronounces on the development of the European Union. There are members of the Government who refer to the risk of so-called expansive interpretations and unexpected judgments. From what you say, you do not share those concerns but do you feel that there could be concerns about that in the future and that there would be something complicated and difficult about the role of delivering preliminary rulings by the Court as well?

Professor Peers: I think the starting point in answering this issue is that a large majority of Member States opted-in to the Court’s jurisdiction over these issues back in 1999. So there is already a history of jurisprudence of the Court of Justice to look at, so I think we have to look at that jurisprudence first in order to answer the question: is there a threat of judicial activism that we ought to be concerned about, and is there an overload of case law likely to happen as well? In practice, the Court of Justice, throughout that whole 13 years, has been receiving between three and five cases per year on this issue, so even though a large majority of Member States—including all the five biggest Member States except the UK—have accepted the Court’s jurisdiction, there is not a very significant volume of case law and there is no particular reason to think that it would increase suddenly in two years’ time when the Court gets its full jurisdiction, because that would not be a change for the majority of Member States in terms of their national courts sending questions.

In terms of the contents of the jurisprudence, and “Is the Court judicially activist?”, I think that by and large if you look at that body of case law, there is no evidence of judicial activism. The case law only concerns three specific measures: the European Arrest Warrant, the rules on cross-border double jeopardy, and the rules on the protection of crime victims, which have been replaced anyway by a post-Lisbon directive that we have opted into, so the block opt-out would not be relevant there anyway.

On the whole, the Court of Justice in that case law has been relatively deferential to Member States, particularly as regards national criminal procedure and the Framework Decision on crime victims. Several recent judgments have said explicitly that you cannot interpret the EU measure to undercut the fundamental elements of the national criminal justice systems of Member States. So even in cases with very sympathetic victims of domestic violence and child abuse, the Court of Justice took the view that just to protect these victims we cannot interpret the EU measure against its general trend, against the
intention of Member States, which was to leave lots of flexibility to implementation and was to preserve national criminal justice systems. In the most recent case, a case called X involving child abuse, the Court said you cannot somehow use the rules on protection of victims to undermine the critical rule in the Italian system that it is the prosecutor who decides whether to lay charges or not. Of course that is a rule we have in our system as well. So you have that clear evidence. I think that the people who are alleging that the Court would be judicially activist have to somehow look at that case law and provide some contrary evidence if they think that it exists, because on the whole I would say that it does not.

Finally, what I think we have to keep in mind is that the Court of Justice is not the European Court of Human Rights; it only had that modest number of cases precisely because there is no right of individual petition, you do not and cannot have thousands of people going to the Court of Justice and alleging unfair trials or unfair surrender pursuant to European Arrest Warrants and so on. It is in the control of the national courts whether to send questions and, as I say, we have both a degree of reluctance by national courts to send those questions and a degree of deference from the Court of Justice when it answers the questions it has been receiving in this area. In light of those factors, I think it is hard to believe that the Court of Justice presents some sort of existential threat once it has jurisdiction over these matters in the UK. In any event, it will have the jurisdiction over the post-Lisbon measures that we have opted into. It will have some jurisdiction in respect of British criminal justice, so the question is only how much it has, not whether it has any at all, because it will have some. The question is how much it is going to have.

**Lord Mackenzie of Framwellgate:** Thank you very much, that is a very comprehensive answer, but can I just ask if you are concerned in practical terms of any resource implications or any extra costs coming from delays and that kind of thing in the Court’s functions.

**Professor Peers:** As long as the number of cases continue to be three to five a year out of 600 or so at the Court of Justice, it is hard to see resource implications for the Court of Justice. It does have a procedure you are probably aware of, of answering emergency questions in the area of criminal justice and some other areas, and it has applied that several times in respect of the European Arrest Warrant, including involving a British citizen last year, so you receive answers within three or four months at the latest. I think that is satisfactory from the point of view of people in detention pending criminal proceedings, so the risk of delay has been adequately dealt with already by setting up that special process about five years ago, even before the Treaty of Lisbon was in force.

**Q37 Lord Rowlands:** Can I just go back to the first question? It might seem odd to a layman, but if it turns out that we think there is only a minority of these 130 of any real value, why opt-in to the whole 130? At present, it seems to me, the assessments are that 40, 50, possibly 60 of the 130 are of some value—that means they are a minority. Why opt-in to a system where the majority do not seem to be of any real value at all?

**Professor Spencer:** It is not a question of opting-in; it is a question of opting-out of them in the first place, with a great deal of disruption and loss of goodwill in the process. If we were presented from completely outside the EU with this whole list of measures, and we were not part of any of them, maybe we would not be sensible to opt-in to them, but we are into them, and before we opt back, we would have to opt-out of all of them.
Lord Rowlands: It appears from the way the evidence is going that the majority of them are not of any particular value. You quoted 40 or 50; that means that another 70 or so have no particular value. Does that not mean that the balance of the argument is that we should opt-out and then opt-in to the ones that we think are any good?

Professor Peers: This partly comes to one of the future questions, which is on the difficulties of then opting back in. Those 40 or 50 of great value are of very significant value. If we then opt-out of everything in the hope that we can opt back in to those 40 or 50, we might find that we cannot opt-in to them all.

Lord Rowlands: Why not?

Professor Peers: That is bringing us to the next question.

The Chairman: I think we had better deal with that when we come to that question, because there is a full question on that and I am sure two or three of our witnesses will want to speak on that.

Q38 Baroness Prashar: If the opt-out is exercised, how straightforward would the UK’s attempts to opt back in to certain measures be likely to be? What is the legal process? Could the Commission impose some conditions? The former Director General of the Council of Legal Service has said it would be a “gamble”. Would you agree?

Professor Peers: Yes, I think it would be a gamble. It is a complicated process because the starting point is Protocol 36. That cross-refers to the Schengen Protocol, and to the Protocol on the position of the United Kingdom. That latter Protocol then cross-refers to the Treaty rules on enhanced co-operation. Let me try to summarise the main features. The first question is the timing of the process of opting back in, because article 10, paragraph 5, of Protocol 36 says that any time afterwards we can notify our wish of trying to opt back in. Now, the word “afterwards” I think has five different potential meanings. Are we talking about after our notification, after the notification deadline, after the transitional period has expired, or after the two measures the Council can adopt relating to transitional issues? It is unclear at what point the timing is, and that has a practical implication because it might therefore mean there is a gap during which these measures will not be applied at all until our opt back in has taken effect, or if they do apply, they are on the basis of some transitional or retroactive rule that might be challenged or questionable. That is a complication that exists in the first place, the timing of it. Then, how does the process work of opting back in? If you look at the cross-references to the two Protocols, it is either the Council or the Commission that decides depending on the circumstances and content of each of the measures. So, if the measure relates to Schengen, like the Schengen Information System primarily and a few other measures relating directly to Schengen, it is the Council—or at least all the Members participating in Schengen, which is nearly all the Member States—who decides unanimously. So that is obviously a significant hurdle. When it comes to the majority of measures, such as the European Arrest Warrant and mutual recognition measures, for instance, it is the Commission that decides, and it decides without having to consult Member States, although it would surely do so. It decides under the process that applies when you opt back into measures that have been adopted in a framework of enhanced co-operation. The Commission has to decide within four months of our application, and if it says no we can appeal to the Council, presumably it would vote by qualified majority. That is not absolutely clear; it depends on the basis of how the original Act was adopted. These Acts were adopted by unanimity originally, but they would be adopted by qualified majority now.
It is not clear what the voting rule would be in the Council if we got to that stage of appealing a “no” from the Commission.

What are the substantive criteria that apply? In Protocol 36 it says, “The EU institution shall seek to re-establish the widest possible measure of participation of the UK”, so that does point towards letting us back in, “but this must happen without seriously affecting the practical operability of the various bits while respecting their coherence.” So you have to look at whether it would be practical and coherent for us to opt back in in partially in the way that we seek to opt back in. I think there are different ways you can interpret those criteria; I have always interpreted them to mean that it is a fairly high threshold to refuse us, so it would be fairly easy for us to pick and choose from the menu. There are certain things that are definitely things that we would have to opt back into together—for instance, the Eurojust Decision, adopted in 2002 was then amended twice. Logically, we could not opt-in to one or two of those three measures, it would have to be all three. Equally, the Europol Decision is subject to a number of implementing measures, and again, logically they have to come as a package, so I do not think that is controversial. But some Member States, or the Commission, may argue that the threshold is different; it is a matter of interpretation. There is no case law to indicate whether my interpretation is correct or some alternative interpretation is correct, and some Member States might be unwilling to help out the UK. The Commission, as the Home Affairs Commissioner has already indicated, thinks this is going to be a difficult process, and is clearly not inclined to make it easy for the UK. I think her view seems to be that it is quite a high threshold for the UK to opt back in, rather than a high threshold for the Commission to refuse our opting back in. So there is that possibility of a more stringent interpretation of these criteria, which would mean it would be more likely to refuse our application or to attach conditions relating to our application to opt back in, saying “If you want Europol, you have to take it along with some other things that you do not like”—for instance, the things that we do not really want to opt back into. That is another significant complication, which of course would be avoided, as all these complications would be avoided, if we simply did not opt-out at all. This complication of opting back in is one of the main reasons I think why it would be useful not to exercise the opt-out at all. If things were clearer, if the process were simpler and the timing was better and it was obvious that we had the same kind of choice you have in a restaurant usually—almost anything on the menu—then maybe it would make more sense to opt-out and opt back in to bits of it. Given those risks, I think it is a significant concern using the block opt-out.

Baroness Prashar: Thank you for that very comprehensive answer. So it would be complex, complicated, risky and it is right that it would be a gamble?

Professor Peers: Yes.

The Chairman: I think I am right in saying, am I not—I do not know whether you would agree with this—that the view of the former Director General of Legal Services was that the references you read out to the Commission working for the greatest degree of involvement do not create a legal obligation on the Commission.

Professor Peers: I am not sure I would agree with that. I think an argument could be made that it is a binding obligation. The wording of the Protocol says the Commission and the Council shall seek to re-establish the widest possible measure of participation. As far as the Commission is concerned, in the rules of enhanced cooperation, it says it shall permit a Member State to opt-in to a measure where it meets the conditions. That is an obligation to admit a Member State that meets the conditions into enhanced co-operation, so the
Dr Alicia Hinarejos, University of Cambridge; Professor John Spencer, University of Cambridge; and Professor Steve Peers, University of Essex—Oral evidence (QQ 32-45)

question is: what are the conditions? That goes back to the interpretation of the conditions, but if we do meet the conditions, at least the Commission must let us in according to two different references, and according to one of the references in Protocol 36, the Council must admit us as well, if we meet those conditions. I do not think you can argue against the existence of an obligation. The difficulty is going to be establishing whether the conditions have been met on the basis of different interpretations of what they are.

The Chairman: I have three people who have asked for supplementaries, I hope no one will mind if we take them all three together so as to allow the three of you to answer, whoever wishes to answer them.

Q39 Lord Hodgson of Astley Abbotts: I wonder if I could pick up on your use of the word “packages” that you used a few minutes ago, and also to come back to Lord Rowlands’s point. It seems to me that we are presented with a view by those who believe we should not exercise our opt-out that in this one ball of wax—one jigsaw—you remove one piece and the jigsaw does not make sense. Can one carve out the 130 decisions into a way that they are standalone? So you would have separate packages of separate decisions that could be treated in different ways or is it, as you have rather indicated, an all or nothing—and I do not mean all or nothing because of the technical nature—because of the practical application of the way this works?

Lord Elystan-Morgan: I would like to go back, if I may, to Lord Rowlands’s point. He says there are 60 of the 133 matters that seem to be useful; that would suggest that there are 73 that are not so useful. But it is not a matter of crude arithmetic, is it? In fact, first of all, all these matters—the pre-Lisbon matters—were matters that were the subject of unanimity. The British Government of the day, whether it might or might not have been incandescently in favour of that particular provision, certainly did not see fit to upset unanimity. Therefore, the question that I would ask would be: first of all, appreciating that there has been a change of Government, have there been any situations at all in relation to any one of those 133 matters that would justify a fundamentally different approach to that particular matter? In that context, I would ask then whether it be the case the Bar Council says that all you would gain from opting out would be that you would be able to remove some of the dead undergrowth—in other words, matters that have fallen into desuetude or that have never in fact been implemented. If that is the sole benefit, bearing in mind that the disadvantages adherent to opting out would be massive in terms of uncertainty and everything else—if that is the case—then really is there any case for opt-out at all?

Lord Richard: It seems to me that one of the difficulties we are in here is that the Government have not disclosed to us what it is they want to opt back into. Therefore, we do not have a list of desirable things that the Government think they want to hang on to. Doing the best one can with the list, it seems to me there are three packages: first, there is the defunct list; secondly there is the list of those that the Government will want to opt back into—I think we have a fair idea of what some of them would be—and the third lot seem to me to be totally neutral; they do not really affect the British position or our criminal justice system to any great degree. If that is so, what on earth is the argument for taking the risk? If you go through the whole of this process, at the end of the day you might find yourself in a position—granted, it is a political and not legal question—where the list that you really want, you might not be able to get them all. Do you think that is a risk worth taking?
Dr Alicia Hinarejos, University of Cambridge; Professor John Spencer, University of Cambridge; and Professor Steve Peers, University of Essex—Oral evidence (QQ 32-45)

Q40 **The Chairman:** There are three questions that hang together fairly well. Could you—whichever of you would like to, and more than one of you if you wish—give a response to those three questions?

**Dr Hinarejos:** Thank you. As to the first question, on whether all of the measures are an all or nothing package, I do not think that is the case. If we look at the substance of the measures, they do not all have to be taken together; they are not part of a puzzle. Because of their substance, we could definitely carve some of them out, but because of what we have just discussed—how difficult it would be to opt back into some of the measures—the question is whether it is worth going through the whole process and, possibly, running the risk of not being allowed to opt back in. It is not a matter of the content of the measures, I would say.

Has anything happened that would justify adopting a fundamentally different approach to these matters since the time these measures were adopted by unanimity? I do not think so. I do not think anything fundamental has changed in this regard, or in any case nothing that would justify exercising the opt-out.

I agree with the assessment that some of the measures covered by the opt-out are not very useful, and some of them are neutral. That makes these measures harmless as well. I think there would be an advantage in removing those measures that are defunct; at the same time, I see no point in doing so through the exercise of the opt out, since those measures are harmless, and since we would have to run the risk that we just discussed and it may be difficult to opt back into other, valuable measures.

**The Chairman:** Presumably your argument there is that it would be useful to all 27 Member States to remove them, if they are defunct?

**Dr Hinarejos:** Yes. I think it would be useful for—

**The Chairman:** But it is not special to Britain?

**Dr Hinarejos:** No. It may be useful for the European Union at some point to conduct a tidying-up exercise, but I do not think exercising the opt-out is a good way to address this issue.

Q41 **Earl of Sandwich:** This is really another supplementary because Professor Peers has covered the process very well. Specifically on the legal uncertainty: how much uncertainty might arise not only during the process of renegotiation or negotiation but also the transition provisions that would cover the period between the opt-out and the time we opt back in? What would the consequences of this uncertainty be and how could it be mitigated?

**Professor Peers:** There is of course first of all a timing question of when to determine the transitional arrangement. Presumably the Council would adopt its transitional decision before termination of involvement, so there would be at least a few months’ notification for everyone involved as to how the transition would work. But in terms of the content the basic question is: can in some way our participation be continued by means of a transitional regime and if not then exactly how does that involvement cease and in what way might that process be challenged? For instance, if we have made an application or have indicated that we are going to make an application to opt back in, and perhaps it has been already agreed in principle even though it is not officially adopted, there is the issue of whether, at least in that case, a transitional measure could actually keep the measure in force for the United Kingdom until the decision allowing us to opt back in is officially adopted. Other than that case I do not see how a transitional decision could keep our participation in force for the
future. For instance, I do not see how we could issue a European Arrest Warrant after 1 December 2014, or how we could execute one. I do not see how a transitional measure could provide for that to take place.

But what it could do, and I think would have to do, is to determine a very important issue of what happens to a European Arrest Warrant that we issued before 1 December 2014. Do other Member States still have to execute it? What if they are in a process of executing it on that date, so someone has been detained on the basis of it? They have officially and formally accepted the request but the person has not yet been officially sent back to the United Kingdom: do they still have to continue with that process of sending them back to the United Kingdom? Similarly, do we still have an underlying obligation to recognise European Arrest Warrants issued by other Member States before that date? What flexibility does the Council have in determining a transitional arrangement? Can it go so far as to say all European Arrest Warrants as between the United Kingdom and other Member States are completely extinguished? Is it obliged to at least allow their validity if they were issued or executed before that date?

Of course it applies to other measures as well, so there will be prisoners in the process of being transferred under the EU’s Framework Decision on prisoner transfer. Does the transfer still go ahead? Do we still get a British citizen coming back to the UK on the basis of that Framework Decision, or do they have to spend some time in foreign jails until perhaps we can revert back to the Council of Europe convention if that does still help them? Similarly, can we continue with a process of sending prisoners from our jails to other Member States under that prisoner transfer Framework Decision? Or do we have to start that whole process from scratch in the event where the process is already underway?

It is practically a very important question for the people concerned in detention because we cannot keep people in detention illegally under the European Convention on European Rights; there has to be a legal basis for it. That issue has to be dealt with; so does the whole process of a criminal prosecution have to take place on the basis of the law. It is very important in human rights terms and in terms of how the courts and the lawyers and the civil servants and the police do their business to know that they are acting in accordance with the law and exactly what rules apply. It is very important to regulate that as precisely and clearly as we can and as early as we can in the Council’s transitional decision. Hopefully that would be the case but I can imagine all sorts of complications and questions of interpretation.

There is also a further problem in that whatever transitional rules the Council adopts, somebody might challenge them—for instance, if the Council decide any British European Arrest Warrant issued before 1 December 2014 has to be executed in other Member States. Let us assume it says that but then someone on 5 December 2014 in Germany says, “Well, hold on, no, no, the Council’s decision is invalid, it did not have that much power or it breaches German national law in some way or German constitution law so I cannot be surrendered”. It is an obvious incentive for defendants who do not want to be surrendered to the UK to challenge the validity of any Council transitional decision that gets made in order to prevent that from taking place. You would have the uncertainty until the question is finally decided on the interpretation and validity of the Council decision on transition. So that is an important question to take into account as well.

Earl of Sandwich: You have put it very gently but you are describing a very serious and expensive disruption.
Professor Peers: I think it is likely to be the case that it would be hard to draft a transitional decision that perfectly clearly caters for all of the important legal issues and that is not subject to many different questions of interpretation or even validity. But then there is also the question, which comes back to one of your upcoming questions, as to whether the transitional decision can, in a sense, regulate the process of moving the UK back to Council of Europe conventions, if I can call it that—whether in the Council’s transitional decision it can say, “Well, any extradition request issued by the UK after 1 December 2014 and to the UK after 1 December 2014 now has to be adopted on the basis of the Council of Europe Extradition Convention and the relevant protocols in the force to that Convention”. It would be useful if you could provide for that and to seamlessly regulate that issue in a transitional decision, but if you tried to I think it might be challenged whether you could. But that is an important point to keep in mind.

The Chairman: Is it your view, as we have heard, that in the case of Ireland for example when they adopted the European Arrest Warrant they removed the underpinning to which one could revert? Do you know anything about that?

Professor Peers: There is the Backing of Warrants Act, but I do not know if we could go back to that easily. I am not quite sure on that one.

Q42 Lord Avebury: Assuming that there are desirable reforms in the European Arrest Warrant: how could the UK achieve those without opting-out? To what extent would implementing the European Supervision Order and any other measures mitigate the European Arrest Warrant’s imperfections?

Professor Spencer: We think that the only legislative change that we could make to our implementing legislation, remaining in conformity with the Framework Decision, would be instituting a forum bar—that is to say, a rule where our authorities can say, “Actually, we can try this person here so we are not handing you back to whichever country it is”. Beyond that we do not see how our internal legislation could be changed much. Probably for improving the working of the European Arrest Warrant we are talking mainly about trying to get international efforts to persuade other Member States to use the European Arrest Warrant in a sensible way and not overuse it in stale or trivial cases.

We certainly think that the European Supervision Order, if it were in force, would deal with the second of the severe problems that arise from the European Arrest Warrant. The problem is that the European Arrest Warrant is a summary measure and if the conditions are met the Member State has to hand the wanted person over, even if the requested state is not yet ready to try them with the consequence that they then spend a long time in prison while the country that got them back is getting its tackle in order for a trial. If the European Supervision Order were in force then that would enable people to wait on bail in their own country. That would be a great help and blunt one of the recurrent harshnesses of the European Arrest Warrant. We are sorry to see that the United Kingdom has let the necessary implementation date for the European Supervision Order pass without implementing it because of the concern about whether we might actually opt-out of it.

Fair Trials International have said the worst scenario they foresee as a result of the opt-out might be that we went back into the European Arrest Warrant and we did not go back into the European Supervision Order, and that would not be a good thing. Could other additional measures help? Yes, I think so. The European Arrest Warrant was thought up with serious and, in particular, organised crime in mind but the drafting of it is such that it can also be used for what might be called disorganised crime—for example, making it possible for
Member States to require the surrender of somebody wanted for shoplifting in that Member State. Part of the trouble here is there is no currently much used procedure enabling the efficient cross-border handling of relatively minor crimes, which means that a Member State—when the person who has committed the crime has gone abroad—is often faced with the choice between issuing a European Arrest Warrant or just letting the matter pass, which is not satisfactory. There does exist the Framework Decision on the mutual recognition of fines. If this were used more then it should be possible in less serious cases for Member States to proceed against people by issuing a summons requesting them to come back rather than a European Arrest Warrant under which they are arrested and sent back. If they did not turn up then they could be fined in their absence, as would happen if you committed a crime and then went to Scotland and did not respond to the summons issued by the local magistrates’ court. Then the fine could be levied by the Member State where the person is. We think that would also relieve the practical necessity to some extent of Member States using the European Arrest Warrant as a means of preventing a complete failure of justice.

We also think that accepting the jurisdiction of the CJEU in this area is potentially helpful. The CJEU is at present considering a case from Romania, the Radu case, where the Advocate General has produced a liberal opinion which would, if adopted by the Court, have the effect of increasing the opportunity of Member States to refuse to return in cases where particular harshness would be brought about by it. We are rather surprised to see how those who are in favour of the opt-out and are opposed to the CJEU seem to be in conflict here. They are saying, “These measures are much too fierce, the European Arrest Warrant is so heavy handed, but we must not have anything to do with the CJEU”. It seems to us the CJEU is something that might be able to solve some of these problems.

At the end of the day the UK could, with other Member States, institute moves to try to get the European Arrest Warrant Framework Decision amended, and indeed it has been by the Framework Decision limiting its availability to enforce judgments recorded against people in absentia. I saw to my pain when I read the Government’s evidence to this Committee that we have not actually implemented this amendment to the Framework Decision yet.

**Lord Avebury:** Is it not rather incongruous of the UK to take the initiative in having the European Arrest Warrant amended in any way, considering our attitude to the European Supervision Order? If we are not moving to implement that then we could hardly ask for changes to be made in the European Arrest Warrant itself.

**Professor Spencer:** Yes, it is, is it not?

**Lord Bowness:** Indeed, when we looked at this on the European Arrest Warrant on previous occasions, we were advised I believe by the Commission’s own office that they had issued revised guidance for the use of it. Has that gone in some way towards dealing with the problems of some states using them on occasions that might be considered disproportionate?

**Professor Spencer:** That is a question that really needs to be addressed by practitioners, and we are not. But the evidence submitted to this Committee suggests in various places that it has.

**The Chairman:** I think that is something we will need to take up also with the Commission, who we will be seeing and taking evidence from.

**Q43 Lord Judd:** We are of course part of the world; we cannot opt out of that. The reality is that crime and terrorism and the rest have become globalised. If we were to opt
out of the present arrangements within the European Union and rely on conventions of the Council of Europe or whatever, would our effectiveness in combating the realities of international crime and terrorism be more effective or less effective? What would happen to the quality of the administration of justice?

Professor Spencer: It would be severely dented, as is the unanimous evidence of a number of those who have given evidence to this Committee, headed by ACPO and the police forces. Yes, it is true that with a lot of complication an alternative scheme could be devised under which without these instruments—particularly the mutual recognition ones—we might just about continue to manage. But it is certainly the case that increased mobility, particularly within the European Union, creates problems which did not exist back in the 1970s when the UK joined. As long as this increased mobility exists we need appropriate measures to deal with them.

This notion that we could somehow go back to the old conventions—which were superseded because they were not very effective—does not seem to be a sensible way of going about things. It is a bit like saying, “Well, you can manage without your kidneys of course, if you are prepared to go for dialysis twice a week”, but it is not a state of affairs in which any sane person would voluntarily put themselves.

Professor Peers: In some cases of course there is a Council of Europe convention, or there is but we have not signed up to it, or other Member States have not signed up to it, such as on financial penalties, for instance. So if we wanted to have our judgments recognised on financial penalties there would be no way for that to happen unless we ratify that Council of Europe convention, which only half the Member States have ratified. So it would still only be half the Member States that gave effect to our decisions, if we did that, and of course they would be doing that in a less effective way, as Professor Spencer has just said, than what the EU Framework Decision provides for.

For something like the Schengen information system, of course there is not a Council of Europe convention and there is not going to be. We would have to look to some form of bilateral arrangement and I think there are a lot of practical or legal questions that might arise if we tried to enter into a bilateral arrangement with other Member States or the EU. So if we try to somehow preserve the European Arrest Warrant, or some aspect of it, by means of bilateral arrangements, well, first of all there is the argument that the rules in Protocol 36 are of a speciality, so if we want to apply EU legislation in future we can only do it by officially opting back in. There is also the argument that the EU has—at least on some of these measures—an exclusive external competence so we could not negotiate with Member States individually, we would have to go the Union as a whole and it might not be willing to negotiate with us or, if it did, it might be on terms we did not like. It might insist that we opt back into more things than we wanted to opt back into.

In the case of Denmark, in a similar position, the EU has actually refused many of the Danes’ requests to enter into treaties with the European Union, and for some of them where it has accepted the request it has insisted that Denmark submit itself to the jurisdiction of the Court of Justice of the European Union as a condition of the deal. So if we did go through that process of treaties with the European Union then we would have, in any event, the Court of Justice’s jurisdiction—which is exactly what some people would like to avoid—being something that we would have to accept as a condition anyway. By means of a different process we would end up with more or less the same result. So there are a lot of complications.
Equally, informal arrangements or formal arrangements with other Member States or with
the European Union might have some practical problems: that national law in other Member
States might have to be amended or there might be reluctance to enter into these deals with
us or arrangements with us. If other Member States did go down this road their decisions
might well be challenged by people subject to a British European Arrest Warrant or
whatever it might be called under these reformed rules. So I think there are a lot of
complications there. Probably even more complications would arise from trying to enter
into bilateral agreements or informal arrangements or treaties with the European Union
than would arise from the formal process, the more obvious process of trying to opt back
in. The only advantage, if it were ever conceived of as an advantage, of not going through the
process of opting back in but entering into side deals of some kind instead, is that we might
avoid the jurisdiction of the Court of Justice. But even then, of course, as I say, our Treaty
with the European Union would likely insist that we do that and I do not think the
complications would really be worth it simply to avoid the Court of Justice’s jurisdiction,
even if it were undesirable. And for the reasons we have given, we do not think the Court’s
jurisdiction is undesirable; it is not something we ought to be escaping from in the first place.

Q44 Lord Judd: Is your contention that if were to opt out of these present arrangements
we will be shooting ourselves in the foot because we will deprive ourselves of the
opportunity to influence constructively and positively the international arrangements for
fighting crime and terrorism, which are absolutely essential? Can you imagine a situation in
which if we have gone through all the disruption of pulling out, the European Union as a
whole would be falling over backwards to facilitate our re-entry?

Professor Peers: I assume there would be a political impact—that they would be unwilling
to help us opt back in, and I already talked about the legal process. As I said then, there is an
argument that they have an obligation to let us back in and that the threshold is relatively
easy for us to cross to show that we have to be let back in. But obviously if there is political
resistance to us opting back in then you can imagine the alternative sorts of legal arguments
being made, that there is no obligation and there is lots of discretion and it is a very high
threshold for us to cross. In terms of our influence, technically speaking we would still be
able to participate in Council of Europe or UN negotiations on criminal law issues and we
would still be participating in EU criminal law proposals made in the future, or any since the
Treaty of Lisbon came into force. We would still have our vote if we decided to opt-in on
those measures, but on the whole I think if you look at the overall context our influence
would be likely to be reduced because other Member States would stay, “Why should we
listen to you; you are not bothering to participate in a large part of EU criminal law
measures? Do we really have to bother? Should we really be concerned about what you
think in light of that?”, which would be a remarkable turnaround from how the system was
originally set up because, as Professor Spencer pointed out, it was the British Government
which pioneered the idea of mutual recognition as the core of the EU system for criminal
law. It was the Home Secretary, then Jack Straw, in the British Presidency of 1998, who
developed this. There were people in the Home Office who developed the concept, the
Home Secretary who pushed it; it was our contribution to the development of EU criminal
law. Particularly in light of that fact, other Member States will think it is very peculiar that we
turn out back on a system that we played such a large role in developing.

Q45 The Chairman: Thank you. I think that is a note on which perhaps we should draw
this very useful session to a close. Could I thank all three of you for the testimony you have
given to us this morning, which I think has greatly assisted our inquiry? Obviously we are at
Dr Alicia Hinarejos, University of Cambridge; Professor John Spencer, University of Cambridge; and Professor Steve Peers, University of Essex—Oral evidence (QQ 32-45)

an early stage now, but you will be able to keep abreast of all that because everything we do is in public. Thank you very much indeed.

Professor Spencer: Thank you, Lord Chairman.
Martin Howe QC—Written evidence

Effects of extension of the jurisdiction of the Court of Justice (ECJ)

If the UK does not avail itself of the option granted to it by Article 10 of Protocol (No 36) on Transitional Provisions to the Lisbon Treaty, then the so-called “Third Pillar” measures adopted before the Lisbon Treaty and to which the UK is party will become fully justiciable before the ECJ, and subject to supranational enforcement procedures by the European Commission under Article 258 TFEU.

This will have a number of serious consequences, all of which in my opinion will be damaging to a greater or lesser degree. These consequences can be summarised as follows:-

1. Subjection of UK domestic courts to the so-called duty of ‘conforming interpretation’ in respect of these Third Pillar measures.

2. The subjection of the United Kingdom to so-called “direct action” infraction proceedings before the ECJ brought by the European Commission under Article 258 TFEU.

3. The interpretation of these Third Pillar measures by the ECJ in accordance with over-arching principles allegedly derived from the EU Treaties, including the furtherance of European unity as an end in its own right.

4. Significant delays to legal proceedings before the UK courts involving these Third Pillar measures arising from the need to make preliminary references under Article 267 TFEU.

5. Serious curtailment of the UK’s ability to develop and apply its own fundamental rights regime to the important areas of policy covered by these measures.

I. The duty of ‘conforming interpretation’

In the context of EU ‘First Pillar’ measures, it is an established doctrine developed by the ECJ that national courts are under a duty to interpret national legislation if possible in accordance with directives. This is despite the fact that under the Treaties (now Article 288 TFEU) directives, in contrast to regulations, do not have general application and are only binding on member states and not on citizens. The ECJ set out this doctrine in Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR 4135 and in a number of other cases.

This doctrine as accepted and applied by UK courts can affect the meaning of legislation which applies to a citizen to a quite considerable extent, and is more powerful than the more limited normal principle that legislation be interpreted consistently with the UK’s international obligations. A generally accepted judicial summary of the effect of the doctrine of conforming interpretation is set out in the judgment of Sir Andrew Morritt
"In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

(a) It is not constrained by conventional rules of construction (Per Lord Oliver in Pickstone at 126B);

(b) It does not require ambiguity in the legislative language (Per Lord Oliver in Pickstone at 126B; Lord Nicholls in Ghaidan at 32);

(c) It is not an exercise in semantics or linguistics (See Ghaidan per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115);

(d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in Litster at 577A; Lord Nicholls in Ghaidan at 31);

(e) It permits the implication of words necessary to comply with Community law obligations (Per Lord Templeman in Pickstone at 120H-121A; Lord Oliver in Litster at 577A); and

(f) The precise form of the words to be implied does not matter (Per Lord Keith in Pickstone at 112D; Lord Rodger in Ghaidan at para 122; Arden LJ in IDT Card Services at 114).

The significance of this in the present context is that the ECJ decided in Case C-105/03 Criminal proceedings against Pupino that the doctrine of conforming interpretation applies to framework decisions adopted under the Third Pillar. It was for a time wrongly assumed that the Pupino decision, and this extension of the doctrine of ‘conforming interpretation’, would have effect in relation to UK legislation enacted to give effect to Third Pillar measures.

However, in Assange v Swedish Prosecuting Authority [2012] UKSC 22, an exhaustive analysis of this issue by Lord Mance demonstrated that neither the Pupino decision itself, nor the doctrine of ‘conforming interpretation’ of Third Pillar measures which it contains, forms part of EU law which is binding on the United Kingdom or its courts. Although Lord Mance dissented from the majority regarding the outcome of that case, his analysis on this point..."
was accepted as correct by all member of the 7-strong panel of Supreme Court Justices who heard the Assange case.

It follows that the present position is that the doctrine of 'conforming interpretation' does not apply to pre-Lisbon Third Pillar measures to which the UK is a party, and only the lesser doctrine of the presumption of conformity with international obligations applies. Whilst under that doctrine the UK courts may treat decisions of the ECJ as persuasive authority, they are free to depart from them either if they regard them as ill founded or if the words of the domestic legislation are clear enough.

2. ‘Direct action’ infraction proceedings

Under 258 TFEU, the Commission may bring proceedings before the ECJ against a member state which the Commission believes to be failing to implement an obligation imposed by an EU measure. If the opt-out is not exercised, this power will become applicable to Third Pillar measures and such actions will be capable of being brought against the UK.

3. Interpretation of Third Pillar measures in the light of wider Treaty objectives

A classic statement by the ECJ itself as regards its approach to the interpretation of EC instruments is set out in its advisory judgment in the European Economic Area Agreement Case (1992):

An international treaty is to be interpreted not only on the basis of its wording, but in the light of its objectives. ... The Rome Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union. Article I of the Single European Act makes it clear that the objective of all the Community treaties is to contribute together to making concrete progress towards European unity. It follows from the foregoing that the provisions of the Rome Treaty on free movement and competition, far from being an end in themselves, are only means for attaining those objectives. ... As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only the member-States but also their nationals."

A fuller analysis of the ECJ’s so-called teleological or purposive approach to the interpretation of the Treaties and measures under them would need a book to set out. However it is clear, in my view beyond all serious doubt, that the ECJ will often interpret measures in ways which depart from their wording or the actual intentions of the states or legislators who negotiated and agreed them in order to further wider political interests including that of European integration. As such, its approach to Third Pillar measures is likely to be to treat them as building blocks for the construction of aspects of a Europe-wide state outside the economic sphere.

4. Delays
If the Third Pillar measures become subject to the jurisdiction of the ECJ, then UK national courts will be under a duty (as a consequence of the duty of ‘conforming interpretation’) to make preliminary references to the ECJ on the interpretation of those measures when they are interpreting national legislation which gives effect to those measures. In the case of the Supreme Court or another national court from whose decisions there is no appeal under national law, making a reference is compulsory under Article 267 TFEU if there is an arguable issue of interpretation which affects the outcome of the case.

This would be likely to introduce significant additional delays into cases where a preliminary reference is made. Cases in the Third Pillar (mainly criminal) field are likely to suffer greatly from such delays. Although the ECJ does have power to accelerate the hearing of cases, this power is quite rarely used. When it is not used, it would not be untypical for a preliminary reference to take around 2 years to resolve and I have been personally involved in a recent case which took over 3 years from the case being sent to Luxembourg and the judgment of the ECJ.

5. Fundamental rights

If the Third Pillar measures become subject to the jurisdiction of the ECJ, they will then also be subject to the EU Charter of Fundamental Rights as interpreted by the ECJ.

In other fields, the fact that the Lisbon Treaty conferred on this Charter the same legal value as the Treaties themselves has already had significant effects, notably in further emboldening the ECJ in its activist approach to EU law. An important example of this is Case C-326/09 relating to equality between the sexes in insurance premiums. The ECJ interpreted Articles 21 and 23 of the Charter as entitling it to strike down as invalid and agreed provision of Directive 2004/113 "implementing the principle of equal treatment between men and women in the access to and supply of goods and services" which permitted insurance premiums to be charged differentially between the sexes where this was justified on the basis of statistical risk differences.

The Charter is extremely vague in its provisions and it can be expected that in the field of Third Pillar measures the ECJ will have wide scope to interpret the Charter in ways which will turn out to be quite unexpected. Nor should it be assumed that its interpretations will necessarily be in the direction of favouring individual rights. The ECJ may well give priority to the objective of intra-EU solidarity in the criminal justice field in ways which conflict with our conceptions of the rights of individuals in this country.

I should note in December 2012, the Commission on a Bill of Rights for the UK reported (by majority) in principle in favour of UK Bill of Rights. The extension of ECJ jurisdiction, and in consequence of the EU Charter, into this field of Third Pillar measures would seriously interfere with the introduction into this important area of a new UK fundamental rights regime. In my view this is a further significant reason in favour of exercising the UK’s opt-out under Protocol 36.
WEDNESDAY 9 JANUARY 2013

Members present

Lord Bowness (Chairman)
Lord Anderson of Swansea
Lord Blencathra
Lady Corston
Lord Dykes
Viscount Eccles
Lord Lingfield
Lord Elystan-Morgan
Lord Hannay of Chiswick
Lord Judd
Baroness Liddell of Coatdyke
Lord Mackenzie of Framwellgate
Baroness O’Loan
Baroness Prashar
Lord Rowlands
The Earl of Sandwich
Lord Sharkey
The Earl of Stair
Lord Stoneham of Droxford

Examination of Witness

Martin Howe QC

Q1 The Chairman: Mr Howe, good afternoon and thank you very much indeed for agreeing to come and give evidence into this inquiry that Sub-Committee E—Justice, Institutions and Consumer Protection—and Sub-Committee F—Home Affairs, Health and Education—are conducting into the United Kingdom’s 2014 possible opt-out decision on these matters.

As you will know, the Government’s current thinking is in favour of exercising the opt-out, but they have said they will consult Parliament before so doing. That is the background to the inquiry that the two Sub-Committees of the European Union Select Committee have launched. We have had a great deal of written evidence already. We will be taking a significant amount of oral evidence, including evidence from the Home Secretary and the
Lord Chancellor. We hope to publish before the end of the Session in May. We cannot write our report at this stage, but we will hopefully cover the merits of the decision and give an indication of which measures in our opinion the United Kingdom should seek to rejoin, if indeed the Government do exercise the opt-out.

As you know, because I know you have given evidence before to these Committees, the session is open to the public. A webcast of the session goes out live. There is an audio transmission accessible from the website. A transcript will be taken. It will be put directly on the website. You will be sent a copy so that you can correct any obvious inaccuracies, but I emphasise that the uncorrected version goes on to the website in the first place. If there is any other evidence that you wish to give us after this session, please do so.

I should also point out that members have declared their interests in the Register of Lords’ Interests. They will in this public session declare any interests that they consider relevant prior to participating in the meeting. In so far as it may be relevant, I declare an interest as a holder of a practising certificate as a solicitor and notary public, although I am not actively practising.

Mr Howe, may I ask you to introduce yourself for the record and make any opening remarks that you want to make before we move to questions?

**Martin Howe:** First of all, thank you for the Committee’s invitation to give evidence, which I am very pleased to respond to. I apologise for not having had the amount of time I would have liked to prepare as much and as full evidence as I would have wanted on this subject. I have my day job, which is as a practising barrister. Until very shortly before Christmas, any excess time was consumed with the proceedings of the Commission on the Bill of Rights, of which I am a member. It reported just before Christmas so I had very little time to do extra on this subject, although it is a subject I have followed and continue to follow.

That said, I would like to make a fairly fundamental point about the nature of the Third Pillar justice and home affairs measures. They were billed, if you like, in a political context as being intergovernmental measures in contrast to First Pillar European Community measures, supranational measures fully within the supranational legal system of the European Community as it then was.

The label “intergovernmental” was always somewhat misleading because these measures are not intergovernmental in the same way as an ordinary international treaty or international agreement, albeit made by a process that, in general, involves unanimity and having less involvement – unless the opt-out is not exercised – by the European Court and European Commission. They are still made within the context of an institutional framework. The most critical thing about them is that, in general, and unlike almost any comparable international treaty, they are not reversible.

For example, we have an important extradition treaty with the United States of America. I do not want to go into the issues that have arisen on that, but there are arguments about whether or not that is working properly. The fundamental point about that treaty is that it is subject to formal notice of termination. Either party can give six months’ notice of termination. Obviously, we need as a country to maintain extradition relationships with the United States. It does not mean to say that one would willy-nilly go round terminating the treaty. What it does mean is that, if there are aspects of the treaty that are found over time not to be operating properly, it is possible for this country to say, “Look, we need to renegotiate this. The last resort, if you will not renegotiate, is that we can exercise the right of termination.”
By contrast, if we look at the European Arrest Warrant, and this applies generally across the board to these justice and home affairs measures, they are unlimited in time and they are not subject to termination or withdrawal. In my view, this raises the question of why we, as a sovereign state, should subject ourselves to this ratchet effect of measures that cannot be withdrawn from or modified, either if they turn out to operate in an unsatisfactory way or if the wishes of Parliament over time are such that the balance of advantage of belonging to them in that form changes, effectively fettering the power of subsequent Parliaments.

I appreciate the same arguments arise in the international trade field—if you like, the single market functions of the European Union—but in that context there is a trade balance involved. There is an argument that, by fettering ourselves to harmonised European rules, we in turn achieve the advantage of market access. But why, I ask rhetorically, should we as a sovereign nation subject ourselves to a similar regime in relation to justice and home affairs measures?

There is a fork in the road here in relation to this opt-out. One option, if you like, is to do nothing, in which case these measures will become fully justiciable, enforceable and for all purposes part of European Union law in the same way as Directives in other fields. The other fork in the road is to exercise the opt-out. If that is done, there is then a further question whether to opt in to some of the measures or whether, as far as possible, to replace them where they are of value with international agreements which achieve the desired objectives but which do not fetter us in the future. It strikes me that, at the end of the day, the only serious argument for staying in is if you believe it is in our national interest to participate in the creation of a super-state with an integrated criminal law. With respect, I cannot see that that is something that we ought to be going forward with. That, if you like, is the perspective against which I give my evidence. I summarise some of the more technical legal issues—conforming interpretation and so forth—in the memorandum I have submitted.

Q2 Lord Hannay of Chiswick: I am a bit startled by your saying so flatly that the measures taken under the Third Pillar, the JHA ones we are talking about, were not reversible, when of course they are. What you mean is that they are not unilaterally reversible.

Martin Howe: Indeed.

Lord Hannay of Chiswick: But that is rather different. They are all reversible, but they require to be reversed by the same process of decision-making as they were taken. There are other international organisations that have fettered us. The membership of the United Nations might come to mind. There is no provision in the United Nations Charter for withdrawal. I just think that one or two of these points that you raise in your introductory remarks are open to question.

Martin Howe: I take the point that in saying “revocable” I was using that in the sense that we can unilaterally revoke or withdraw from them. It is of course correct that all of these measures can be amended or revoked by the same process by which they were made, but, in the case of justice and home affairs measures that were adopted under unanimity provisions, that requires the unanimous consent of 26 other states. Frankly, a very similar situation arises to an even greater extent on the European Convention on Human Rights, where you have an even larger number—I think it is 47 member states. The difficulties of achieving any amendment to the text of that are extremely great.

Q3 Lord Dykes: Musing a bit about the situation, why does it strike you that the other countries do not seem to worry about this kind of thing and that they are all very content to
go along with what is agreed through unanimity, or indeed majority voting on other aspects, and are quite happy with that without fearing any loss of sovereignty? Why is there this unusual feeling in the UK among certain people?

**Martin Howe:** I do not know how usual or unusual it is as regards other Member States. Other Member States have their own different perspectives and fundamentally different viewpoints on participation in the European Union. If one views it as essentially something that we do primarily because of our trading interests, then one could question the extent to which one should happily undertake supplementary obligations that do nothing to serve our trading interests.

**Q4 Viscount Eccles:** I want to come back to the onward march of the super-state. I hope I am quoting you reasonably correctly. How would you suggest that this Committee tackles a great difficulty? In your evidence you say, “including the furtherance of European unity as an end in its own right”. That is probably at the heart of your evidence, it seems to me. What we are considering is a whole host of practical matters like the European Arrest Warrant and other matters of that kind. Is it the case that it is your view that the furtherance of the super-state simply knocks out the validity of any other argument because it so overshadows the scene that it is not worth talking about practical details?

**Martin Howe:** No; I do not say it is not worth talking about practical details. That quotation of course is from the European Court itself. They are not my words. I have quoted the European Economic Area Agreement case and their commentary on their own jurisprudence. The choice we face is that, if we do not opt-out, then these practical measures will be interpreted by a court that has avowedly said that it will interpret all measures under the Treaties in the light of the overall objective of furthering European unity. That is a choice we face. I think that is very important. If there are ways of achieving practical benefits on securing extradition and the other practical benefits of justice and home affairs co-operation by means which avoid being subject to the jurisdiction of the European Court in this area, then I firmly believe we should go down that road. I do not discount practicalities, but I think that is a very important issue, which indeed one could regard as almost overriding.

**Q5 Lord Anderson of Swansea:** You have cited the one judgment of the European Court as if that is decisive. That is but one judgment. No doubt there will be others that take a rather less expansionist view. Is it not the case that all these matters we are concerned with were agreed unanimously and, therefore, the UK could have said no at that time? Legally, one agreed them, so is it a legal or a political objection that you are making?

**Martin Howe:** Let us look at it. We agreed to these measures at a time when they were not subject to the jurisdiction of the European Court of Justice. Subsequently, as a result of the Treaty of Lisbon, they will become subject to that jurisdiction unless we opt-out. The problem is that you agree to a measure on the basis that you think it has a particular meaning. If the umpire then interprets it in a way that gives it a different meaning, under this system as will come in, then you are caught by it. An example I gave in my paper, which I admit is not in the justice and home affairs—

**Lord Anderson of Swansea:** But that is one umpire in one cricket match.

**Martin Howe:** The example I gave of the goalposts being shifted was the insurance premiums case. We agreed a Directive containing a specific derogation to protect our

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interests, namely, that insurance premiums could continue to be assessed differently between the sexes if statistically justified. That was specifically agreed by us and negotiated by the Member States in the Directive. The European Court of Justice crossed it out on the basis that now, under Lisbon, the Charter of Fundamental Rights has attained the same legal value of the Treaty and they can then interpret the Directive to say the derogation in it is invalid. I am afraid that is but one example.

More generally, I have given two examples in the paper of expansionist cases by the European Court of Justice. There are many examples of its expansive approach to its interpretation. One classic one is the Sabena case, where they interpreted a Treaty article saying that Member States shall respect the principle of equal pay between the sexes as giving rise to directly enforceable rights of individuals. That was something that was never intended in the Treaty as written. I do not accept that the examples I have given of the cases I have cited are in any way atypical of their general approach.

Q6 Lord Judd: I wonder whether you would like to reconsider a little your deployment of the argument that we should distinguish between what is and is not in our national interest. My point is that a lot of people will pick this up and interpret those remarks in exactly the way they want to interpret them, which might not be the way in which you intended. If you take the whole sphere of international crime, global terrorism or whatever, it is terribly important for us that there are not only arrangements that are effective in the rest of Europe, and not only arrangements with which we can fully co-operate, but arrangements in which we can fully participate and that we are able to influence policy in—for example, preventing what might be counterproductive actions in some of these spheres. I wonder from that standpoint whether you might be able to consider slightly different language from just “the national interest”. It is much more complex than that.

Martin Howe: I would certainly accept your point that you should not take too narrow a view of our national interest. We have a national interest in promoting international measures against crime and indeed in arguing for the right kind of measures. I accept that. The question that really arises, because crime is a worldwide problem, is why should we have relationships with the European Union countries in this field that, in principle, are so different from the relationships we have with other countries—

Lord Judd: A bird in the hand is worth two in the bush, perhaps.

Martin Howe: It depends whether it is a worthwhile bird or whether it is a bird that imposes restrictions on you as well as on others.

Q7 Lord Rowlands: Since Lisbon, Governments have already opted in on at least nine measures in this field. Our Committee has scrutinised all those. I cannot recall at any time government Ministers expressing the same depth of concern about the fact that the Court was becoming actively involved in these processes. Would you oppose those nine opt-ins on the same ground as you oppose any opt-in of the pre-Lisbon measures?

Martin Howe: I do not know what the Government’s reasons were for these, but personally I did have very serious reservations of principle about the Government’s decision to opt in to those measures for that very reason: opting in to measures now post-Lisbon, or indeed agreeing to an amendment of an existing measure, automatically has the effect of bringing it into the jurisdiction of the European Court. I do not know internally how

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88 Defrenne v SABENA Case 43/75 [1976] ECR 455

304
Governments operate, but perhaps they might have woken up to the perils a bit earlier, in my view.

**Lord Rowlands:** But these are Ministers, many of whom were not overly enthusiastic pro-Europeans but who felt that there was a fundamentally sensible and practical reason why they should opt in and become part of the processes. I cannot recall—I do not know if other members of the Committee share my view—that at any time did they really feel that this Court was a great threat in the decision-taking on these particular measures. Obviously you do.

**Martin Howe:** Obviously, they must speak for themselves, but I regard the extension of the Court's jurisdiction in this area as a serious problem.

**Lord Rowlands:** Completely? There are no exceptions?

**Martin Howe:** Indeed. I would put it this way. My view would be that, if there are two alternative methods of achieving some form of practical co-operation or collaboration where one involves the jurisdiction of the Court and the other does not, then I would go for the one that does not involve the jurisdiction of the Court.

**Q8 The Chairman:** Perhaps we might move to the questions. Mr Howe, you have really answered the first question. You have made it quite clear that you think the Government should exercise the opt-out, unless you want to add anything, and the grounds on which you believe that that should be done. I was going to ask you, but I think you have perhaps almost answered it just now, turning to the positive, how extensive a list of measures covered by the opt-out should the Government try to opt back in, or are you saying they should not try at all because of the problems with the Court? If we opt back in, my understanding is that they become subject to the Court.

**Martin Howe:** My preference would be not to opt in to any measures. One has to be practical. I think one should first explore whether alternative methods not involving an opt-in will secure the desired objective. For example, in the case of the European Arrest Warrant, I would be appalled by a Government decision to opt-out en bloc and then to opt in to that measure, unless that measure were significantly reformed.

In my view, there would be a better way forward. First of all, it would not create a void because the European extradition treaty would continue to be in force if we ceased to be part of the EAW. We would go back to the status quo ante. That could no doubt be improved. It could be improved by an international agreement with termination provisions rather than by an opt-in decision.

**Q9 Lord Mackenzie of Framwellgate:** You would say, even in the light of powerful evidence from ACPO, that the European Arrest Warrant is an essential tool in the fight against crime.

**Martin Howe:** First, I have not seen or read ACPO's evidence.

**Lord Mackenzie of Framwellgate:** That is their submission.

**Martin Howe:** I apologise; I have not had an opportunity to see it. The question then arises: what are they comparing it with as the counterfactual? I do not think anyone in their right minds would advocate proceeding to a situation in which we had no extradition arrangements whatever with our closest neighbours. The question is to what extent there is
evidence that the European Arrest Warrant is more effective or better than alternative arrangements. The baseline would be the European extradition treaty.

**Lord Mackenzie of Framwellgate:** Presumably these arrangements would have to be renegotiated with each individual—

**Martin Howe:** If we opt-out, since we are still a member of the European extradition treaty, which still has practical effects between us and other Council of Europe states who are not European Union members, that would then, without any negotiation, drop into place between us and the other European Union members. That might not be perfect but it would not mean there are no arrangements.

**Q10 The Chairman:** Have they all left them in place? Lord Hannay and I have been advised that Ireland has revoked the treaty in the light of the European Arrest Warrant. Is that correct?

**Martin Howe:** I confess I have not followed that point up. Ireland of course is a special case as regards extradition arrangements with this country, in that we have our own rendition of offenders’ provisions, even in the absence of a treaty framework.

**Q11 Lord Anderson of Swansea:** Have all other relevant states signed and ratified the treaty? Would it be as universal as—

**Martin Howe:** I must say I had thought, until this point about Ireland was raised, that all European Union Member States are parties to that treaty, and a number of non-European Union states.

**Q12 Lord Hannay of Chiswick:** I apologise to you first because this comes up against a problem that you have identified already, which is that we have seen the written evidence and you have not. Written evidence will be available on our website tomorrow, so that will be filled in, but I hope you will be prepared to accept what I am saying when I tell you that quite a lot of the written evidence we have had has emphasised the positive aspects of the UK’s role in negotiating all this body of European legislation. It has had the effect of raising the standard of trial rights and the rule of law in other Member States. Taken overall, the UK’s participation in EU police and criminal justice measures has been quite substantial—that is seen as highly positive not just by us congratulating ourselves but by others talking about us. Would the opt-out decision that you believe the Government should take have any implications for the UK’s positive influence that it has exercised so far in all these matters?

**Martin Howe:** Obviously it would mean withdrawing from the measures. However, I do not necessarily accept that our positive influence would disappear, although it might perhaps be exercised in different ways. If, in replacement of the measures we opt-out of, we seek to negotiate bilateral or parallel arrangements to the measures applying to the other European Union states, it will still, in practice, give us a considerable amount of input to their processes.

**Lord Hannay of Chiswick:** But presumably you would recognise that the process that you are proposing should take place, ie the complete replacement of our obligations for both pre and post-Lisbon measures—you answered a previous question by saying that you thought we should not be opting in to any of the post-Lisbon ones either—would put the other 26 Member States to a great deal of difficulty, complexity, cost and delay. Why do you think they should thank us for that?
Martin Howe QC—Oral evidence (QQ 1-31)

**Martin Howe**: It is not a question of them thanking us. They all negotiated the Lisbon Treaty with us. The Treaty contains an indisputable right on the part of this country that it may exercise unilaterally to opt-out.

**Lord Hannay of Chiswick**: Yes; that is not in dispute. My question related to the bilateral arrangements that you suggest should be put in place instead, not to the opt-out, which we all understand perfectly well is a sovereign decision by the British Government in which the other 26 Member States do not have a role to play in any legal terms.

**Martin Howe**: I would say the answer to this is that the interests that are pursued, principally the co-operation in fighting crime, are important interests of mutual benefit to this country and to other European Union countries. Unless we are saying they will behave irrationally and say, “Oh, we are so annoyed that the United Kingdom does not want to come along with us in our supranational project that we are not going to collaborate with them or we are going to disrupt the collaboration in some way”, I would expect that we would have a continued constructive collaboration with them in this field.

**Q13 Lord Rowlands**: How much freedom will the other Member States have to negotiate these bilateral relationships with us? They have already opted in. They have been bound. The Commission is not just going to watch this with interest, is it? It is going to be concerned that this will undermine the arrangements that other Member States have already accepted. Do you think they will have the freedom to negotiate bilaterally with us on these issues?

**Martin Howe**: You are raising an issue as to whether it will be a negotiation between individual Member States or with the European Union as a block. In general, in fields where the European Union has internally harmonised itself, certainly another expansive interpretation by the European Court is that the European Union then acquires external competence in the field covered by internal collaboration. The bilateral arrangements would be a question of negotiating with the other European Union members minus us en bloc, rather than a series of 26 individual negotiations with individual Member States.

**Lord Rowlands**: Why should they do that? Almost all the other countries have opted in to the whole process and have accepted the terms of the pre-Lisbon framework. How are you going to negotiate completely different terms from what has already been agreed by all the other Member States?

**Martin Howe**: If they want the collaboration concerned—we may want additional safeguards that are not contained within the European Union measures internally—then they would have to agree to it with those additional safeguards or not have collaboration at all. I do not think there is anything revolutionary about this viewpoint. Crime is a global problem. Collaboration in criminal matters is a global issue. What strikes me as odd is to have this quite exceptional mechanism in relation to European Union countries that we do not have with any other countries in the world.

**Q14 Lord Anderson of Swansea**: We make more use of the European Arrest Warrant than any other EU country. Is it likely that they would give the same priority to requests from the UK if we were not part of their formal treaty?

**Martin Howe**: It depends on the arrangements.

**Lord Anderson of Swansea**: Whatever the formal arrangements.
**Martin Howe**: The statistics I have seen suggest that we are certainly the largest recipients of incoming European Arrest Warrant requests of any Member States.

**Lord Anderson of Swansea**: We also make more use than any other single country.

**Martin Howe**: The statistics that I have seen suggest that one-third of all the European Arrest Warrants issued within the European Union are directed at this country, which is a huge percentage. I do not know what the statistics are in relation to outgoing European Arrest Warrant requests that we make. They are higher than other Member States; is that right?

**Lord Anderson of Swansea**: Yes.

**Q15 Lord Hannay of Chiswick**: But you are also presumably aware that the requests that are made to us, or at least a high percentage of them, are for nationals of other Member States than Britain and that this enables us to deport them without delay. These people are in many cases criminals or people charged with serious crimes. The European Arrest Warrant enables us to deport them without delay.

**Martin Howe**: The issue is the arrangements that we enter into if we replace the European Arrest Warrant. Let me put it this way. Certainly I and other people have very serious concerns about aspects of that measure because it was brought in as a crisis measure in a great hurry, after the Twin Towers attack. It was pushed through on the basis that it was a measure directed at countering terrorism. In fact, of course, it is very much wider than that. Only one category of the 21 categories covered is terrorism.

The serious concern I have is the complete lack of any judicial safeguards in this country in relation to incoming requests. The Assange case—and I will not say anything in particular about Mr Assange personally and his merits—illustrates quite clearly that Parliament was told, when that measure came in, in clear terms, that these European Arrest Warrants would only be issued by a judicial authority in the sense of a judge or magistrate in the requesting state. Yet what has happened is that it has been interpreted as covering the issue of these warrants by people who are not judges or magistrates. In that particular case, it was by a prosecutor. Parliament was sold a complete pup when it brought that measure into force. I think that that, for example, is a fundamental problem with the European Arrest Warrant, which must be corrected—regardless of practical considerations, which I accept are important—on fundamental civil liberties grounds.

**Q16 Baroness O’Loan**: Mr Howe, you have outlined what you consider to be the negative implications of the Court of Justice acquiring jurisdiction over police and criminal justice measures. Some of the other written evidence that we have received has suggested that there may be positive implications of the Court of Justice’s proposed role, including achieving consistency in the application and interpretation of each measure across the EU. Could you tell me what your view of that is? I would also like to know what you think are the specific risks of enabling the Court of Justice to give preliminary rulings at the request of the national courts on the interpretation of the measures in question.

**Martin Howe**: Those are two separate questions. I will answer the preliminary ruling one first, because that is a simpler answer. The effect of the preliminary ruling procedure would be that our courts would be obliged, in cases where an arguable point of interpretation on one of the measures arises, to make a request for a preliminary ruling. In fact, the rule is that lower courts are not obliged to make such a reference, although they have the power to do so, but the Supreme Court is obliged, if it is an arguable point that will affect the outcome of
the case. They do not have to make a reference on a point that may be interesting and arguable but does not affect the outcome.

The practical effect of that—and there is a strong analogy here with what happens in relation to the Strasbourg Court in deportation cases—would be very significant delays. I would say that, typically, you are talking about two years for an answer from the European Court. I give an example not of a justice and home affairs case but a recent one I was involved in where it was three years. Although they have an expedited procedure for urgent cases, that is very rarely used. You have significant delays. Of course, the delay will affect not merely necessarily the individual case of one person but also other similar cases where the same point arises. They will have to be stayed to await the outcome of the European Court. We will then transpose a problem that exists in relation to Strasbourg and the delays its processes impose into this field.

There may then be a further complication. If the European Union proceeds with its current intentions, which is another issue, to join up to the European Convention on Human Rights, which would involve a process for the Luxembourg Court referring cases to the Strasbourg Court, you could then have a double process of delay. I regard the practical consequences of introducing the preliminary reference procedure into this field as something to be thought about very seriously.

Baroness O’Loan: Let me clarify that with you. Your objection is a pragmatic one on the grounds of delay; it is not a principled objection because of the impact in terms of sovereignty or independence of the British constitution.

Martin Howe: I have a second objection. That is the practical objection: once you have preliminary references, there will be delays. That must be recognised. The principled objection, if you like, is probably more important. You are right to say that this goes hand in hand with the issue of consistency. The purpose of preliminary references is indeed to ensure consistency. There are fields of European Union law where consistency is extremely important. To give a paradigm example, in relation to the external customs tariffs in the European Union, it is very important that a consistent approach is adopted by all Member States in classing goods, as to which category they go into. If they are different, then of course all the goods will travel in via the Member State that has the laxest approach. It is important that there is consistency.

On the other hand, in this field, other considerations apply. One very important consideration is that many of these measures interface with issues of civil liberty and human rights. Under the European Convention on Human Rights, we have a system where the Strasbourg Court acts as a backstop enforcing minimum standards, but, within that, there is a very considerable margin of appreciation for different states as to how they adopt and apply the fundamental provisions of the convention.

Once you have the European Court—the Luxembourg Court, to distinguish it—applying preliminary rulings, you will get harmonisation and you will lose the margin of appreciation. That is powerfully illustrated by Advocate General Sharpston’s opinion in the Radu case,89 which would in effect communitise the approach to human rights within Member States. The question is really whether consistency is desirable or desirable enough to justify getting rid of our margin of appreciation in this field.

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89 Case C-396/11, 18 Oct 2012
Q17 Viscount Eccles: I have rather thrown away my question. I want to come back to the Court and the way that it interprets the Treaties. I think you are concerned about wider fields here. Is this position irredeemable or is there some form of negotiation and agreement about how the Treaties should be interpreted that would put the matter right?

Martin Howe: In theory, you could have a protocol on interpretation of the Treaties that altered things. There are two problems with that. One is a practical issue. You would then have to negotiate and agree that with all other Member States, not all of whom might be willing to do so. One of the most difficult problems, speaking as a lawyer, is how courts—and particularly international courts—exercise self-discipline in restricting themselves to interpreting measures rather than making up the law as they go along, to put it colloquially the opposite way. It is a cultural issue to do with the attitude of the courts concerned. It is extremely difficult to think of wording that would correct it. This is a problem one can wrestle with, not just with the Luxembourg Court but with the Strasbourg Court, where there have been various attempts to try to persuade the Strasbourg Court to give greater weight to the margin of appreciation and to the concept of subsidiarity by means of declarations. Do they have any effect at all? It is very difficult to know.

Viscount Eccles: Nevertheless, do not those who think we should opt-out because we cannot have any confidence in the Court in the future have some sort of obligation to make the case at least for a draft protocol or to make their opinion clear? If their position is a wider emotional thing about national sovereignty, and not a clearly articulated argument, it is pretty difficult for people to follow what is going on.

Martin Howe: Yes. That obviously raises a very broad subject, which is the whole question of the attitude of the European Court. There are a number of controversial writings in this field. Lord Neill of Bladen some years ago produced an interesting paper called “The European Court of Justice: A case study in judicial activism”. Members may have come across that. I appear in front of the European Court quite regularly. In that capacity as counsel, of course, I further my client’s interests with whatever arguments will assist my client’s case, whether they are integrationist or not. From the viewpoint of looking at the Court in the way it behaves, I think there is a self-selection here. The people who are interested in putting themselves forward as judges in that Court are, by and large, people who believe in the European integration project. It is very difficult to curtail that culture.

Q18 The Chairman: I am staying with Lord Eccles’s question. This flows out of some of your references to the Pupino case, which you seem to think was particularly negative. Do you accept that the Court of Justice can also make judgments that actually respect the autonomy of national systems and maybe even in some instances improve the operation of police and criminal justice measures?

Martin Howe: Indeed; it is possible they may do so. On the other hand, I tend to feel their perspective will be very much towards favouring European integration. My comment on the Pupino case is that the decision in that case was that Framework Decisions are subject to the same doctrine of “conforming interpretation” as Directives. It is not just my criticism; others have criticised that as saying that is converting what was a different-in-nature beast—a Framework Decision arrived at between Governments—into something similar to a Directive.

The Chairman: Forgive me, because I have not been able to give you any notice of this, but in my ignorance I thought I had better find out what the Pupino case was. While I do not have the whole judgment in front of me, in the statement that it issued, the Court adopted
the jurisdiction. It says quite clearly: “The Court of Justice notes the Framework Decisions adopted on the basis of provisions of the EU Treaty on police and judicial co-operation on criminal matters. The Court’s jurisdiction to give a preliminary ruling on those provisions is subject to a declaration by each Member State that it accepts that jurisdiction. Italy has made such a declaration.” That was surely the point. It was not that the Court of Justice suddenly sat down and said, “We are going to impose our will on Italy.”

**Martin Howe:** That is quite right. I have no criticism whatever of the fact that they accepted jurisdiction to deal with that case and to interpret the Framework Decision. As you point out, that followed from Italy’s declaration submitting itself to the jurisdiction of the Court in relation to those measures. The criticism is its extension of this doctrine of conforming interpretation to Framework Decisions. That is a very specific doctrine, which is not to be found in the Treaties but was invented by the Court of Justice, that Directives which are not directly applicable according to the Treaty none the less create legal effects by altering the way courts should approach the interpretation of national legislation.

**The Chairman:** Thank you for clarifying that.

**Q19 Lord Anderson of Swansea:** Did I hear you say that the judges to the Luxembourg Court are selected because of their integrationist perspective? Would you apply that to the British Government?

**Martin Howe:** No. I said that, by and large—I hope I used the words “self-selecting”.

**Lord Anderson of Swansea:** But they are chosen by Governments, surely.

**Martin Howe:** Indeed, they are in practice nominated by individual Governments. However, those who put themselves forward for appointment to that Court, and who want to spend five or 10 years in Luxembourg acting as judges in that Court, by and large are going to be people who are enthusiastic for the project. That is the point I was making.

**Lord Anderson of Swansea:** Surely the judges chosen by the UK are frequently chosen because they are Scots lawyers and because, therefore, they understand Roman law and that tradition.

**Martin Howe:** That is true of Sir David Edward of course, who was last but one.

**Lord Anderson of Swansea:** And Lord Mackenzie-Stuart.

**Martin Howe:** Yes, who indeed was the President of the Court. However, since then, we have had Konrad Schiemann as the next judge. He was an English lawyer rather than a Scots lawyer. Most recently, there was Christopher Vajda, who has just taken up his appointment.

**Lord Anderson of Swansea:** Selected because of their integrationist credentials.

**Martin Howe:** Not selected because of their integrationist desires. The people who are enthusiastic in that field of law and who put themselves forward to, and are qualified to, act in that field of law are by and large integrationist enthusiasts.

**Lord Anderson of Swansea:** But you are also so qualified.

**Q20 Lord Sharkey:** Staying with the duty of conforming interpretation for the moment, what do you see are the risks of requiring courts to interpret national legislation implementing the measures under the duty of conforming interpretation?
**Martin Howe:** The point about it is that it is an extremely strong duty. It has been the case, certainly for a very long time, under our law that, if Parliament passes legislation in order to implement an international treaty, for example, there is a presumption of consistency—that you interpret the national legislation in order to be compatible with the Treaty obligations. In effect, that is only common sense. The difficulty arises if and when the European Court adopts an interpretation of the international measure that is not expected by Member States at the time they frame that measure. I believe that is an extremely common occurrence.

Indeed, you could argue that decisions are arrived at which would not have been expected by the Member States at the time they negotiated the measure concerned.

Under the doctrine of conforming interpretation, the effect is that the national court is obliged to use all powers at its disposal to try to conform its interpretation of national law with the European Court's decision. This is more powerful and can produce concrete effects. I think the best statement of those concrete effects, or at least potential concrete effects, is contained in Lord Mance's opinion in the Assange case,\(^90\) rather than me attempting to produce my own formulation. It is paragraphs 206 and 207. I do not know if your Lordships have the Assange case. It is a fair old monster.

**The Chairman:** We have the reference in your evidence.

**Martin Howe:** Paragraphs 206 and 207 point out that Parliament may not have intended to comply with a particular interpretation or implement a measure in such a way that it conforms with an interpretation subsequently adopted by an international court. In that context, the normal presumption of conformity does not, as it were, override the wishes of Parliament and yet the doctrine of conforming interpretation often will.

The particular context of that case was this issue of whether or not European Arrest Warrants should be issued by a judicial authority and whether that means a court as distinct from a prosecutor. The majority of the Supreme Court applied the ordinary doctrine, having been, as it were, persuaded by Lord Mance's analysis, that conforming interpretation did not apply. However, they found that the lesser doctrine of presumption of conformity with international obligations carried it through. On the other hand, there could readily be cases where there would be a difference in outcome.

**Q21 Lord Elystan-Morgan:** My question is very much on this line. Mr Howe, as I understand it, your case in relation to interpretation is this. Those of us who have lived in the field of English law appreciated that the golden rule of interpretation for statute, wills and documents was the ordinary grammatical meaning of the words unless there was some patent or latent absurdity, and that had to be proven by whoever was challenging that situation. In your paper, you suggest that there could be a very real threat to that and that there could be an alternative system that might take over altogether the old golden rule of interpretation.

In other words, following European Directives or other instruments that might be of comparable authority with them, you could have a situation where even a court in England and Wales would feel constrained not to interpret in accordance with the ordinary grammatical meaning of words subject to the absurdity rule but would interpret looking through the prism, as it were, of the whole purpose of European policy in this matter—in other words, looking to the eventual desires of the European Union rather than the ordinary

\(^{90}\) [2012] UKSC 22
meaning of the words, or as that character in Lewis Carroll would have said, “Words should mean what I wish them to mean and not what ordinary meaning is given to them”.

At what level do you argue and project that danger? Do you say that, on the one hand, if one were to take half a dozen instances here and there, but instances that are perfectly clear and valid, one could say, “Yes, putting each one at its highest, you could have a system that would eventually dislodge our traditional English law rules on interpretation but the likelihood of that happening is very small”, or are you saying on the other hand, “Oh no, there is here a force that has a dynamic effect”, and that it is your judgment on the whole that over the years to come we could find this supplanting our own well established rules on interpretation?

**Martin Howe**: In answer to that, I would say that the doctrine of conforming interpretation is of course already with us within the First Pillar field. Indeed, to add to your absurdity on the face of the instrument, the other category is ambiguity on the face of the instrument. There may be a word or phrase that has somewhat elastic meaning, when it is permissible under traditional English law rules to look to other aids to more precisely give you the meaning. The doctrine of conforming interpretation explicitly goes further than that. I have summarised the principles in the paper that I have put in. There is no requirement for there to be any threshold ambiguity or absurdity before the doctrine kicks in. In other words, the national law may on the face of it appear to be clear and say one thing, but that is not a barrier to the doctrine of conforming interpretation if it is found to be inconsistent with a Directive as interpreted by the European Court. That is, if you like, bread and butter in the field of law with which I deal in a civil context and in the context of Directives that are under the First Pillar: the old European Community pillar. What is involved in the block opt-out decision is whether or not that same principle of conforming interpretation should be extended into the sphere of measures covered by the justice and home affairs pillar.

**Q22 Lord Elystan-Morgan**: You mentioned the policy that predates the European Community. That was the attitude of English law toward treaty obligations. If I remember rightly, I think the leading case in this is Ashbury Railway Carriage and Iron Co Ltd v Riche, a decision of the House of Lords in the 1880s. I may well be wrong and it is a thousand years ago since I was a law student, but my understanding was that, if it was possible, without any offence to the language of the instrument, to interpret a provision in our statute that was consistent with the treaty, one should do so. But you are saying that one should go much further beyond that.

**Martin Howe**: The case I learnt about was The Jade in the House of Lords,91 where Lord Diplock said words to similar effect about international obligations. Under the doctrine of conforming interpretation, yes, you do go considerably further because there is no need for there to be any threshold ambiguity. Indeed, I would argue that what is described as interpretation by courts under that doctrine is really not interpretation at all. Adding to a list of exceptions in a section another implied exception—

**Lord Elystan-Morgan**: It is really a case of putting our legislation up against a template of sovereign European law. That is really what it comes to, is it not?

**Martin Howe**: It does almost amount to that. What has happened of course is that the Treaty of Rome—and this provision has gone all the way through and is now in the Treaty on the Functioning of the European Union—said that the Community institutions can make regulations. We know where we are with regulations because they are directly applicable.

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91 [1976] 1 WLR 430 at 436
They are part of the law in the same way as an Act of Parliament. They have direct effect, you can rely on them in the courts, and, obviously, however they are interpreted by the European Court will prevail. Then, Directives are the next category, and they are not directly applicable and simply directed to the Member States. What has happened is that the European Court, in order indirectly to give legal effect to these, has come up with that doctrine. There is another doctrine called the Francovich doctrine\footnote{Francovich v Italy, Joined Cases C-6 & 9/90} about compensation against states. In particular the doctrine of conforming interpretation—the so-called Marleasing doctrine\footnote{Marleasing SA v Comercial Internacional de Alimentacion SA Case C-106/89 [1990] ECR I-4156}—says it is the duty of national courts to interpret their national legislation in accordance with a Directive, even if, says the European Court, the national legislation concerned has not been passed in order to implement the Directive, or may even be earlier in date.

Q23 Lord Stoneham of Droxford: Professor John Spencer has suggested that, if many measures are indeed defunct, as the Home Secretary suggested on 15 October last year, then they present no threat to the UK were the Court of Justice to acquire jurisdiction over them. Would you like to comment on that?

Martin Howe: I would accept that point. If measures are indeed defunct and they have no continuing effect or purpose, then it is most unlikely that any case will be raised on them that would go to the European Court. In that sense, it may be completely academic.

Q24 Lord Hannay of Chiswick: So it does not count on either side of the particular argument that we are discussing about the opt-out.

Martin Howe: No, but obviously there are a large number of measures that are not defunct.

Lord Hannay of Chiswick: We understand that the Home Office will shortly be providing us with a list of the measures that they consider to be in this category.

Martin Howe: I am afraid that all I have is the Home Secretary’s letter.

Lord Hannay of Chiswick: They have not provided it yet.

Lord Stoneham of Droxford: Do you have a view, though, on the scale of these measures being defunct?

Lord Hannay of Chiswick: I think we will have to wait about a week.

Martin Howe: There are 109 measures and then the Schengen measures. I do not know to what extent Professor Spencer was using the word “defunct”. Some measures are harmonisation of law measures.

Lord Hannay of Chiswick: The word is the Home Secretary’s word, in her letter to this Committee. She has used the word “defunct”. They are intending, within a week, to give us a list of the measures that in their view are in that category, which I think you agree is really therefore outwith the question about whether you need to opt-out or not.

Martin Howe: Indeed. There is possibly just one other point. It depends what you mean by “defunct”, but in one sense, if there is a measure that requires us, for example, to change our law in a particular way, and we have changed our law in a particular way to comply with
it, you could say that is spent. On the other hand, it is not defunct in the sense that, if we, as a country, want to alter our law in the future, it would then be a fetter against us doing it.

**The Chairman:** I should say, Mr Howe, that in a sense you may say your view is that we should opt-out of everything. We would nevertheless like your opinion.

**Q25 Lord Dykes:** I am trying to avoid treading into the department of irrational complexity. There is a possible problem that would arise on the legal uncertainty that would exist. You yourself have referred to some of the delays that occur in all these complicated processes that arise during that period of negotiation of any Commission or Council decisions regarding the measures that the UK will rejoin, as well as any transitional provisions to cover the period between the opt-out taking effect and the point at which the UK opts back in. What would the consequences of that uncertainty be for any specific examples?

**Martin Howe:** This raises a point on interpretation of the opt-out. I apologise if I have got this wrong, but I had thought that, if we exercise the opt-out, it will then actually come into effect at the end of the five-year transitional period. In my view that argues, if we do opt-out, for opting out as early as possible so there will then be the longest possible period. We can opt-out on the last day six months before the end of the transitional period. If we leave it that late, there could well be practical issues in putting alternative measures in place in the time available. I would suggest that if we do opt-out, we should do so as early as possible, giving a much longer lead-in period.

**Lord Dykes:** At the moment of decision on those individual items and whether the UK Government goes back in, will you be giving advice to the Government on those items and what they should do?

**Martin Howe:** I do not know; I have not been asked to give any advice to the Government on that.

**The Chairman:** Lord Judd, perhaps we can go on to your question. Again, Mr Howe, we appreciate that you do not want us to opt back into anything.

**Q26 Lord Judd:** This is a very erudite discussion and very much in a legal context. Of course the Community is a political reality. The legal judgments and legal implications will take place in a live political context. If we could be portrayed, however unfairly perhaps, as rather selfishly cherry-picking what suits us and what does not suit us and wanting to hang on to what suits us, is that really going to produce an atmosphere in which there is enough willingness among Member States to look positively on our applications to rejoin on things that suit us? I can imagine quite a lot of ill-will may be generated in this process and that we would be undermining the possibilities of rejoining on things we really do want to rejoin on. I see that the Director-General of the Council Legal Service said that we would be embarking on a “gamble”. What do you feel about all that?

**Martin Howe:** One could say, “He would say that, wouldn’t he?”

**Lord Hannay of Chiswick:** He has retired.

**Lord Judd:** Perhaps because it is an obvious question.

**Martin Howe:** I do not know. As you say, this is more a political question than a legal one.
**Lord Judd:** But the Community is a political body.

**Martin Howe:** Let us suppose they are annoyed, even though we have a clear unequivocal Treaty right that we chose to exercise, and we then come along and say that we would like to opt back in to a particular measure. Are they really going to say, “Oh well, actually we think it is important that there should continue to be collaboration between us and the United Kingdom in this field, but we are just going to say no because we are annoyed”? I do not really think that is the likely pattern of behaviour.

**Lord Judd:** You really do not.

**Martin Howe:** No.

**Lord Judd:** There are an awful lot of Member States.

**Martin Howe:** But what would they achieve by this?

**Lord Judd:** They might achieve the view that they were bringing to a head a question of British membership of the Community.

**Martin Howe:** Maybe.

**Lord Judd:** But you are quite happy to face that.

**Martin Howe:** I certainly think that the time is long overdue for us to reassess the terms of our membership.

**Q27 Lord Judd:** If the Chairman will allow me, can I put a more general question, which relates back to my original question much earlier on in our proceedings? If we live in a world in which many of the most testing and important issues that face us and our children and grandchildren are, by definition, international issues, and it is therefore the responsibility of us as the current generation of politicians in Britain to be strengthening effective international response to how you handle these dangers and threats, whatever they are, is it not incumbent on us to show every sign that we actually belong, and want to belong, to a process, whatever its weaknesses and strengths, in which we can play a full part and by playing a full part actually bring effective influence to bear on getting right the things that are wrong? Is that not in our strategic interest?

**Martin Howe:** As a general proposition, I would say yes, but the question that arises is whether participation through the particular mechanisms of the European Union is the best way of securing international objectives in a globalised world, which is much broader.

**The Chairman:** I think we had better stop there.

**Q28 Lord Rowlands:** You have had one go at giving your interpretation and I just want to clarify what that is. I understand there are valuable areas of co-operation that are at the moment embedded in these pre-Lisbon arrangements, which you think should be saved and developed, not by the opting-in process but by a kind of alternative negotiation process. Is that right?

**Martin Howe:** Yes.

**Lord Rowlands:** That is the first thing. The question we all ask ourselves is how feasible this is going to be. It is a follow-on really from Lord Judd’s point. Is it feasible that with so many members already opted in to all the existing arrangements—all these pre-Lisbon
Framework Decisions—they will sit down with us and en bloc negotiate our access to some of these seeking further safeguards and so on? You say that is a feasible political and legal alternative.

**Martin Howe**: I would certainly say it is feasible, yes. The alternative is the view that they may say, “We are so annoyed with the United Kingdom that we are not going to bother.”

**Lord Rowlands**: What they might say is, “No, you can access these valuable arrangements of co-operation by opting in on specific issues and that is the route we think you should go, rather than trying to negotiate with us on a completely different set of arrangements.”

**Martin Howe**: The point about these arrangements is that they are valuable both ways. It is not a case of us desperately seeking a free gift or a benefit. We are seeking collaborative arrangements that are in our mutual interests for justice and home affairs co-operation, for fighting crime. If it is clear to other Member States that we are not going to opt in because we do not want to be subject to the jurisdiction of the European Court and the supranational procedures in this area, apart from pique, what is to stop them negotiating sensible alternative arrangements?

**Q29 Lord Hannay of Chiswick**: What would you say to the view that I have heard expressed, and which is in some of the written evidence, that such arrangements—the sort that you say will be preferable—would be more costly for the individual, would involve greater delay and would inhibit the protection of British citizens’ human rights?

**Martin Howe**: I do not think you can generalise on the first two points. You would have to look at the particular measure and how, if it were different, it might cost more or contain more delays. I find it very difficult to comment on that at a general level.

**Lord Hannay of Chiswick**: These are comments that have been made in the specific instances of the Council of Europe conventions and the way they might operate.

**Martin Howe**: My concern on the other point on human rights is that we would there be surrendering our own control over the interpretation and application of human rights law in this field. At the moment, we have a margin of appreciation under the Strasbourg Court’s jurisprudence. We would be substituting that with a uniform harmonised approach developed by the Luxembourg Court. That is not to assume that it would necessarily be of higher standard. It might be of lower standard than the approach we wanted to adopt under our own law. I would regard the human rights element personally as a very strong argument for keeping the European Court out of this field.

**Q30 Lord Rowlands**: You have used the word “pique” two or three times as your defence in that case. You have said it would be “pique” if they acted in this particular way. Most of these Member States have said, “We have all of these arrangements in place. We accept that we would love to have your co-operation and collaboration, but there is a very sensible route by which you can do it. It is the route we have all done it by and that is by opting in on individual cases where it is mutually viable.” That would not sound too much like “pique” if that was put back to us, would it?

**Martin Howe**: In a sense, it would just be saying, “We are not going to negotiate with you on the international plane at all. We are going to force you, if you want to collaborate, to go down this supranational institutional route.” I would say, if that is the choice we are faced with, we may have to say, “So be it. We are not willing to go down this route. We do not
want to create a senseless lack of co-operation, but, if that is what you choose to impose on us, so be it."

The Chairman: Thank you very much. I will ask my colleagues whether they have any other question they would like to put to Mr Howe.

Q31 Earl of Sandwich: Since I went out of the room, I would like to have one opportunity to put a question, which my colleagues may already have asked. I am following Lord Judd here. There seems to be a lot of “us and them” discussion—that they are something quite apart—but we have been essential in the creation of European law and we are concerned about the raising of standards and practice. In your general attitude, do you have any regret that we might, under your direction, actually cause a deterioration in the development of this law and practice in Europe by the fact that we would not be part of it? How would you justify your position in an international sense?

Martin Howe: I am not convinced that this approach would result in standards being lesser in Europe than if we maintained our position in the system. Let me give an example. At the moment, we are parties to the European Arrest Warrant Framework Decision, which involves no form of judicial control in this country over the basis on which the warrant is issued in the Member State of origin. If we had a system where such a system of control existed, I would suggest that that would tend to raise standards in the requesting states. It is not all a one-way issue, I would say.

The Chairman: Thank you very much. Is there anything that you want to say to us, Mr Howe, that we have not asked you?

Martin Howe: I think you have fairly comprehensively covered the ground. Thank you, Lord Chairman.

The Chairman: On behalf of the Committee I thank you very much indeed for coming. Thank you for answering our questions so fully and patiently. Thank you very much indeed; we are very grateful.
Many of the questions raised by the call for evidence are technical and others have the detail to answer them. This submission is concerned with the practical operational impact of the proposed “opt out”. Others have written and spoken eloquently about the legal issues and the political background, especially Professor John Spencer. Several commentators have referred to the potential impact on policing cooperation across Europe and this paper seeks to provide a flavour of that from the point of view of an old practitioner.

In 2010 during the Belgian Presidency of the EU, I presented a paper to COSI as the retiring Director General of SOCA. On behalf of the UK, I firmly supported closer working across Europe as the way to deal with the serious organised crime threats identified in the OCTA produced by Europol.

I identified several new approaches being taken within the UK to seek to disrupt and prevent criminal activity and suggested that they could be implemented by other EU countries and become part of a common EU approach. The paper was received with great interest and enthusiasm, and it was agreed to use it as an action plan for the year ahead. After the meeting I received many positive and encouraging responses from the leaders of the EU countries police and judicial authorities that I had come to know well in my 10 years as the UK representative to the European Police Chiefs Task Force, which had been absorbed into COSI.

In those 10 years, the UK had introduced the concept of the European Crime Intelligence model, based upon the successful UK National Intelligence Model, and which now allows Europol, under its British Director, to produce the Organised Crime Threat Assessment. In its turn, this was based upon the UK Serious Organised Crime Threat Assessment produced by NCIS and latterly SOCA.

With the Dutch during their Presidency, the UK had developed the CosPol approach whereby volunteer EU countries were identified to lead various initiatives to deal with specific types of cross-border serious organised crime, with active support from others in strategic and intelligence-led operations. The use of Joint Investigation Teams were of great importance in this approach, and many times the UK police were asked to lead such JITs because of the respect for the UK and its policing methods.

Huge improvements in intelligence sharing across police databases in the EU have improved the intelligence picture on serious organised crime out of all proportion and this has been invaluable in the counter-terrorism approaches following 9/11. Under the UK Presidency of the European Police Chiefs Task Force, Europol and Interpol were brought together to support European and international policing operations, where before there had been little positive cooperation between the two.

The European Arrest Warrant has become an invaluable tool for rapidly identifying and arresting fugitives from the UK living in Europe and those fugitives from other EU countries who were in the UK and often continuing their criminal activities, believing that the UK
police would not trouble them. There is a lot that has been written about the EAW, which unfortunately often ignores the valuable contribution that it has made.

It has reduced by an incredible level of magnitude, the dreadful, slow and laborious processes that were needed before to identify suspects in other countries, to initiate law enforcement action against them and to arrest and extradite them back to the country that has issued the Warrant. Conducting trials many years after the events created major problems for the legal process and were not in the interest of any party involved.

The successes in relation to this piece of legislation are many, and I have a list of some of the more notable ones that have enormously benefited both the UK and other European countries in bringing suspects quickly to trial. In the recent past, it is very likely that they would have simply disappeared or been impossible to trace and bring back.

I am very conscious that all in Europe is not ideal in terms of arrest, detention and trial procedures, but in my view, it would be simplistic and false to assert that this is the fault of the EAW. Those problems existed before and have to be resolved in a common European framework that uses a mixture of methods by which to improve the standards. There is still a long way to go, and action has to be taken. The UK has often reinforced the demands for improvement, and whilst not perfect, seeks to demonstrate the way forward.

I am sure that some will accuse me of complacency or ignorance. I have however, always believed that if you want to improve the club of which you are a member, it is best to do so from inside and by example. It is for the stronger and more capable to work with and mentor those who are not at the required level as part of being a committed team player. The UK police and law enforcement agencies have done a great deal of that kind of work.

In other areas of law enforcement and policing, there are many other examples of good practice and innovation that have come about as a direct result of either UK proposals, or of the UK leading the EU approach because of the respect for the “honest broker” approach of the UK. I was part of a team of people from the UK that sought to influence and contribute to improvement in the way that all European police and law enforcement strategies operate. Much of that was designed to give the EU an opportunity to develop new ways of preventing or disrupting serious organised crime and of removing the financial rewards of such activity. In turn, this was intended to reduce reactive and unproductive policing operations in some EU countries, which appeared to owe more to their recent history, than more modern intelligence-based approaches.

In this the UK is seen as a valued member of the EU policing and judicial arena. Our involvement and commitment are demonstrated by the fact that a British law enforcement officer now heads Europol, and two of Eurojust’s Presidents have been British. CEPOL, the EU police virtual college, is based in the UK. My paper to COSI was received well precisely because the UK was seen as a committed team player and a valued contributor to EU policing strategies.

I am now concerned, based upon my recent experience when I recently conducted a review of Europol with RAND Europe which was designed to judge the effectiveness of Europol following the Lisbon Treaty and its governance structures. During that work, I met some of my old friends from the European Police Chiefs days. They were saddened to tell me that their Ministers and officials were becoming very concerned at the approach being taken by
the UK towards the EU and especially towards police and judicial matters. The issue of the “opt out” was raised several times. The fact that there is an “opt out” provision was not the issue. It was rather the arrogant view being expressed in the UK that we could withdraw and then “cherry-pick” those of the 130 measures that we thought would suit us. The view was that this was not the way that an “honest broker” would behave. They expected the UK to work with the other EU States to work on revising the list, to remove those that are of no use or out of date, and to amend or update those that are useful across the EU.

Some may say, well what does that matter in today’s modern world, where markets are crumbling, countries have huge debts and it’s every country for itself? In my opinion, it matters a lot. In my experience over the last ten years or so, there has been an unprecedented level of cooperation and willingness to work together across the EU policing and judicial agencies. Europol, Eurojust, CEPOL, Frontex all work together far better than many hoped. In any fast-moving investigation or operation, there has developed an attitude of “let’s get this to work effectively, quickly and lawfully”.

That did not used to be the case, I can assure you. Relationships between the UK and some of our immediate neighbours used to be dreadful, and much of this was based upon a series of complex legal systems trying to be worked through, with each side accusing the other of dragging their feet or not being helpful enough. Intelligence was not shared properly, because there was no real mechanism to do so. It is a fact of human life that when things do not work well or go wrong, people get blamed rather than the systems they operate within.

Of course the law should be above personalities and politics. That is right, but the simple matter is that in the interests of justice and security, there has to be real and meaningful cooperation at all levels across the EU and there will be a risk to that if we continue as a country, down a route that is illogical, potentially expensive and unnecessary, and which will almost certainly lead to a period during which law enforcement effectiveness in the UK and in the EU will be degraded. This will only be of benefit to serious organised criminals and terrorists.

Within ACPO, my ex-colleagues are now working on developing processes and “work arounds”, which would provide some semblance of operating procedures if the opt-out occurs. This is at the request of the Home Office and despite a lot of thought and hard work, the resulting situation would fall considerably short on effectiveness, timeliness and simple workability.

The arguments on whether the “opt out” is actually required should be made clearly and factually and such an approach would be welcomed. Unfortunately across the UK and the EU, many learned and experienced individuals in the law, policing and academia have looked at this decision to “opt out” with bemusement, searching for some fact that would explain why anyone would think this was a sensible way to go. They have searched in vain.

Although retired, I have not lost my passion and commitment to international policing cooperation and I do not want to see the great advances made in Europe over the last ten years being thrown away without proper consideration of the possible consequences.

William F Hughes CBE QPM
Director General Serious Organised Crime Agency 2006 – 2010
William Hughes—Written evidence

UK Representative European Police Chiefs Task Force 2001 – 2010

13 December 2012
William Hughes, Association of Chief Police Officers, Aled Williams and Mike Kennedy—Oral evidence (QQ 229-248)

William Hughes, Association of Chief Police Officers, Aled Williams and Mike Kennedy—Oral evidence (QQ 229-248)

Submission can be found under Association of Chief Police Officers
JUSTICE — Written evidence

Introduction

1. JUSTICE is a UK-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. JUSTICE has been active in the field of EU criminal justice for the past ten years, through research, lobbying and court interventions. We recently completed a two year study, on the European arrest warrant (European arrest warrants: ensuring an effective defence94) and are engaged in cross border empirical research into procedural safeguards for suspects95. We are well placed to observe the impact of EU law-making upon British citizens and welcome this inquiry into whether the UK should opt out of the pre-Lisbon Treaty EU criminal justice cooperation measures.

1. Should the Government exercise its block opt-out?

2. Whilst we have expressed concerns about certain implications of measures relating to mutual recognition from the perspective of the suspect, which we will return to below, our overall view is that the UK is in a much stronger position to ensure access to justice and fair trial rights for people travelling to and from the UK who become involved in the criminal justice system by remaining fully engaged in this area than by exercising the opt out and attempting to negotiate a piece-meal alternative.

3. Irrespective of the decision taken in 2014, people will continue to travel throughout the EU and, for whatever reason, become embroiled in the criminal justice system of other nations, or commit crime in the UK. We do not consider that a case has been made as to why the opt out should be exercised. Without the benefits of doing so being demonstrated it is difficult to see what the purpose would be.

2. What are the likely financial consequences of exercising the opt-out?

4. We are not in a position to quantify the financial consequences, but it is clear that Protocol 36 provides for financial recompense where other member states are affected by the UK’s decision. The remit of this is not limited and could therefore encompass wide-ranging applications – for example, amendment of legislation through 26 parliamentary systems to return to Council of Europe or other conventions in relation to the UK. If we seek to negotiate bi-lateral treaties, the cost of doing so for each member state could be invoiced to us. There could be indirect consequences to cases where wanted persons,  

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94 The publication of results is available here http://www.justice.org.uk/resources.php/328/european-arrest-warrants. The project was funded by the European Commission and supported by the International Commission of Jurists and the European Criminal Bar Association. It considered defence to EAWs in Denmark, Germany, Greece, Ireland, Italy, Netherlands, Poland, Portugal, Sweden and the UK.

95 Inside Police Custody: An Empirical Study of Suspects’ Rights in Four Jurisdictions is an empirical study of police detention conducted in England and Wales, France, Scotland and the Netherlands through observations in police stations, accompanying defence advisers and through informal and formal interviews with police and legal advisers. The results are currently being collated and will be published in May 2013. This a joint project between the University of Maastricht, JUSTICE, University of Warwick, University of the West of England, OSJI and Avon and Somerset Police. The project is funded by the European Commission.
records of previous convictions, incarceration post-conviction, freezing or confiscation of assets or investigation of crime are no longer available from the UK. If discontinuance or acquittal results, there could be a claim against the UK where loss of assets and compensation could be directly linked to the UK’s decision. A request for compensation from another member state could result in litigation to the CJEU which in itself could be costly.

5. The internal cost of to the UK will no doubt be considerable due to the complex and time consuming process that will ensue for civil servants engaged in this activity as well as ministers in negotiation.

3. What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

6. The relationship of the UK with the rest of Europe is already considerably strained by the much reported Eurosceptic views held by some in the UK. The position the UK has taken in relation to financial management of the EU has conflated this. It would be naïve to think that each area of EU competence is insulated and that a decision to pull out of cooperation with respect to criminal matters will have no effect on other areas in which the UK is participating.

7. Opting out would also be likely to have a detrimental impact with respect to current and future measures in the criminal justice field. The UK has opted into a number of these post Lisbon (set out in the letter of the Home Secretary of the 21st December), together with measures on procedural safeguards for suspects in criminal cases relating to interpretation and translation and the right to information. Whether the UK opts in to a measure or not, civil servants and MEPs as well as civil society organisations such as JUSTICE continue to play a leading role in negotiating and lobbying for improvement in the protection of fundamental rights in these instruments, as they will affect UK citizens travelling abroad irrespective of whether the UK opts in post adoption or not (a possibility afforded by Protocol 21 TFEU). A wholesale opt out will limit the ability of these bodies to persuade other member states to agree to improvements in legislative proposals. Current instruments being negotiated that the UK as not opted into but is nevertheless fully engaged with are the proposed directives on the right to a lawyer96 and on confiscation and freezing of assets97, both of which will have significant implications for accused persons and those associated with them.

8. The Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings is a crucial agreement between the member states and the legislation adopted under it has the potential to greatly improve standards in the trial process across the member states. We wrote to this Committee on 20th October 2010 urging the Committee to lift its scrutiny reservations and allow the Roadmap to be adopted. The focus by the EU institutions on fair trial rights for both defendants and victims over the past few years has been welcome. However, it is already beginning to wane with the prospects for measures on legal aid, vulnerable suspects and detention conditions uncertain. The UK

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should be supporting measures that aim to ensure higher standards during the trial process across the member states. Our ability to do so will be weakened by a lack of commitment to cooperation in criminal matters that the opt-out will demonstrate.

The UK’s current participation in PCJ measures

4. Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

9. The Cambridge Centre for European Studies at Cambridge University produced a paper in the summer considering the implications of each measure in detail. We have read and agree with this paper. Generally, the European arrest warrant offers the most benefit to the UK since it is the instrument which is used the most widely, with 10,376 requests for surrender being sent around the EU last year. We consider its benefits and disadvantages below at question 10.

10. Other significant measures relate to the establishment and participation in Europol and Eurojust, as well as the European police college, and training programmes that UK police forces are engaged in with other forces from across the EU to ensure evidence gathered will be admissible in UK courts. These bodies facilitate investigation, arrest and prosecution across the EU in relation to cross border crime.

11. Once fully operational across all member states, all the measures adopted will be of use to the UK. The most significant feature of all EU measures is that they require parity with domestic measures and response within a restricted period of time through a uniform process. This means that a request for freezing of assets or for criminal records will be answered within a period of time that will enable the request to be utilised in the UK trial process. Prior to EU cooperation measures, and for those areas not covered by EU mutual recognition measures, obtaining cooperation through letters of request for assistance could lead to lengthy delays in the prosecution process, and possibly discontinuance.

12. One disadvantage of the measures relates to the difficulty for the defence in being able to challenge the application of a measure in the trial because often evidence is obtained from the requested state by the trial state without the opportunity of the accused person to challenge its inclusion. However, this problem is not caused by the instrument itself, but its application in the member states, predominantly in relation to the need for training of judges and lawyers in ensuring that equality of arms is maintained and that access to a lawyer is available in both member states. This is being addressed by EU funding for judicial training, by the introduction of the EU Charter of Fundamental Rights raising the importance of trial rights, by an article in the proposed directive on the right to a lawyer which will afford dual

representation (at least in EAW cases), and, after 2014, the opportunity to take references to the CJEU.

13. There is also evidence that standards of conditions of detention differ markedly across the member states and that measures, such as the EAW and transfer of sentenced persons will require UK residents and citizens to be incarcerated in poorer conditions. The European Commission has consulted on whether it should bring forward legislation to tackle this problem and a response is anticipated during this year. Furthermore, the transfer of sentenced persons framework decision can also be utilised to remove people from poorer conditions as well as place them there, and a measure which should have come into force in the UK in December 2012 but has been suspended pending the opt-out decision, which would have afforded a Supervision Order to be used to alleviate some pre-trial incarceration measures by allowing the person to remain in their country of residence under bail conditions pending trial.

14. Therefore, more work is needed to fill in the gaps in safeguards revealed by the prosecution oriented instruments rather than their removal. In our view the UK should be striving to support the necessary improvements to these measures, as a leader amongst EU nations of fair trial rights and prison standards, rather than turning away from them.

5. In her 15 October statement the Home Secretary stated that “... some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

15. We again refer to the CELS paper which carries out a detailed analysis of this position.

6. How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?

16. There is little public information about how often all measures are used; some will be utilised during criminal trials at a domestic level, with requests being made to other EU countries as a matter of course. We are unaware of whether this information is recorded by the Court Service or the CPS. Requests to the UK as the Central Authority will go to SOCA, which may record these. The EU Council periodically collects information on the implementation of each measure which reveals how many are now in force across the member states. The Commission also carries out evaluation reports as to implementation and compliance with the relevant EU law. Statistics are available on the use of the European arrest warrant, see note six above.


[102] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union

[103] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention
17. The EU agencies are utilised by the UK. Europol records that in 2011, 13,697 cases received its operational support and information generating support, 9.7% of which was for the UK (or 1,328 cases). This was the third highest number of requests amongst member states.\textsuperscript{104} Eurojust reports 1441 requests for assistance across the member states in 2011, of which 71 were from the UK. The annual report refers specifically to the assistance Eurojust offered in facilitating a joint investigation team between the UK and the Czech Republic concerning Roma women being trafficked to the UK for prostitution which led to the arrest of 11 ringleaders.\textsuperscript{105}

7. Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

18. The UK has not implemented two measures - Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, and the Supervision Order, which as we have set out above has been suspended pending the decision on opt in. Since the UK operates comprehensive community sentencing and bail systems it is unlikely that giving effect to these instruments will cause any difficulties. If the UK does not exercise the opt-out, it is likely that the measures will be implemented before the Commission considers infringement proceedings.

8. What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

19. The UK is only before the CJEU a few times each year, with only 23 actions for failure to fulfill obligations between 2007 and 2011,\textsuperscript{106} and 113 requests for a preliminary reference over the same period, with 26 last year.\textsuperscript{107} Given the wide remit of EU competence this demonstrates the UK has a good record in implementing EU law and national courts rarely need to refer cases to the ECJ for clarification.

20. As set out above, the Commission is unlikely to bring infringement proceedings since the UK is largely in compliance with its implementation requirements in the field of criminal cooperation. The national courts will only refer to the ECJ if there is a lack of clarity in the EU law that has been transposed into domestic law. Even when referred, the Court will limit itself to interpreting the EU law, and not interfere with its application in the member state. It has also been careful not to expand the remit of its jurisdiction where EU law cannot be said to apply.\textsuperscript{108} There is therefore in our view no danger of the Court limiting common law or British principles of justice.


\textsuperscript{106} Court of Justice Annual Report 2011, p 98.

\textsuperscript{107} Ibid, page 118.

\textsuperscript{108} See Case C-507/10 Criminal proceedings against X (21 December 2011) (unreported, available at www.curia.europa.eu) and Case C-105/03 Criminal proceedings against Maria Pupino ECR [2005] I-05285.
21. Previous judgments in this field have not affected the approach to measures in the UK because the decisions have often related to specific systems which do not concern the UK or are already established practices here.

22. Nevertheless, the Court will offer a benefit where the EU law does require clarification in the application of fair trial rights where these are not fully respected, or where the thresholds set are too high\(^{109}\). The Court could provide an additional protection from the risk of injustice rather than a danger of interference with UK law.

9. If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

23. We see no danger from the Commission enforcement powers, as set out above. With the possibility post Lisbon not to opt in to new measures that are considered against the national interest, the powers of the Commission cannot be detrimental.

24. The benefit of Commission enforcement powers will be where EU law can improve standards for individuals but the UK fails to implement the law correctly or at all, since the power will provide an impetus to do so. The jurisdiction of the Court will again assist individuals where the EU law is unclear. The opportunity to refer to the Court will enable better interpretation at national level.

25. Concern has been expressed (by this Committee and elsewhere\(^{110}\)) that the Court will not be able to handle an influx of criminal cases, due to lack of capacity and experience. The Court has had to manage aspects of criminal law throughout its history, since sanctions and penalties have long fallen within its jurisdiction. The Court has also not shied away from developing a rights focused jurisprudence which has upheld fair trial principles.\(^{111}\) Capacity is a matter of funding and logistics which will no doubt be monitored and reviewed subsequent to the 2014 transition. It does not provide an acceptable reason to opt out of these measures in our view.

The potential consequences of exercising the opt-out

10. The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

26. The EAW offers speedy return, through an agreed timetable with limited grounds for refusal and judicial scrutiny of the process. It affords a hearing to the requested person to put forward their opposition to surrender. It requires fundamental rights to be respected.

\(^{109}\) See the Advocate General’s Opinion in Case C-396/11 Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu which considers that the test for finding a violation of the right to a fair trial should be amended from the ‘flagrant breach’ European Court of Human Rights test to ‘the infringement in question must be such as fundamentally to destroy the fairness of the process’ at [83].


\(^{111}\) See Case C- 405/10 Özelm Garenfeld v Germany (10th November 2011), unreported at [48].
27. The advantage to the UK of remaining in the EAW system is the return of wanted persons for trial or sentence within a reasonable passage of time that affords a fair trial to take place and the removal from the UK of criminals abroad.

28. It is not certain what process will take place were the EAW no longer to be utilised. Return to the European Convention on Extradition 1957 may be the desired route, but this would lack the judicial scrutiny and speed of proceedings provided by the EAW and may lead to challenge through the courts if it were attempted for discrimination on the grounds of nationality and violation of the right to a fair hearing under article 47 of the EU Charter of Fundamental Rights. It is likely that the UK will need to arrange bi-lateral treaties in order to ensure the benefits of the EAW procedure remain. This could be a lengthy process which other member states may be reluctant to engage in. Without recourse to the CJEU, other member states may not prioritise UK requests, notwithstanding a bi-lateral treaty.

29. Since the UK receives far more requests through the EAW system than it generates it may be that other member states will continue to request extradition in as many numbers as currently. Where there is insufficient information provided in a request at present, the Crown Prosecution Service liaises with the requesting state for further information to be received in order to comply with the EAW procedure. Again, it is not clear whether the requesting member state would fully cooperate with this process without the requirements of the EAW system and may make extradition more difficult. Often police and prosecution services will refer to Europol and Eurojust for assistance with an investigation or for clarification of the law in another member state. This will not be possible following opt out and will make it more difficult to decide whether the extradition request should be granted.

30. Ultimately, without the EAW, it is likely that requested persons will be in a worse position because proceedings will take longer, and information provision will be more limited. The current problems with the EAW process in relation to requests for surrender for minor offences, the absence of a less draconian mechanism to resolve the complaint, and failures to amend or remove Schengen Information System alerts and Interpol red notices will remain irrespective of the measure used.

31. The UK also risks, either in the interim or indefinitely harbouring criminals and becoming a safe haven for crime since other member states may not wish to adopt the UK’s proposed surrender system at all such that the number of requests reduces.

11. What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?

32. There will certainly be an impact for investigation of crime and information sharing but this question is best answered by the services identified.

12. Which, if any, PCJ measures should the Government seek to opt back in to?
33. It is very difficult to separate out the measures since they relate to all aspects of the
criminal justice system. Mutual recognition measures are all of importance and assist each
other – if the EAW were opted back in to but no others we would lose the option of
demanding the return of a UK citizen for service of their sentence if convicted, or of refusing
a warrant purely for sentence if they can serve it here\textsuperscript{112}. The application of this measure is
something which many organisations like JUSTICE have lobbied for to mitigate the draconian
nature of the EAW. The same is true of the Supervision Order\textsuperscript{113} which it is anticipated
could be utilised to allow a requested person to remain in the UK pending trial in the
requesting country.

34. Many measures assist the domestic trial of a defendant who has made use of EU free
movement, and allow freezing or confiscation assets\textsuperscript{114}, payment of fines\textsuperscript{115}, and admissibility
of convictions obtained in another member state\textsuperscript{116}. It would be very difficult to appease
victims of fraud should their funds no longer be available for seizure because the UK has
opted out of the measure that allows them to be captured.

35. Substantive measures requiring cross border crimes to be defined and prosecuted
may not seem important because the UK already recognises them, but the measures for
investigating crimes such as drug or human trafficking that have been established as a result
will not be available to ensure that these crimes continue to be targeted. If the UK already
recognises the crime, why opt out of the EU measure reinforcing it at all? To do so would
damage the cross border cooperation that has so far been achieved in this area.

36. Equally the continuing engagement with Eurojust and Europol are vital for the
investigation and prosecution of cross border crime. Of Eurojust, this Committee has
previously concluded:

\begin{quote}
We are in no doubt that Eurojust meets a real and increasing need for assistance in facilitating the
investigation and prosecution of complex cross- border criminal cases. It is unrealistic to expect
individual national prosecutors to be familiar with the evidential and other requirements of a large
number of different jurisdictions and to be able to co-ordinate unaided a complex investigation
involving several different Member States.\textsuperscript{117}
\end{quote}

The UK, and particularly London, receives a significant amount of cross border
criminal activity, in relation to financial crime, drug and human trafficking for sexual and
other forms of slavery. These bodies are also vital for the investigation of wider and more
serious international crimes of universal jurisdiction such as crimes against humanity, torture
and other war crimes. It is difficult to see what justification can be given to victims of these
heinous acts for reducing the ability of UK police forces to investigate these crimes the most
effectively.

\begin{itemize}
\item \textsuperscript{112} See note 9 above.
\item \textsuperscript{113} See note 10 above.
\item \textsuperscript{114} Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing
\item \textsuperscript{115} Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.
\item \textsuperscript{116} Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.
\item \textsuperscript{117} EU Committee of the House of Lords, 23\textsuperscript{rd} Report of Session 2003-2004, Judicial Cooperation in the EU: the role of Eurojust, HL Paper 138 (21 July 2004), para 105.
\end{itemize}
13. How straightforward would it be for the Government to opt back in to specific PCJ measures on a case-by-case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?

37. Protocol 36, together with protocol 19(4) and 21(4) (which cross-refers to article 331(1) TFEU), demonstrate that conditions can be placed on a request by the UK to opt back in. It is not clear what these conditions might be – whether they will be limited to technical matters, or could demand that other measures are included to ensure better functionality. The views of the other member states will need to be canvassed before the imposition of any conditions, and for Schengen matters, the unanimity of member states in Council is required to approve the request.

38. This could be a very complex and time consuming process given that there may be divergent views amongst the member states and the Commission in relation to each instrument. Furthermore, because, as we have demonstrated above, many instruments are inter-linked it is likely that it will be difficult to consider a request in isolation. The Government should in our view, if opt-out is exercised, ensure that it has a comprehensive list of measures it proposes to opt back into rather than attempting case-by-case basis requests.

14. What form could cooperation with other Member States take if the United Kingdom opts out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?

39. This route has been suggested by a number of commentators. It is not necessarily simple to do so however. Other member states will need to amend legislation to bring the UK back within the remit of these instruments. More significantly the EU concluded over a lengthy period of debate and reflection that these instruments are inadequate for the prosecution of crime in the EU. The instruments that the EU has drafted offer far better mechanisms for the investigation and prosecution of crime, and also far better recognition of the rights of the defence or victims of crime. The Conventions, being previously recognised as unfit for purpose, may provide convenient replacements, but they are poor ones for ensuring access to justice.

40. The alternative is the negotiation of bi-lateral treaties that would be largely reflective of the existing instruments in the hope that all EU member states would sign up. It is unclear what the purpose of going through what is likely to be a lengthy and technical process is when the instruments already exist and are operationally successful.

41. The UK should be taking this opportunity to advance amendment of these instruments prior to the 2014 transition, where it considers reform is necessary, whilst it is in a strong bargaining position.

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118 In particular Open Europe, see Cooperation not Control; The case for Britain retaining democratic control over EU crime and policing policy (29th October 2012); An Unavoidable Choice: More or less EU control over UK policing and criminal law (29th January 2012).
15. Is Article 276 TFEU, which states that the Court of Justice has no jurisdiction to review the validity or proportionality of operations regarding the maintenance of law and order and the safeguarding of internal security, relevant to the decision on the opt-out?

42. Article 276 TFEU reflects article 72 TFEU which limits EU competence in the field of police and judicial cooperation. The Court has competence to review measures in this field that have been adopted notwithstanding the potential impact of article 72, as the member states have agreed that Union activity is necessary, in accordance with the subsidiarity principle.

16. If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area?

43. We are unaware of the particular implications for the Republic of Ireland.

2 January 2013
Justice Across Borders—Written evidence

Justice Across Borders

1. Justice Across Borders is a campaign group, which has recently been founded to campaign in the interests of British victims of crime against a UK decision to opt out of the pre-Lisbon JHA instruments. This submission contains arguments against a decision to opt-out, together with three Annexes: Annex A containing extradition statistics, Annex B giving details of operational benefits to the UK of EU police and justice cooperation, and Annex C providing press summaries of successes of UK police forces using the EU instruments.

The risks of Opting out

2. Effective law enforcement enables victims to obtain justice and the UK to protect its security. If the United Kingdom opts out of Justice and Home Affairs (JHA) instruments under Protocol 36, we believe that this will:

- weaken UK law enforcement,
- reduce the chances of victims obtaining justice,
- risk making the UK and other EU Member States a safe haven for foreign criminals,
- expose UK security to other increased risks,
- reduce the chances of the UK being able to raise standards in other Member States, and
- reduce UK leverage to improve the texts of the relevant instruments.

Shortcomings

3. That does not deny that there are shortcomings in the JHA instruments. The flagship instrument is perhaps the European Arrest Warrant (EAW). This provides an efficient means of extradition between EU Member States, which needs to be balanced by proper protection of human rights. In our view, the EAW does not get this balance right, at least in the way it is operated. We argue in paragraphs 36 to 40 below that this is not a reason to opt out of the EAW, though it is a reason to seek improvements and to adopt measures which will remedy the main problems.

Democracy and Sovereignty

4. The reason for the opt-out provision in Protocol 36 is that after December 2014 the pre-Lisbon JHA instruments become subject to the full powers of the EU institutions, in particular the Commission and the Court of Justice of the European Union (CJEU). It has been argued that this involves loss of democratic control or loss of sovereignty. This argument risks misrepresenting the nature of both.

5. Democracy is underpinned by the rule of law. Independent courts uphold the rule of law and are not directly accountable to Parliament under any system. If Member States wish

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119 This has been pointed out by many bodies in many reports and submissions. See, for example, the Joint Committee on Human Rights Fifteenth Report, The Human Rights Implications of UK Extradition Policy, 22 June 2011 (referred to as the JCHR Report), paragraphs 3 and 4.
to reverse the effects of a judgment of the CJEU, they still retain the right to adopt amending legislation.\textsuperscript{120}

6. Sovereignty is a tool. If the UK obtains benefits by undertaking international obligations or by subjecting itself and others to binding court decisions, that does not amount to “loss” of sovereignty as if the UK is gaining nothing in return. Rather, it is what sovereignty is there for, to engage in the world for our national interest. The UK has, for example, already taken a sovereign decision to agree the pre-Lisbon instruments by unanimity because of the significant benefits they give the UK in bringing criminals to justice.

**Strengthening the Rule of Law**

7. Since the Second World War, the UK has sought to create a rules based international order. This would be ineffective without international courts or settlement processes which enforce those rules, such as the International Court of Justice, the CJEU, the WTO Panel and the International Criminal Court. In particular, the success of the EU single market has depended on an effective CJEU. Without the CJEU, there would be no effective means of enforcing EU laws. It was the UK in the 1990s which pressed for stronger CJEU (ECJ) powers, including the power to fine Member States for non-compliance.

8. The same applies to the area of European police and judicial cooperation. Binding legal obligations between the Member States create a stronger legal regime than non-binding mechanisms. If binding obligations are agreed, it is in the interests of victims of crime and of UK security that these are implemented and enforced. Granting the CJEU jurisdiction over JHA instruments increases the prospect that this will happen. Stronger enforcement of EU laws means less crime in Britain, less crime in other Member States, and greater stability for Europe as a whole.

**Consequences of Free Movement**

9. Other Papers and Reports have documented the dramatic increase in movement across borders within the EU.\textsuperscript{121} EU nationals move freely.\textsuperscript{122} That is to the benefit of all EU nationals, including British nationals.\textsuperscript{123} The huge growth of free movement and transnational crime requires modern and streamlined procedures, a point recognised as far back as the Interdepartmental Working Party on Extradition in 1982.

10. The resulting growth in extradition is illustrated by the tables in Annex A. Table 1 shows the number of suspected criminals removed from the UK under the EAW between 2004 and 2011. This has risen from 24 in 2004, to 1173 in 2010 and 922 in 2011. The total for these years is 4081. Table 2 breaks down these figures for British nationals and foreign\textsuperscript{124} residents.

\textsuperscript{120} After Lisbon, only the UK and Ireland have the right to decide whether they will opt into measures for which there is a Qualified Majority among the others.

\textsuperscript{121} For example, Hinarejos Alicia, J R Spencer, Opting-out of EU Criminal Law: What is actually involved?, CELS Working Paper, New Series, No 1, September 2012: Centre for European Legal Studies, Cambridge (referred to as the CELS Paper), paragraph 20 and footnotes 24-26; and A Review of the United Kingdom’s Extradition Arrangements presented to the Home Secretary on 30 September 2011 (referred to as the Baker Review).

\textsuperscript{122} The latest census showed that there are \([600,000]\) Poles resident in the UK, \([97,000]\) Lithuanians, \([xxx,000]\) Czechs.

\textsuperscript{123} Footnotes 24-26 of the CELS Working Paper state, drawing on various sources, that each year some 19.3 million Britons travel to France and over 12 million to Spain; some 200,000 British citizens now own second homes in France; and around a million British citizens now live in other EU Member States – as against around 1.6 million citizens from other EU states resident in the UK.
nationals. The numbers of foreign nationals removed are 19 in 2004, 1125 in 2010 and 890 in 2011, making 3859 in total. Table 3 shows the number of British nationals returned to the UK under the EAW. These were 63 in 2005, 134 in 2010 and 86 in 2011.

11. Serious problems of law enforcement would result if the UK attempted to deal with the flows of migration and extradition by cumbersome and outdated procedures. It is in everyone’s interests (apart from criminals’) that European countries as geographical neighbours have efficient mechanisms to deal with the consequences of the huge flow of nationals across their borders, subject to proper safeguards from injustice or mistreatment.

12. In this context, British nationals facing trial abroad is the quid pro quo for foreign nationals facing trial here. Hard cases involving British nationals in other EU countries illustrate current weaknesses which have to be faced. But facing these weaknesses is another reason why the UK needs to engage in EU JHA, to remedy the problems and impose obligations on other countries to raise standards.

**Strengthening New Democracies**

13. Mafia and organised crime pose threats to both new and old democracies. One of the biggest threats to our own security is organised crime and transnational crime. New democracies, including those in the European Union, are particularly vulnerable. It is in the UK’s interests to strengthen their defences. Participation in European JHA cooperation, including the pre-Lisbon instruments, affords the UK an opportunity to do that. If the UK opts out of these instruments, what sort of signal does this give to others? It might imply that we don’t care about what they do, only about what we do. A number of the pre-Lisbon instruments, such as the peer reviews, were adopted in the context of the accession of new Member States to encourage greater responsibility in JHA. What is the effect if we now abdicate that responsibility ourselves? 124

**Protecting British Nationals in the EU**

14. This responsibility matters not just because a stable Europe helps to create a stable UK but because large numbers of British nationals travel in the EU each year. British tourists, together with British companies and individuals doing business abroad, need to operate with a high degree of personal security and protection from the rule of law. The same applies to the large communities of British nationals reside or have second homes in EU countries, not just in France but in countries such as Bulgaria, Romania and Greece.

**The British Solution**

15. The big challenge facing Governments in the 1980s and 1990s was to how strengthen law enforcement in Europe when faced with differences between common law systems like our own and civil law systems in most EU countries. There were essentially three possible routes: harmonisation of criminal law and procedures; mutual recognition; or muddling through.

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124 This point is particularly relevant to the group of instruments under which Member States are obliged to punish certain forms of misbehaviour. The UK does so (and in nearly every case did so before the EU instrument was adopted). It has been suggested that, since this group of instruments are ones that give us no direct benefit, we should opt out of them, and stay out: even though the UK does not want to decriminalise any of the types of behaviour to which they refer.
16. All the studies of UK extradition between 1982 and 2001 showed that “muddling through” on the existing basis was not an option. That left harmonisation or mutual recognition. Although harmonisation was in UK interests in some cases, generally the UK argued for a system of mutual recognition. This would preserve the different basis of each other’s legal systems but enable the decisions of one jurisdiction to be recognised and enforced in another. This was in practice largely “the British solution” — a solution which the UK pressed for and negotiated in the EU.

17. The pre-Lisbon instruments are not therefore generally measures of harmonisation. The measures of practical cooperation in fighting terrorism, serious crime, fraud and drugs are largely based on the principle of mutual recognition. They do not threaten the common law. In fact, they help to preserve it, at the same time as helping to improve law enforcement. If our courts could not recognise as valid instruments and procedures in other EU countries and vice versa, it would present both a considerable burden to them and a considerable obstacle to effective law enforcement.

Civil Liberties

18. As we have already stated, we share some of the misgivings which have been expressed in respect of the EAW. These are sometimes expressed in the context of wider misgivings about the protection of human rights in EU countries. On whatever basis we cooperate with our EU partners in law enforcement – and cooperate we must, we have an interest in strengthening human rights protection in the EU. This is the corollary of streamlined police and justice cooperation.

19. This, however, requires two things. First, it requires that the UK uses its leverage within the field of EU JHA cooperation to maximise human rights protection. The less it participates in EU JHA, the less it can do that. The UK should opt in to, and encourage others to opt in to, the EU measures specifically designed to give increased protection. Second, it requires that the UK continues to apply itself, and encourages others to apply, the overarching instruments of European human rights – namely the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights.

The risks of CJEU Jurisdiction

20. We share the analysis of the CELS Paper that there is little risk to the UK from accepting CJEU jurisdiction over the pre-Lisbon instruments. The UK has a strong record in implementing EU laws. The CELS Paper shows the same to be true in respect of the pre-Lisbon JHA instruments. The UK also has a strong record in cases before the Court though

125 See the statement of the then Home Secretary, Rt Hon Jack Straw in the Foreword to The Law on Extradition: A Review, Home Office, March 2001: “Developments in the EU are setting the pace for progress and the United Kingdom is determined to be at the forefront of this. The purpose behind the Treaty of Amsterdam 1997 was to establish an area of freedom, security and justice. In seeking to implement the treaty it was agreed at the Tampere Special European Council in October 1999 that the mutual recognition of judicial decisions should become the cornerstone of judicial co-operation in both criminal and civil matters within the Union. In the light of these developments, the present arrangements for extradition from the United Kingdom appear out of date and in most cases unnecessarily complex. The Extradition Act is now over 10 years old but some of its provisions date back to previous centuries when European nations were periodically at war with each other. What was needed then is no longer always appropriate in today’s fast-changing climate. Serious crime is becoming increasingly complex and international in character...In response we need to step up our efforts to tackle these growing problems”. This is quoted in the House of Commons Select Committee on Home Affairs, First Report, Extradition Bill, 28 November 2002, at paragraph 10.
Justice Across Borders—Written evidence

no court finds in favour of the Government all of the time. The JHA instruments do not pose a threat to the basis of our policing or of our criminal law, nor would the exercise of CJEU jurisdiction over them. A key judgment is whether the risks posed by CJEU jurisdiction outweigh the risks posed by opting out. We argue on the basis of the above that they do not.

21. The UK in fact stands to gain substantially from the stronger regime of enforcement which the Commission and CJEU will impose on others. A cost-benefit analysis must include the benefit which our participation gives by raising standards in other countries, by committing them to binding obligations, and by participating as fully as possible in a Europe-wide system, over which the UK has had profound influence. If it is a gain to their law enforcement, it is a gain to the UK. The UK would become a free rider if we relied on other states (and the EU institutions) to do the heavy lifting. Our leadership so far has paid dividends.

Opting Back In

22. On the face of it, even if the UK wished to opt out of only a few of the pre-Lisbon instruments, it might look attractive to opt out of all instruments and then opt back into the instruments which the UK thought desirable. But there are costs and risks to this approach.

23. First, under Article 10(4) of Protocol 36, the United Kingdom will bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of ceasing to participate in those acts in respect of which it opts out.

24. Second, the procedure for opting back in is not straightforward. The bulk of the instruments would be subject to Protocol 21 on The Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. Article 4 of the Protocol specifies a procedure whereby, if the United Kingdom (or Ireland) notifies its intention to accept a measure after it has been adopted, the procedure in Article 331(1) of the Treaty on the Functioning of the European Union shall apply. The Commission shall, within four months of the notification, confirm the participation of the Member State concerned.

25. However, Protocol 36 specifies that, when exercising this right, the Union institutions and the United Kingdom “shall seek to re-establish the widest possible measure of participation of the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence”. The UK would, therefore, be constrained from opting in to parts of the acquis on a basis which was not coherent or which affected practical operability of the various parts. The EU institutions might also legitimately baulk at an approach designed to re-establish the “narrowest” possible measure of participation, as distinct from the “widest”.

26. Third, opting back in might leave gaps in transitional arrangements. For example, either the EU or the Member States might not have immediately available and in force legislation necessary to deal with areas where the UK had opted out, even if these were areas where it sought to opt back in. Different domestic jurisdictions might interpret the decision to opt out in different ways, creating legal uncertainty.126

126 See the CELS Paper, paragraph 166.
**Ad Hoc and Bilateral Arrangements**

27. The Open Europe Report “Cooperation Not Control”\textsuperscript{127} asserts that:

“For each measure examined in this report, the functional cooperation could be achieved through ad hoc bilateral or multilateral cooperation, cooperation pursuant to a Memorandum of Understanding (MoU) coupled as necessary with domestic implementing legislation, or – where an international legal basis is required – a treaty framework or EU instrument that is not supervised and enforced by the Commission and ECJ.”

28. A key judgment, therefore, is whether such “functional cooperation” could be achieved, or could be achieved effectively, on the basis that the Open Europe Report suggests.

29. First, negotiation and implementation of bilateral and ad hoc arrangements are fraught with difficulty. Other States may not accord these priority, resulting in significant operational delays. Individual legislation may not be fast-tracked or implemented against a deadline like EU legislation. Discrepancies between implementing legislation or differences in interpretation may arise, with no mechanism to rectify them.

30. Second, such agreements might not be negotiated on the terms the UK wants, or at all. International engagement is a bargain whether it is done inside or outside the framework of European police cooperation. Just because you work outside the European framework does not mean you get all or even anything of what you want. In fact, you might get less because you have less influence. Other states could refuse to negotiate or cooperate just as we could, or ask us to pay a price on other issues. There has as yet been no public indication whether other Member States are willing to engage with us outside the EU framework, or on what terms, or what their “price” might be. Sensitive issues such as application to Gibraltar, which are now dealt with in an EU context, would have to be dealt with in a bilateral context.

31. Third, Member States are likely to be reluctant to negotiate a “patchwork quilt” of arrangements with an EU partner. Even if they were willing to do so:

- they might be constrained by EU law. Post-Lisbon, Union competence has been extended in the field of JHA, including the fields covered by the pre-Lisbon instruments. As a matter of EU law, there might now be a limit to which individual Member States can negotiate terms by themselves, particularly if this was to be inconsistent with the EU acquis in the relevant field.

- there is a real risk that requests for assistance under ad hoc arrangements will go to the “bottom of the pile”. If the UK is not committed to cooperation with its EU partners under established Europe-wide mechanisms, there is a risk that other EU partners will not accord our cooperation any priority.

\textsuperscript{127} Cooperation Not Control: The Case for Britain Retaining Democratic Control over EU Crime and Policing Policy, Dominic Raab MP, Open Europe, 29 October 2012, in the Executive Summary (referred to as the Open Europe Report).
32. Fourth, however tight or efficient the bilateral or *ad hoc* arrangements, they result in differences in procedures which criminals exploit. The history of our extradition arrangements with Spain since 1978 is an object lesson. There were no extradition arrangements between the two countries between 1978 and 1985. Arrangements were resumed in 1985 but operated weakly until 2001. Spain became a renowned safe haven for British criminals. Since application of the EAW, the UK has secured the return of 49 of 65 of the top UK fugitives from Spain. An *ad hoc* approach would open up the possibility of the UK becoming a “Costa del Crime” of EU nationals and other Member States becoming a “Costa del Crime” for British nationals.

33. Fifth, the UK’s existing bilateral arrangements with non-EU countries show that these are not free from difficulty. The UK/US extradition arrangements and the McKinnon case are one example.

**The European Public Prosecutor**

34. Continuing to participate in the pre-Lisbon JHA instruments does not mean acceptance of harmonised criminal law, or any supposed code of Euro crimes, or a proposal for a European Public Prosecutor. The UK need not opt-in to any of these. There is in fact no proposal for a harmonised criminal law. The UK has already indicated in the European Union Act 2011 that it will not participate in a European Public Prosecutor’s Office without a referendum.128 Article 10 of Protocol 36 relates only to the 130 or so pre-Lisbon JHA instruments.

**Operational Benefits**

35. We cannot speak to the operational benefits of each and every instrument. But we believe that the operational benefits go deeper than other analyses suggest. Annex B contains an extensive list of operational benefits of police and judicial cooperation to the UK, which seeks to show this. Annex C contains an extensive list of press reports of successes resulting from EU police and justice cooperation, including cases of terrorism, murder, robbery, rape, child sex offences, and a worldwide paedophile network. They make a significant contribution to protecting the British public and ensuring that British victims obtain justice.

**Remedying the Problems of the EAW**

36. The Baker Review concluded that the EAW generally worked well and that its operation had been substantially improved over time. But there remain clear shortcomings in the EAW, at least in its operation. Parallel or collateral measures, some of which are included in the pre-Lisbon instruments, should deal with many of the criticisms. The ongoing parallel package of procedural rights measures (the Roadmap) is intended to raise criminal justice standards across the EU for the British and other EU nationals arrested and tried in other member states.129 For example, the measure on trials in absentia will prevent individuals being extradited after a trial in absentia in another member state of which they were unaware. Prisoner transfers will enable many to serve their sentences in their home

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128 Section 6(3) European Union Act 2011
129 [http://www.theyworkforyou.com/wrans/?id=2011-11-15c.81154.h&s=section%3Awrans+speaker%3A11494#g81154.q0](http://www.theyworkforyou.com/wrans/?id=2011-11-15c.81154.h&s=section%3Awrans+speaker%3A11494#g81154.q0)
member state. Pre-trial supervision will prevent lengthy pre-trial detention in other member states. The measure to resolve conflicts of jurisdiction will do precisely that.

37. The United Kingdom should not only fully apply all these measures but should support other parallel measures which will strengthen the protection of British nationals in other EU Member States.

38. The Baker Review concluded that the main problem with the EAW was ‘proportionality’: a small number of member states overuse the EAW for small or petty crimes (though in practice, anecdotal evidence suggests that such cases are never prioritised by UK authorities). The European Commission has recently introduced more robust guidelines on how to use the EAW in a proportionate way and left open the possibility of further amendments to the EAW if necessary.130

39. The recent Advocate General’s Opinion in Case C 399/12 Radu suggested that the EAW is covered by the proportionality principle, which limits its use for minor offences; and that a court may refuse to execute an EAW on human rights grounds. Moreover, the Advocate General suggested that the substantive threshold for this falls below that established in ECHR case law, i.e. flagrant disregard of fair trial rights. Instead the threshold should be that deficiencies in the trial substantially destroy its fairness. The standard of proof for the complainant should be that his or her concerns are substantially well-founded.

40. If the CJEU does not follow this Opinion, we would urge the British Government to join with other Member States in proposing an amendment to the EAW which would establish the proportionality principle. We believe that the UK’s negotiating hand would be all the stronger if it was clearly committed to the EAW.

The Case against Any Exercise of the Opt Out

41. On the basis of the evidence submitted, the case for participating in many of the operational JHA pre-Lisbon measures is overwhelming. That might leave some arguing that we should exercise the opt out and then opt back in to 40, 60, 80 or 100 measures, depending on variations of operational assessment and ideological perspective.

We, however, believe that this would be a second best solution, not only for the technical reasons stated in paragraphs 22 to 26, but also because:

- The operational benefits of the pre-Lisbon instruments are deeper than other analyses suggest.

- By continuing to support some instruments which may yield little direct benefit to us but may still do so to others, we are encouraging support for a system which improves law enforcement and raises standards across Europe.

- The fewer the instruments in which the UK participates, the weaker its commitment it will be perceived. This will reduce its influence and leadership. It will reduce its capacity to lever improvements in other Member States or negotiate other texts in this area. The UK at present gains substantially in reputation, and therefore in

Justice Across Borders—Written evidence

influence, by its participation and leadership of organisations such as Europol and Eurojust.

- The opting back in process poses risks of negotiability, costs and timing. Why risk at all the types of operational success illustrated in Annexes B and C?

- If we remained party – as we should – to the JHA instruments of most operational importance, these are precisely the instruments which most concern Member State powers and which the CJEU would be most likely to adjudicate. If we exercised the opt out only to exclude defunct instruments or those of lesser operational importance, what is the point?

21 December 2012

ANNEX A: TABLES WITH EXTRADITION STATISTICS

Table 1: Criminals Removed from the UK

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<th>Total</th>
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<td>77</td>
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<td>2006</td>
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<td>2008</td>
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<td>2009</td>
<td>855</td>
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<tr>
<td>2010</td>
<td>1173</td>
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<tr>
<td>2011</td>
<td>922</td>
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Table 2: Breakdown of EU Nationals and UK Nationals Removed

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<tr>
<th>Year</th>
<th>All Criminals Removed</th>
<th>UK Nationals Removed</th>
<th>Other EU Nationals Removed</th>
<th>% of other EU Nationals</th>
<th>% of UK Nationals</th>
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<td>5</td>
<td>19</td>
<td>79.2%</td>
<td>20.8%</td>
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<td>2005</td>
<td>77</td>
<td>11</td>
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<td>332</td>
<td>27</td>
<td>305</td>
<td>91.9%</td>
<td>8.1%</td>
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131 http://www.theyworkforyou.com/wrans/?id=2012-06-20b.112241.h&s= european+arrest+warrant+section%3Awrans#g112241.q0
http://www.theyworkforyou.com/wrans/?id=2011-11-24b.79003.h&s= european+arrest+warrant+section%3Awrans#g79003.q0

132 http://www.theyworkforyou.com/wrans/?id=2012-06-20b.112241.h&s= european+arrest+warrant+section%3Awrans#g112241.q0
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**Table 3: Criminals Returned to the UK under the EAW**

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**ANNEX B: BENEFITS OF EU POLICE AND JUDICIAL COOPERATION TO THE UK**

This Annex contains details of many of the UK success stories using the European Arrest Warrant, Europol, Eurojust and Joint Investigation Teams, and some of the core EU police and judicial cooperation measures.

**European Arrest Warrant (EAW)**

The EAW has dramatically reduced the time and cost it takes to bring back criminal suspects that have fled to other parts of the EU. Up to 62% of those subject to an EAW surrender voluntarily, allowing for return to stand trial on average within 14-17 days. Where the individual does not voluntarily surrender, it takes an average of 48 days. In both cases, this compares very favourably to the previous arrangements which took months and sometimes years, if at all.

- In 2010 alone, the UK extradited over 134 individuals (both UK and non-UK citizens) from other EU member states to the UK to face criminal prosecutions for crimes they had committed here. In the same year, 48 British nationals were extradited from the UK to other member states for crimes committed in those member states.

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133 [http://www.theyworkforyou.com/wrans/?id=2012-06-20b.112240.h&s=european+arrest+warrant+section%3Awrans#g112240.q0](http://www.theyworkforyou.com/wrans/?id=2012-06-20b.112240.h&s=european+arrest+warrant+section%3Awrans#g112240.q0)


135 [http://www.theyworkforyou.com/wrans/?id=2009-06-09c.265789.h&s=european+arrest+warrant+2008+section%3Awrans#g265789.q0](http://www.theyworkforyou.com/wrans/?id=2009-06-09c.265789.h&s=european+arrest+warrant+2008+section%3Awrans#g265789.q0)

134 SOCA Annual Report 2010-11 page 93.

135 [http://www.theyworkforyou.com/wrans/?id=2011-12-01c.84152.h&s=european+arrest+warrant#g84152.q0](http://www.theyworkforyou.com/wrans/?id=2011-12-01c.84152.h&s=european+arrest+warrant#g84152.q0)
• Over the last two years, the UK has used the EAW to extradite at least 71 non-UK nationals suspected of committing serious crimes in the UK. This includes 4 thefts, 4 robberies, 5 murders, 5 rapes, 6 child sexual offences, 9 cases of grievous bodily harm and 14 cases of fraud.136

CASE STUDIES: Operation Captura & Crimestoppers
Crimestoppers, the UK crime fighting charity founded and led by Lord Ashcroft, has an active and highly successful programme working with UK and Spanish authorities to track down and repatriate UK criminals that have fled to Spain using the EAW. Under the programme called ‘Operation Captura’, 49 out of the 65 top UK fugitives hiding in Spain have been identified and returned to face justice in the UK. Full details of Operation Captura and its individual successes can be found here and here.

CASE STUDY: London Bomber
Hussain Osman, one of the individuals involved in the July 2005 attempted London bombings was arrested in Italy under a UK issued European Arrest Warrant and extradited to the UK to face trial. Further details can be found here.

Europol:
While Interpol is effectively a communication hub only between national law enforcement agencies, Europol has considerable analytical, operational and support capabilities which are hugely valued by UK law enforcement authorities, prosecutors and relevant NGOs. In almost every one of the list of UK success stories in Annex C, Europol has played a major role. Europol supports UK law enforcement in a variety of ways:137

• Providing various operational support services including via its 24/7 Operational Coordination and Support Centre, mobile office for on the spot support, forensic and technical analysis, operational analysis, financial support to operations, hosting operational meetings and coordinating cross-border operations, including Joint Investigation Teams138 (in 2010, Europol was a member of 7 Joint Investigation Teams (JITs) and involved in 11 others).139

• Establishing Analysis Work Files and providing analytical support for crimes or crimes areas involving more than one EU member state.140

• Providing access to the Europol Information System (EIS) which includes EU-wide information on serious crimes and criminal suspects at large. The EIS holds over 174,000 pieces of crime information loaded up across all EU member states and member states have undertaken over 120,000 searches of the EIS a year.141

136 http://www.theyworkforyou.com/wrans/?id=2011-11-28c.81230.h&s=section%3Awrans+speaker%3A11494#g81230.q0
• Providing secure access to sensitive operational information and information exchanges between national authorities via the Secure Information Exchange Network Application (SIENA), launched in July 2009. As at March 2011 SIENA had been used to exchange on average 25,000 messages per month.\textsuperscript{142} Over 13,000 cases were initiated on SIENA in 2011.\textsuperscript{143}

• Producing valuable reports based on the EU-wide information they receive including threat assessments, situation reports and intelligence notifications.\textsuperscript{144}

• Providing a variety of training courses for national law enforcement officers\textsuperscript{145}, such as the 2011 course on “Combating the Sexual Exploitation of Children on the Internet”.\textsuperscript{146}

• Cooperating and coordinating activities with other agencies such as Eurojust, Frontex, the European Police College, the External Action Service, as well as with international security partners (e.g. US authorities under the Terrorist Finance Tracking Programme)\textsuperscript{147} and organisations (e.g. Interpol).\textsuperscript{148}

\textbf{CASE STUDY: ‘Operation Rescue’}

A 3 year operation launched by British Metropolitan Police and coordinated by Europol across 30 countries that led to the discovery of the world’s largest online paedophile network. 670 suspects were identified, 184 arrests were made, 230 sexually exploited children were released, including 60 in the UK. For further details See here and p.8-9.

\textbf{Eurojust:}

UK authorities, such as the Serious Fraud Office (SFO), regularly use Eurojust to enhance, speed up and coordinate cross-border important investigations of importance to the UK. Eurojust provides a variety of services:

• Responds to requests from member states for support with existing cases or to launch cross-border cases through Eurojust.

• Runs a Eurojust Case Management System which enables Eurojust to cross-reference national cases for relevant information and connections, and to coordinate cross-border efforts.

• Runs an On Call Coordination system providing 24/7 support for member states.

• Participates in, and provides administrative support and financing for, Joint Investigation Teams (JITs, see below).

\textsuperscript{142} P.78: \url{https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf}
\textsuperscript{143} P.48: \url{https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf}
\textsuperscript{144} P.89: \url{https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf}
\textsuperscript{145} P.101: \url{https://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf}
\textsuperscript{147} P.15: \url{https://www.europol.europa.eu/sites/default/files/publications/en_investigator_-_copy.pdf}
• Acts to resolve conflicts or potential conflicts of jurisdiction in cross-border cases.

In 2011, Eurojust participated in 29 JITs and funded and administered a further 16 JITs. In many of the success stories described in Annex C, Eurojust has played a critical role. In the last year alone, Eurojust has provided £500,000 in funding for JITs involving UK law enforcement authorities. In the last two years, UK authorities have requested Eurojust assistance in 166 cases. In 2011, UK authorities registered 127 cases with Eurojust. The Crown Prosecution Service (CPS) engages with Eurojust to agree individual case strategies and wider thematic approaches to crimes and criminality that cross two or more EU jurisdictions and/or involve third Party (non-EU) States.

The CPS uses the European Judicial Network (EJN) to encourage early, direct liaison between prosecutors to advance individual case issues and provide quick advice as to an individual State's practice and procedure. The European Liaison Magistrates Network is used to represent the CPS, the Serious Fraud Office (SFO), Revenue and Customs Prosecutions Office (RCPO) and the Crown Office in Scotland, especially in relation to mutual legal assistance requests and European Arrest Warrants. These networks provide the bottom-up relationships, trust and working practices that enable smooth and efficient cross-border judicial cooperation.

CASE STUDY: Vietnamese People Smuggling to the UK
In February 2011, a Eurojust co-ordinated operation involving five other countries resulted in nineteen arrests of individuals involved in the smuggling of thousands of illegal immigrants, mainly from Vietnam to the UK. For a full report, see Eurojust website here.

CASE STUDY: JIT on Roma Women Trafficked to the UK for Prostitution
In 2011, a Joint Investigation Team was set up between the UK, Czech Republic and Eurojust targeting an organised criminal network trafficking Roma women from Czech Republic to the UK to work as prostitutes. Eurojust provided analytical and coordination support for the operation and helped to resolve potential conflicts of jurisdiction early. The JIT operation led to the arrest of 11 ringleaders within 3 months of being set up. See p. 21 here.

Joint Investigation Teams (JITs):
The UK has launched and run dozens of successful JITs to date with other European national police forces and EU agencies. The UK now advocates it as a best practice form of international police and judicial cooperation. Since 2009, the UK has been involved in at least

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151 Ibid

347
15 JITs covering serious crimes such as drug trafficking, trafficking in human beings, illegal immigration, fraud, money laundering, vehicle crime and cybercrime.

**CASE STUDY: ‘Operation Golf’**

A joint investigation between Europol, the Met and Romanian Police, broke up an organised criminal network operating a child trafficking network in the UK and across the EU. In 2010, this saw 7 individuals arrested in the UK and the release of 28 children. In total, some 121 individuals were arrested under the Operation, 181 children (trafficked for £20,000 each and earning traffickers £160,000 each per year) were identified and released and saving the UK £400,000 through stopping related benefit fraud. For further information, see p.17-18 here and here and p. 107 here.

**Other Examples, Facts and Figures:**

- **Effective Customs Cooperation:** Naples II, the Convention on Mutual Assistance and Cooperation between Customs Administrations, allows for the exchange of information and administrative assistance between customs authorities in order to combat the illicit trafficking of goods. For example, information gained from Naples II led to the UKBA’s seizure of 1.2 tonnes of cocaine with a street value of £300m – the UKBA’s biggest cocaine seizure ever.

- **European Criminal Records Information System (ECRIS):** The European Criminal Records Information System became operational in April 2012, with 8 member states currently operating ECRIS. Since it came into effect, it has already enabled UK law enforcement authorities to obtain criminal records notifications of nearly 1,700 British nationals convicted of crimes elsewhere in the EU, and nearly 1,600 non-UK EU nationals who are being prosecuted in the UK. The use of ECRIS is set to grow exponentially over time as it becomes operational in more member states.

- **Mutual Recognition of Financial Penalties:** The Council Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties became operational for the first time in 2010. In its first two years, it has enabled UK law enforcement authorities to enforce over £100,000 worth of fines to individuals and companies based elsewhere in the EU. Some 41 cases are being pursued under the measure. The measure was proposed by the UK Government in response to two cases where foreign companies refused to pay fines for corporate failures: (i) Swedish company and ferry walkway collapse and (ii) Austrian company and Heathrow tunnel collapse.

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154 http://www.theyworkforyou.com/wrans/?id=2012-04-16b.103060.h&s=section%3Awrians+speaker%3A11494#g103060.g0
155 http://www.theyworkforyou.com/wrans/?id=2012-02-20d.95610.h&s=joint+investigation+team+section%3Awrians+section%3Awms#g95610.r0
156 http://uk.reuters.com/article/2011/08/03/uk-britain-cocaine-idUKTRE7722JL20110803
157 http://www.theyworkforyou.com/wrans/?id=2012-07-02a.114112.h&s=section%3Awrians+speaker%3A11823#g114112.g0
158 http://www.theyworkforyou.com/wrans/?id=2012-05-01b.106071.h&s=justice+speaker%3A11494#g106071.g0
159 http://www.theyworkforyou.com/wrans/?id=2012-04-16b.103058.h&s=justice+speaker%3A11494#g103058.g0
160 http://news.bbc.co.uk/1/hi/business/280107.stm
161 http://www.independent.co.uk/news/ferry-walkway-disaster-blamed-on-inept-design-1284771.html
162 http://news.bbc.co.uk/1/hi/business/280107.stm
• **Prisoner Transfers:** The EU’s Prisoner Transfer Framework Decision, which recently came into force in December 2011, should allow the UK to both improve rehabilitation outcomes and reduce the size of the British prison population by returning foreign national prisoners to the home EU member state. The transfer of the first batch of 24 non-UK EU prisoners is currently in the pipeline.162

• **The Schengen Information System II,** once it comes online in 2013/4, will deliver £465m in net benefits to the UK. It will provide real time alerts extending the reach of UK law enforcement into Europe covering missing persons, lost/ stolen ID and movement of people of interest to law enforcement agencies. SIS II will provide UK law enforcement authorities with real-time data on over 27,000 people subject to a European Arrest Warrant (nearly 50% of which relate to violent/sex crimes, drugs or terrorism offences), missing persons, persons assisting the judicial authorities and over 42 million alerts on lost or stolen property.163

• **Simpler and Faster Information Exchange:** The Council Framework Decision of 2006 on simplifying the exchange of information & intelligence between law enforcement authorities establishes a simple form for information requests between law enforcement authorities with an 8 hour deadline for responses.

• **Psychoactive Drugs:** The Council Decision of 2005 on information exchange, risk assessment and control of new psychoactive substances, provides for an early warning system for new psychoactive substances discovered across the 27 member states and for them to be banned across the EU. It enables UK identified measures to be banned across the EU, and for the UK to benefit from EU-wide capabilities and resources in terms of toxicology, forensic analysis, pharmacological and epidemiological studies. In 2011 alone, 49 new psychoactive substances were identified across all member states under the measure, just 6 of these had been identified by UK authorities and the largest number ever identified in one year.164 The new substances included, in particular, new forms of cannabis/ skunk, amphetamines, mephedrones and so called ‘legal highs’.165

• **European Police Training College:**166 This provides 80-100 training courses to senior police officers across Europe every year. This provides a valuable mechanism for bottom-up best practice sharing and development of new cross-border crime fighting techniques. Since it is hosted and led by the UK, it helps the UK lead on practical cross-border crime fighting.

• **Networks:** The various EU law enforcement and judicial networks - European Crime Prevention Network (EUCPN)167, Liaison Officers Network168, Liaison

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162 [http://www.theyworkforyou.com/wrans/?id=2012-03-07a.98443.h&s=section%3Awrans+speaker%3A11494#p98443.q0](http://www.theyworkforyou.com/wrans/?id=2012-03-07a.98443.h&s=section%3Awrans+speaker%3A11494#p98443.q0)


Justice Across Borders—Written evidence

Magistrates Network\(^{169}\) and European Judicial Network\(^{170}\) - help facilitate cross-border crime, speed up trust and cooperation and allow for best practice sharing and development.

- **European Image Archiving System**:\(^{171}\) Enables the rapid exchange of images of and information about genuine and falsified documents helping to crack down on identity fraud and allows UK to benefit from EU-wide pool of forgery experts.

- **Mutual Recognition of Supervision Measures**:\(^{172}\) This will allow defendants awaiting trial for an offence in another member states to remain in their home country rather than being extradited and sometimes held in lengthy pre-trial detention (an oft cited complaint of the operation of the EAW).

- **Trials in Absentia**: Jointly proposed by the UK\(^{173}\), France and Germany, it seeks to prevent cases where individuals can be extradited under European Arrest Warrants without having been informed of a trial and having the opportunity defend themselves.

- **Conflicts of jurisdiction in criminal matters**:\(^{174}\) This measure helps prevent lengthy disputes between member states over who has jurisdiction in a particular criminal case by setting out a process for resolving disagreements early.

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ANNEX C: SOME RECENT UK SUCCESS STORIES WITH THE EUROPEAN ARREST WARRANT, EUROPOL, EUROJUST & JOINT INVESTIGATION TEAMS

**METROPOLITAN POLICE:**

**September 2012 – Sex Offences**
Police obtained a European Arrest Warrant for a former Catholic priest accused of past sex offences, who failed to answer bail. In June 2010, a man made an allegation of sexual assault at St Benedict's School in Ealing, west London. The former priest was arrested on suspicion of sexual assault in September 2010. He was bailed to return to a west London police station in March last year but failed to appear, said police. See here\(^{175}\).

**July 2012 – Online Theft Crime:**
Pavel Cyganok was jailed for five years and Ilja Zakrevski for four years for masterminding online theft crimes. A third man, Aldis Krummins, was jailed for two years for helping launder some of the cash stolen by the pair. UK police were tipped off about the criminals

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173 http://www.nio.gov.uk/enhancing_procedural_rights_and_judicial_co-operation_in_the_eu.pdf


175 http://www.bbc.co.uk/news/uk-england-london-19455172
by Estonian police who suspected Zakrevski was using viruses to target Britons. Cyganok and Zakrevski used the SpyEye trojan to steal login details for online bank accounts. Stolen data was uploaded to servers to which the pair had access.

The Metropolitan Police’s Central E-Crime Unit (PCEU) said it had seized one of the servers that was based in the UK, which revealed about 1,000 machines had been infected by SpyEye. The seizure led the PCEU to other machines through which the two men were identified. Cyganok was still logged on to one of the control servers when his home was raided and he was arrested. Zakrevski was arrested in Denmark for a different crime, but because British police had issued a European arrest warrant for him he was extradited to the UK in July 2011. See here and here.

**July 2012 – Blackmail:**
Three people were arrested in Amsterdam and London after a Europe-wide probe into blackmail linked to animal rights extremism. A 50-year-old woman was held in Croydon, south London, on suspicion of conspiracy to blackmail. She was arrested by officers from Scotland Yard’s Counter Terrorism command, who led the investigation. Two other people were arrested in the Netherlands. A man and a woman, both 25, were arrested at a residential address in Amsterdam under a European Arrest Warrant, the Metropolitan Police said. See here.

**June 2012 – Murder:**
The son of a woman found dead at her home in Kingston has been arrested in northern Spain. He was arrested by police in San Sebastian on a European warrant last Friday. His mother was found dead lying on her couch in her flat on Springfield Road in Kingston on June 12. Detectives initially believed the mother had died from head injuries but a postmortem examination later revealed the cause of death as asphyxiation. A Metropolitan Police spokesman said: "On Friday 22 June a 28-year-old man was arrested on a European Arrest Warrant in San Sebastian, Spain, in connection with the murder of Margot Sheehy in Kingston on 12 June.” See here.

**August 2011 – Boiler Room Scam:**
Three men were sentenced at Southwark Crown Court to a total of 19 years in jail for boiler room fraud, following a long running and detailed investigation by the Financial Services Authority (FSA), City of London Police (CoLP) and Eurojust. The Crown Prosecution Service (CPS) conducted the prosecution. Tomas Wilmot, the ringleader of the operation, was sentenced to nine years imprisonment, while his sons Kevin and Christopher were given five years imprisonment each. The sentences were passed following the individuals' convictions on four offences of conspiracy to defraud which resulted in £14 million of losses. The Wilmots controlled a syndicate of boiler rooms that defrauded an estimated 1,700 investors of £27.5 million in total. Many of the victims were elderly and, in some cases, suffering from serious illnesses. The court found that the three Wilmots conspired to acquire, transfer and sell millions of low value, worthless and sometimes non-existent shares to victims in the UK. See here.

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176 http://www.searchclinic.org/2012/07/online-bank-account-robbers-are-jailed.htm
178 http://news.uk.msn.com/three-held-in-blackmail-plot-probe-1
2011 - Armed Robbery:
Operation Captura, launched in 2006, is a joint operation run by SOCA, Crimestoppers, Spanish Authorities and Europol, to track down the most wanted Brits on the run in Spain (‘Costa Del Crime’) and return them under EAWs to the UK (see here). James Hurley, convicted killer of a police-man during an armed robbery in Hemel Hempstead, who escaped custody in 1994, was arrested in 2007 in The Netherlands for drug offences and extradited back to the UK in 2011 to stand trial for murder, see here.

April 2011 – Murder:
A father and son who stabbed a man to death after a row at a party in south London were jailed for life. Jose Aburto-Rojas, 45, and his son Roberto, 26, were asked to leave the celebrations at a house in Brixton after rowing with Gabriel Morales. Hours later they returned and stabbed Mr Morales, 33, to death as he lay in bed with his girlfriend. Both Jose and Roberto, who fled abroad after the 2008 killing, were jailed at the Old Bailey for at least 20 years. The court heard that the two men, Chilean nationals who lived in Walworth, south London, became embroiled in a row during a birthday barbecue hosted by the victim in March 2008. They were asked to leave but returned at about 4am, armed with knives, and forced their way in before attacking Mr Morales. The pair then fled to Italy and Germany. See here.

March 2011 – Financial Fraud:
Italian businessman Giovanni di Stefano was extradited to the UK from Spain and appeared in court on fraud charges. Andrew Penhale of the CPS Organised Crime Division said: ‘Giovanni di Stefano has appeared in City of Westminster Magistrates’ Court this morning on a European Arrest Warrant from Spain. Mr di Stefano is charged with 10 counts of obtaining a money transfer by deception, one of attempting to obtain a money transfer by deception, one of obtaining property by deception; one count of theft of a BMW car belonging to BMW Financial Services; three counts of money laundering; two counts under the Fraud Act 2006. The charges refer to events between 2004 and 2009 and the alleged deceptions include representations that he was a qualified Italian lawyer.' See here.

8 February 2011 – Smuggling Illegal Immigrants:
Co-ordinated action by five countries supported by Eurojust and Europol led to nineteen arrests of individuals involved in the smuggling of illegal immigrants, mainly from Vietnam to the UK. For a full report see Eurojust website here.

2011 – Murder:
Under Operation Captura, James Tomkins, wanted by the Metropolitan Police Service over the murder of electrician Rocky Dawson, 24, in Hornchurch, in May 2006, was arrested in Spain in 2011 and returned to the UK under a EAW, see here.

2011 - Drug Trafficking:

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182 http://www.bbc.co.uk/news/uk-england-suffolk-15782371
183 http://www.bbc.co.uk/news/uk-england-london-12955264
Anthony Fraser was sought under a European arrest warrant for drugs offences in relation to a joint SOCA-Metropolitan Police Middle Market Drugs Partnership investigation. He was arrested in Gibraltar. See here.  

**January 2011 – Insider Trading:**
Christian Littlewood, a senior investment banker and former Financial Services Authority (FSA) Approved Person, his wife Angie Littlewood (also known as Siew Yoon Lew and Angie Lew) and a family friend, Helmy Omar Sa’aid, pleaded guilty to 8 counts of insider dealing contrary to section 52 of the Criminal Justice Act 1993. They were alleged to have made approximately £590,000 profit from the trades. The offences related to trading in a number of different London Stock Exchange and AIM listed shares between 2000 and 2008 and were only brought to an end when the City of London Police working with FSA staff arrested the Littlewoods in March 2009. The third defendant, Helmy Omar Sa’aid, was returned to the UK in March 2010 following the execution of a European Arrest Warrant in Mayotte, one of the Comoros Islands. The case was bought by the FSA and heard at Southwark Crown Court. It was the sixth successful prosecution for insider dealing bought by the FSA and was part of its ongoing drive to tackle market abuse and promote efficient, orderly and fair markets. See here.  

**October 2010 – Child Trafficking and Exploitation:**
Operation Gulf, coordinated by Europol, consisted of a Joint Investigation Team (JIT) between the UK Metropolitan Police and the Romanian National Police, to tackle a Romanian organized crime network that was trafficking and exploiting children from the Roma community. The operation’s primary aim was to safeguard the potential child victims and involved 16 addresses being searched in Ilford, Essex. The children found were taken to a dedicated centre staffed by child protection experts from the police, the local authority and local health trust, where individual assessments were made on each child. The Operation resulted in the rescue of 28 children, 126 arrests, and further transnational organized crime links being identified. For a full report see the Europol website here and here and here.  

**2010 – Drugs Offences:**
Under Operation Captura, Stephen Henry Pitman, from SE London, wanted since 2001 on drugs offences, was arrested on Monday 26 October 2010 in Mijas Costa, see here.  

**2009 – Attempted Murder:**
Under Operation Captura, Andrew Snelgrove, was wanted for attempted murder in London, wounding with intent and possession of a firearm with the intent to danger life on 24 June 1999. He was arrested in Spain in June 2009, see here.  

**17 November 2009 – Trafficking Illegal Immigrants:**
Five men arrested under European Arrest Warrants in England and Scotland by SOCA officers were suspected of participating in a criminal network trafficking thousands of illegal immigrants. See here.  

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189 https://www.europol.europa.eu/content/page/operational-successes-127  
190 http://content.met.police.uk/News/Children-safeguarded-in-major-operation/1260267437629/1257246745756  
immigrants into Europe, mainly from Iraq and Afghanistan. For full report see SOCA website here.  

**March 2009 – Bank Robbery:**
An organised crime gang that attempted to pull off the biggest bank theft the UK had ever seen – attempted theft of more than £229 million from Sumitomo Matsui Banking Corporation in London – was sentenced in March 2009. SOCA used technical expertise to unravel a complicated web of companies and accounts to track down the criminals. Three people were extradited to the UK under European Arrest Warrants from Belgium and Spain. Approximately £1.5 million in assets was restrained. For full report see SOCA Annual Report 2008/9 (p.19) here.  

**31 January 2008 – Human Trafficking Network:**
Eurojust and Europol assisted in dismantling a human trafficking network, supporting authorities in France and the UK to make 23 arrests of individuals involved in the trafficking network and other forms of organised crime such as money laundering and drug smuggling. For full report see Eurojust website here.  

**2008 – Suspected Gangster:**
Under Operation Captura, Noel Cunningham was wanted for conspiracy to rob, conspiracy to steal, having an offensive weapon, handling stolen goods, escape, wounding/inflicting grievous bodily harm, wounding/inflicting grievous bodily harm with intent, possessing firearm with intent. He was arrested in the Netherlands in September 2009, see here.  

**December 2007 – Child Sex Offender Deported:**
A paedophile who worked as a teacher will be extradited to serve a prison sentence for having child pornography. He will be deported tomorrow to serve five months in a Dutch prison for importing and stockling pictures of children. After his conviction for the child porn offences in the Netherlands in August 2002, he was ordered to appear to be sentenced. He did not turn up for the hearing and was sentenced in his absence but never returned to the country to serve his time. His appeal against the conviction was rejected in October 2003. Detectives from the Metropolitan Police and Sussex Police raided the man’s home armed with a European arrest warrant. See here.  

**2007 – Security Van Theft:**
Under Operation Captura, Clifford Hobbs was arrested and stood trial for the theft of £1.25million from a security van. Arrested in Spain and returned to the UK in August 2007 and returned to the UK under a EAW, see here.  

**July 2012 – Drug Gangster:**
A key player in a major drug smuggling gang, who fled the country in 2004, was jailed for nine years for his involvement in an attempt to smuggle £2million worth of cocaine into the UK. Richard Wright (51), formerly of Chislehurst, Kent, who was extradited from the Netherlands, was sentenced today for conspiring to import Class A drugs via Zeebrugge.
back in 2004. He escaped before he could be charged but he continued his illegal activities and was arrested by HM Revenue and Customs (HMRC) officers after he had served a jail term in a Dutch jail. Mike O’Grady, HM Revenue & Customs Assistant Director Criminal Investigation said: “Wright fled the UK when circumstances got difficult and he saw we had arrested other gang members associated with the smuggling attempt. It became clear that he had continued his illegal activities in the Netherlands in the intervening period when he was arrested by our partners there for similar drug smuggling offences. Combining our intelligence and expertise for both smuggling cases has protected UK citizens and wider European communities from this habitual organised criminal.” See here.200

CENTRAL SCOTLAND POLICE:

August 2012 – Child Sex Offences:
A suspected paedophile who twice skipped bail in Scotland was arrested in the Costa del Sol. Rolf Dieter-Glaetzner, accused of abusing two young Scottish girls, spent more than six years on the run after absconding ahead of a High Court appearance. Detectives say he will now face extradition proceedings. He faces charges in Scotland over a series of violent sexual assaults on two primary school pupils, aged six and seven at the time of the alleged attacks. See here.201

GRAMPIAN POLICE:

2012 – Drug Trafficking:
Under Operation Captura, John Cearney Barker, wanted under two European Arrest Warrants for trafficking in cocaine and amphetamine to the value of over £110,000 in 1998 and 1999 within Scotland, was arrested in Spain earlier this year, see here.202

LOTHIAN & BORDERS POLICE:

February 2012 – Murder:
A man was arrested in Poland in connection with the death of a Polish man in Edinburgh. Maciej Ciania's body was found in his flat in Dickson Street, Leith, on 14 January by his flatmate. The 34-year-old was said to have suffered a "violent and brutal" death. Lothian and Borders Police said the 25-year-old man had been arrested on a European Arrest Warrant. He is expected to appear at Edinburgh Sheriff Court at a later date. See here.203

2005 – Drug Trafficking:
Christopher Bailiff failed to appear for trial in relation to drugs charges. The European Arrest Warrant was craved from the Sheriff at Edinburgh on the afternoon of Friday 24 June 2005 and issued that night. Bailiff was arrested in Spain on the warrant on Tuesday 28 June. He consented to his extradition and returned to Scotland less than a month later. Bailiff subsequently pleaded guilty to being concerned in the supply of drugs, and was sentenced on Thursday, 1 December to five years in prison, See Notes to Editors here.204

201 http://www.barcelonareporter.com/index.php?/news/comments/costa_del_crime_suspected_paedophile_arrested_in_spain_he_faces_charges_in/
202 http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7204362.stm
203 http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-16996309
STRATHCLYDE POLICE:

2010 – Hit and Run Death:
Paul Lyons pleaded guilty to causing the death of Mark Fleeman on the M74 at Larkhall and attempting to defeat the ends of justice by fleeing to Spain shortly after the incident. Following information that he may be residing in Spain, the Crown Office International Co-operation Unit sought a European Arrest Warrant for Lyons which was granted at Edinburgh Sheriff Court. This warrant was executed by Spanish police and he was arrested on 23 September 2010. Lyons did not consent to his surrender but following a hearing before a Court in Madrid he was ordered to be returned to the UK to face criminal charges in Scotland. See here.205

2009 – Benefit Fraud:
Anthony Kearney was accused of fraudulent offences, including obtaining benefits from Department of Work and Pensions (DWP) and setting up false accounts. Under Operation Captura, he was arrested along with his accomplice, Donna McCaffery, within hours of a press conference in Alicante in November 2008 and returned to Scotland, see here.206

April 2009 – Rapist and Murderer:
A Slovakian man was jailed for a minimum of 25 years for the "barbaric" rape and murder of a businesswoman in a Glasgow park. Marek Harcar forced 40-year-old Moira Jones into Queen's Park as she returned home from a night out. Passers-by heard screams coming from the park. A park ranger found Jones's badly beaten body the following morning. Harcar fled to the Czech Republic, and then to Slovakia, after the murder. A European arrest warrant was granted, and he was extradited back to the UK. See here207 and page 8 here.208

KENT POLICE:

August 2012 – People Smuggling:
On Tuesday 2 June 2009 at just after 9.30pm, a hired Fiat Ducato Motor home arrived in the UK from Dunkirk, France. The vehicle was examined by officers and ten Vietnamese people were removed from inside the rear compartment. Danny Bracke and his wife, Svetlana Malinova Anguelova, were both arrested and questioned by Kent Police. Bracke was charged on 10 January 2010 and Anguelova on 29 April 2010 for assisting unlawful entry to the UK. In March 2011, both were found guilty at Canterbury Crown Court and were bailed pending being sentence on 6 May 2011. Both Bracke and Anguelova failed to appear at the Court and were sentenced in their absence to five years imprisonment. A European Arrest Warrant was issued for each offender. Kent Police travelled to Belgium on 30 July to take into custody Danny Bracke from Beringen, Belgium. Officers from Belgium handed Bracke to officers from Kent at Ostende and Bracke was brought back to England and put before Canterbury Crown Court on 31 July. Bracke was handed a further four months on 31 July for breach of bail. See here.209

April 2011 – Murderer:

206 http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7715974.stm
207 http://www.guardian.co.uk/uk/2009/apr/08/slovakian-jailed-murder-glasgow
208 Scottish Crime and Drug Enforcement Agency Report, 2008-9
A man who murdered his 19 year old girlfriend in Humberside and then committed an offence while on licence, was extradited back to the UK and held in custody after being tracked down by police in Spain. 40 year old Raymond Gunnell, previously of St Luke’s Road, Maidstone, was brought up in Grimsby, where he murdered his girlfriend, Alison Newland, in 1990 whom he stabbed 11 times in a jealous rage, while her baby daughter was just metres away. He served nine years of his life sentence and was released on a life licence in December 1999 to a bail hostel in Kent. He is then believed to have committed an unprovoked attack on a man in a pub in Maidstone, after which he fled to Spain. A European arrest warrant was obtained and he was arrested by authorities there two weeks ago. A specialist team of officers from Kent Police brought him back to the UK via Heathrow to Maidstone Police Station. He will now be returned to prison to serve the remainder of his sentence for the murder. See here. 210

2011 – Kidnapped Child Freed, Kidnappers Deported:
Another example is the forfeiture of seized cash under the Proceeds of Crime Act from a couple at Dover Eastern Docks. A couple, originally from Somalia, were subject to an outstanding European arrest warrant in relation to the abduction and/or kidnap of a young boy from the Dutch Local Authorities. This child had been with foster carers in Holland. Officers from Kent Police intercepted the vehicle with the three inside on 19 May 2010. A search of the vehicle and belongings identified a cash sum of over 10,000 euros, which was seized under POCA. The couple were handed to the Dutch Authorities to be subject of court proceedings. The boy was returned to his Dutch foster parents. The money was made subject of a forfeiture order under POCA by Folkestone Magistrates Court. See here. 211

October 2009 – Murder:
A 34 year-old man was charged with the murder of a man from Gravesend six years ago. Kamaljit Kalon, who was known as Bobby, was 31 when he was stabbed in Gordon Promenade off Commercial Road in Gravesend on July 10, 2003. Baljinder Singh Kooner was arrested in Paris under a European arrest warrant on September 24. He was extradited on October 7 and taken to Maidstone police station, where he was charged last night. He was collected from Paris by Kent police officers and will appear at Maidstone Magistrates’ Court this morning. See here 212 and here. 213

August 2009 – Drug Trafficking Gangster:
A convicted drug dealer who has been on the run for nearly three years is back behind bars after being extradited from Spain. Robert Colyer, 41, is now serving more than 10 years in jail after police tracked him down to Malaga. The second hand car dealer, from Island Road, Hersden, near Canterbury was found guilty of conspiring to supply controlled drugs worth more than £2million. He absconded before facing trial, but a Kent Police investigation revealed he was living in Malaga, Spain and a European arrest warrant was obtained. In July Spanish authorities arrested Colyer on behalf of Kent Police. See here 214 and here. 215

2008 – Murder:

210 http://www.heart.co.uk/kent/news/local/convicted-murderer-extradited-kent/
212 http://www.newsshopper.co.uk/news/4671285.GRAVESEND__Man_charged_with_murder_from_six_years_ago/
215 http://news.bbc.co.uk/1/hi/england/kent/8197884.stm
Under Operation Captura, John Seton, wanted for the murder of Jon Bartlett in March 2006 in Kent, was arrested in the Netherlands and returned to the UK in May 2007 under an EAW, see here.  

**2008 - Child Rapist:**
Andrew Alderman was convicted to 10 years' imprisonment for indecent assault and rape of a girl under the age of 16, between 1st January 1995 and 30th April 2004. Alderman handed himself over to authorities in Madrid in November 2008.

**2007 - Drug Trafficking:**
John Dowdall was wanted for importing large quantities of cannabis from Spain in 2003. He was tried, convicted and sentenced to five years imprisonment in his absence on the 17th May 2005. After being arrested in Spain, he was returned to the UK in September 2007. After appearing in Canterbury Crown court he was sentenced to a further four months’ imprisonment, which is to run consecutively to the sentence of his original sentence. See here and here.

**THAMES VALLEY POLICE:**

**2012 – Child Sex Offender and Rapist:**
Timothy Edmonds appeared at Oxford Crown Court for sentencing after admitting to 15 charges relating to child sexual offences on 9 December, 2011. These charges included four counts of rape of a child under 13, two counts of sexual activity with a child, seven counts of taking indecent images of a child and two counts of distributing indecent images of children. The charges relate to offences carried out against one child between January 2009 and January 2011. Edmonds’ arrest was the result of a joint operation between Thames Valley Police’s Paedophile Online Investigation Team (POLIT), the Child Exploitation and Online Protection (CEOP) Centre and the Danish National High Tech Crime Centre's (NITEC) Proactive Unit. See here.

**HAMPSHIRE POLICE:**

**May 2012 – Murder:**
The hunt for the killers of a Southampton man whose body was found in a burnt-out car has taken a new twist after detectives arrested a man in Rome on suspicion of murder. Yesterday’s dramatic development comes almost four weeks after Agim Hoxha was murdered and his body left in a torched car dumped at the side of the road.

Two detectives from Hampshire are understood to have flown out to Italy to make the arrest, having obtained a European arrest warrant earlier this week. The man was detained by the officers, who were working in conjunction with police and local authorities in Italy. Moves are now under way to extradite the man back to Hampshire for questioning. See here and here.

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218 http://www.crimestoppers-uk.org/most-wanted/catching-criminals-in-spain/arrests-to-date-operation-captura
221 http://www.dailyecho.co.uk/news/9703043.print/
**November 2010 – Child Sex Offences:**
A sex offender who was named in Britain’s top ten most wanted criminals after going on the run, was finally brought to justice and jailed for ten years. Mark Brito, 45, fled abroad as soon as he heard police were investigating complaints from two girls, saying he had repeatedly abused them. He absconded when he knew he was coming under suspicion after one victim had plucked up the courage to tell her teacher, rushing upstairs at his Southampton home to pack a bag, saying he was going to be away for a few days. Detectives believe Brito went to Portugal and later moved to France where he got a girlfriend, a nurse. The fugitive was finally arrested in April, after 11 years on the run, when he committed a driving offence and was pulled over by police. He was taken to a police station for questioning where it was discovered he was wanted on a European arrest warrant prepared by Hampshire Police and the Crown Prosecution Service. Following extradition, Brito stood trial at Southampton Crown Court where he was unanimously convicted of six specimen counts of indecent assault and five specimen charges of indecency with a child. Jailing him for ten years Judge Derwin Hope told Brito his victims’ childhood had been ruined and they had suffered in silence. See [here](http://www.thisishampshire.net/news/8637556.Child_sex_abuser_is_finally_caged/?action=complain&cid=8925620).  

**December 2009 – Fatal Hit and Run:**
A Polish man extradited to Britain pleaded guilty to causing the death by dangerous driving of a promising diver from Bradford, the Crown Prosecution Service said. Łukasz Banasik, 22, was flown from Poland to face the charge relating to the death of Gavin Brown. The 22-year-old, a promising international-standard diver, died after being struck by a Vauxhall Astra driven by Banasik as he walked near the Hobbit Pub in Bevois Valley Road, Southampton, on April 27, 2007. James Kellam, Crown Advocate for the CPS, said: “Mr Banasik should never have been behind the wheel that night. He didn’t hold a driving licence or have insurance. We worked extremely hard alongside Hampshire Police to bring Mr Banasik back to the UK. The execution of a European Arrest Warrant meant he finally had to face justice. Only now has he owned up to killing Gavin.” See [here](http://www.thetelegraphandargus.co.uk/news/local/localbrad/4819774.___Cowardly____driver_admits_fatal_crash/).  

**SUSSEX POLICE:**

**April 2012 - Fraud:**
The case was referred to the SFO in March 2006 by the Sussex Police following the winding up of Secure Trade & Title Ltd by the FSA. The ensuing joint investigation by the SFO and the Sussex Police resulted in Brian O’Brien being arrested in the USA on 8 October 2010 and handed to the custody of Sussex Police at Chicago’s O’Hare airport on 1 December 2010. O’Brien, D’Albertson and Pye appeared in Westminster Magistrates’ Court in December 2010 and were sent to Southwark Crown Court for trial. The trial of O’Brien and D’Albertson opened in January 2012. Pye had already pleaded guilty to the charges against him at a preliminary hearing in July 2011. Damien Smith was extradited from the Republic of Ireland following the issue of a European Arrest Warrant. He appeared at Westminster Magistrates’ Court in January 2012 and was sent to Southwark Crown Court for trial. See [here](http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/offshore-share-sharks-who-duped-british-investors-jailed.aspx).  

**March 2011 - World’s Largest Online Paedophile Network:**

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Europol supported and coordinated investigations through Operation Rescue, bringing together 13 countries to track offenders using a website that was used to disseminated experiences and inappropriate content. See Europol website for full report here.226 This Operation led to 240 offenders targeted in the UK; 121 offenders arrested to date in the UK; 60 children safeguarded to date in the UK. Worldwide the figures are 670 offenders targeted across the world; 184 offenders arrested to date worldwide; 230 children safeguarded to date worldwide. This includes Ian Riley from Sussex, see here227 and here.228

**2011 - Child Sex Offences:**
Twin brothers, whose details were published on the Child Exploitation and Online Protection (CEOP) Centre’s Most Wanted website, are now both back behind bars in the UK, after being extradited from France. The brothers, Thomas and Kenneth Parker, were both in custody earlier in the year in France, after their details were published on the website. See here.229

**October 2010 – Drug Gangster:**
Four men were sentenced at Maidstone Crown Court for their involvement in a drug supply network operating in the Sussex, which CPS Crown Advocate Anthony Hill described as "a prolific organized crime group concerned in the wholesale supply of cocaine". The surveillance of an illicit meeting between three men triggered a series of arrests starting in October 2008, which later revealed the extent of the network and the defendants involvement. A Ford Mondeo at the centre of that meeting was followed, searched and found to contain 122g of cocaine of 99 per cent purity. The driver was acquitted; his passenger Sadettin Uysalan pleaded guilty. The third man was followed to James Parker-McCue’s home address. During the course of the investigation, three other suspects were identified, properties searched and the threads linking all the men were unravelled. Shortly after the arrest of Darren Simpson, James Parker-McCue departed on a flight bound for Alicante and a European Arrest Warrant was issued for his arrest. Spanish Police arrested him at a birthday party in a property he owns there. See here.230

**SURREY POLICE:**

**Sept 2012 – Murder of UK Family in France:**
Following a two day meeting in Annecy, France between Surrey Police, the Crown Prosecution Service, the French Judges, Prosecutors and Police, a joint UK -French investigation team (JIT) was set up in order to take forward the investigation into the murders of members of a Surrey family and a French cyclist, in the Annecy region of France on the 5th September 2012. The meeting was co-ordinated and chaired by Europol. Detective Chief Superintendent Adrian Harper and Deputy Chief Crown Prosecutor for CPS South East, Jaswant Narwal, jointly commented after the meeting; “The establishment today of the Joint Investigation Team marks a significant step forward in progressing the murder investigation, enabling closer co-operation and greater understanding between the

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UK and French authorities, with a single focus of bringing to justice those responsible for these heinous crimes.” See here, here and here.

**August 2007 – Murder:**
A convicted murderer who absconded from a mental health unit in Surrey has been arrested in Germany. Laszlo Varga, 68, was living on licence at the Horton Haven facility in Epsom. He was allowed to leave on 8 May to visit friends, but he never returned. Surrey Police said the Hungarian man was held in Berlin under a European arrest warrant on 27 July. He is now awaiting a court hearing in Germany, before he is brought back to the UK and recalled to prison. See here.

**WEST MIDLANDS POLICE:**

**July 2012 – Murder:**
Martin Christopher Stafford, 46, is to stand trial charged with the murder of Michelle Gunshon, aged 38, who disappeared while working at the NEC in December 2004. Despite extensive enquiries, Michelle’s body has never been found. She went missing in December 2004, while staying in Birmingham City centre, while working as security staff at the NEC. Stafford was extradited from the Republic of Ireland in December 2011 under terms of a European Arrest warrant, by officers from West Midlands Police and charged with Michelle’s murder. See here.

**May 2012 - Murder:**
West Midlands Police (WMP) has shown it doesn’t give up on criminals easily, as officers tracked down two offenders who’d fled the country. One man was wanted for theft, while another has been hunted down and sentenced for a murder. Romanian Florian Baboi drunkenly beat to death 63-year-old David McArthur in the pensioner’s home. The attack took place in August 2011 and Baboi quickly fled back to Eastern Europe after his victim’s body was found by a neighbour. Investigators issued a European Arrest Warrant to bring the killer back to Britain. Officers were aided by authorities in Bucharest and the man was taken into custody on 12 September 2011. When he appeared at Birmingham Crown Court on 2 May, a jury unanimously found Baboi guilty of murder. The judge ordered the man to serve at least 23 years in prison, after which he could be deported back to Romania. See here and here.

**December 2011 – Murder:**
A 43 year old man has been charged with the murder of a woman who went missing from Birmingham seven years ago. The man will appear before Birmingham Magistrates Court on 14 December charged with the murder of Michelle Gunshon. Officers from the Major Incident and Review Team extradited the man from the Republic of Ireland yesterday (Tuesday 13 December) and he was brought back to the UK under terms of a European Arrest Warrant. He was charged with the murder of Michelle and remanded into custody.

231 http://www.getsurrey.co.uk/news/s/2121101_police_team_set_up_to_investigate_alhilli_murders
232 http://scotlandyard.blogspot.co.uk/2012/09/eurojust-bulletin.html?m=1
234 http://news.bbc.co.uk/1/hi/england/surrey/6926100.stm
236 http://www.constabulary.org.uk/2012/05/04/west-midlands-police-hunts-down-two-offenders-who-fled-britain/
237 http://www.cps.gov.uk/westmidlands/cps_west_midlands_news/romanian_national_found_guilty_of_murdering_birmingham_man/
Michelle Gunshon went missing in December 2004, while staying in Birmingham City centre, while working as security staff at the NEC. See here.  

**September 2011 – Murder:**
A man has appeared before Wolverhampton Crown Court today (22 September) accused of the murder of a Birmingham man last month. The 34-year-old was arrested at Heathrow Airport on Wednesday evening in connection with the death of David McArthur, who was found dead at his home on Woodbrooke Grove, Northfield on 22 August. Police issued appeals earlier this month to trace a man officers wanted to speak to in connection with the incident. A man was later detained in Romania and was returned to the West Midlands on a European Arrest Warrant. He was remanded in custody to re-appear before a court in Birmingham at a date yet to be confirmed. See here.

**STAFFORDSHIRE POLICE:**

**May 2012 - Kidnap:**
A fugitive wanted by police in connection with a kidnap has been arrested in Spain. Martin Wolstenholme, of Stoke-on-Trent, has been the subject of an international manhunt after Staffordshire Police named him as part of their investigation into the kidnap which took place in November, 2010. Officers also took part in an appeal on TV's Crimewatch as part of their efforts to track him down. Now Wolstenholme, aged 34, is being transported to Madrid where a hearing will take place to extradite him back to Britain.

A spokesman for Staffordshire Police said: "Liaison is ongoing with the Spanish authorities to facilitate his return to the UK so that proceedings can begin concerning his case in Staffordshire." A spokesman for the Serious Organised Crime Agency said: "He was arrested in Malaga on a UK issued European arrest warrant for conspiracy to kidnap. See here.

**September 2011 – Lorry Theft:**
A 37 year-old man wanted by Staffordshire Police for more than two years has been arrested in Tenerife. David Kelly, who was formerly living at an address in North Street, Stoke, had not been seen since failing to answer his police bail in 2009. But Kelly was finally tracked down to an address in the tourist town of Los Cristianos on Monday after the execution of a European Arrest Warrant. Kelly had to appear before a Spanish court before being flown back to Britain. Kelly had been arrested in early 2009 in connection with the theft of a lorry loaded with about £300,000 of electrical goods from James Irlam logistics company, at Hanchurch. After returning to Britain earlier this week, Kelly was charged with conspiring to steal the lorry. See here.

**2011 - Aggravated Burglary:**
Jonathon Lejman, born 15/05/1981 in Stoke-On-Trent was arrested this afternoon (Thursday 24 March 2011) about 2.30pm UK time in Tenerife and was found living in a commune on a beach. Lejman was sought on an EAW for his part in an aggravated burglary in Staffordshire. On the 28 December 2008 Lejman with an accomplice kicked in the front door of a house in Stoke on Trent while the owners were asleep upstairs. Lejman proceeded upstairs to the

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241 http://www.thisisstaffordshire.co.uk/300-000-lorry-raid-suspect-custody-Spanish-arrest/story-13396146-detail/story.html

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362
bedroom and threatened the occupants before slashing a kitchen knife across the face of the male occupant. Lejman and his accomplice left the house leaving the male occupant with a broken cheekbone and a deep wound from ear to mouth. See here.\(^\text{242}\)

**July 2010 – Murder of a British Soldier:**

Mr Newman, a Sergeant in the Royal Corps of Signals employed in the Derby branch of the Army Careers Information Office, was shot dead on 13 April 1992. On that day he left his office in Derby city centre and walked to the car park where he had left his car. He was followed by two men who shot him once to the head. The men ran off to a waiting getaway car and made good their escape. Mr Newman died of his wounds. The Irish National Liberation Army (INLA) claimed responsibility for Mr Newman's murder. The men involved fled to the Republic of Ireland. Initial attempts to extradite them failed. A European arrest warrant (EAW) was issued on 14 February 2007. The man sought was serving a sentence in a prison in the Republic of Ireland as extradition proceedings commenced. He requested and was granted a transfer to a prison in Northern Ireland. From there he was transferred to England and arrested on the first instance warrant that underpinned the EAW. He was produced at Stafford Crown Court on 22 July 2010 and pleaded guilty to a single count of murder. He was sentenced to life imprisonment with a recommendation that he serve at least 24 years. See here.\(^\text{243}\)

**WEST MERCIA POLICE:**

**April 2009 – Fraud:**

A conman found guilty of fraud although he did not turn up for his trial has been arrested in France. David Oakley was jailed in his absence to three years and nine months at Shrewsbury Crown Court in September. He had said he was too ill to leave his Spanish home to attend the trial, which heard he netted about £100,000 through his illegal activities. West Mercia Police said Oakley was arrested in Melle on Friday. He is due to appear in a French court on Wednesday for an initial extradition hearing. Oakley was found guilty of 12 offences, including fraudulent trading and using forged cheques. A woman has also been arrested under a separate European arrest warrant on suspicion of fraud offences and she will also appear in court on Wednesday. See here\(^\text{244}\) and here.\(^\text{245}\)

**November 2007 – Suspected Child Sex Offender:**

Britain’s most wanted paedophile is to be extradited from Ireland to the UK despite a “cynical” attempt by his brother to block it. John Richard Murrell fled to Ireland after serving half of a two-year sentence for sexually assaulting a nine-year-old girl, breaching the terms of his release. The High Court in Dublin today ordered the 39-year-old be sent for trial in England even though he faces a charge in a Dublin court. The summons, for failing to notify gardaí of his whereabouts, was issued in the name of Murrell’s brother, Alan. Ordering the extradition Mr Justice Michael Peart accused the brother of cynically attempting to abuse the legal system. “It is so cynical attempt to get around the provisions of the European Arrest Warrant Act that even if I was satisfied that there was some merit in the case, my view would be that it quite clearly was such an abusive attempt … that it would be unconscionable for this court to uphold,” the judge said. Murrell is to be sent to England by


\(^{243}\) [http://www.cps.gov.uk/publications/prosecution/ctd_2010.html#a01](http://www.cps.gov.uk/publications/prosecution/ctd_2010.html#a01)

\(^{244}\) [http://news.bbc.co.uk/1/hi/england/shropshire/7986568.stm](http://news.bbc.co.uk/1/hi/england/shropshire/7986568.stm)

\(^{245}\) [http://news.bbc.co.uk/1/mobile/england/shropshire/7986568.stm](http://news.bbc.co.uk/1/mobile/england/shropshire/7986568.stm)
the end of December. Murrell is wanted by West Mercia Police in England to answer charges of breaching the terms of his release and now faces trial at Worcester Crown Court. See here\(^{246}\) and here\(^{247}\).

**WARWICKSHIRE POLICE:**

**September 2007 – Suspected Murderer:**
At Leamington Spa town hall today (September 26 2007), the Warwickshire Coroner, Mr Michael Coker closed the inquest into the death of Ryszard Sawczyk and now awaits the outcome of the forthcoming trial at Warwick Crown Court. Mr Sawczyk was murdered on October 19 2005 at Evans Road, Rugby, Warwickshire. Mariusz Szpyt, aged 24 years, was charged with the murder of Mr Sawczyk in September 2006. Mariusz Szpyt will next appear at Warwick Crown Court on November 23 2007. Szpyt was extradited back to the UK from Poland on a European Arrest Warrant in September 2007. See here\(^{248}\).

**AVON & SOMERSET POLICE:**

**August 2011 – Suspected Child Sex Offender hiding in Spain:**
A man wanted over child sex offences in Bath has been arrested in Spain. Lewis Knight, 60, was arrested by Spanish police in Torres de Segre, near Barcelona, on 23 August. He was charged with seven counts of sexual abuse in 1999 but failed to turn up to Bristol Crown Court in February 2000. After appearing in a Madrid court he was refused bail while an extradition request is considered. He now faces at least 18 charges. Mr Knight was arrested after Avon and Somerset Police issued a European arrest warrant in July. See here\(^{249}\).

**GLOUCESTERSHIRE POLICE:**

**August 2011 – Slavery and 20 Freed:**
A man has been arrested for conspiracy to commit slavery as part of an operation targeting slavery, servitude and forced labour. Following work by Gloucestershire Police, the 19-year-old Staverton man was arrested yesterday (August 23) in Copenhagen by Danish police acting on a European arrest warrant. He will now be escorted back to the UK by Gloucestershire Police officers in the next few days. The arrest follows searches and four arrests in March in Staverton, Leicestershire and Derbyshire. During those searches 20 people forced to work as slaves were rescued. See here\(^{250}\) and here\(^{251}\).

**DEVON & CORNWALL POLICE:**

**February 2011 – Fatal Hit and Run:**
On 6 July 2008, in Littleham Road, Exmouth, three people were walking home from a night out when a car collided with the group, pushing them 300 metres along the road and fatally injuring one of them. The car continued on its way as if nothing had happened. Paramedics arrived at the scene but despite their best efforts a 43 year old woman died. The perpetrator, Kevin Stagg, was arrested but, as the trial approached, Stagg fled to Spain.

\(^{246}\) [http://www.breakingnews.ie/ireland/wanted-paedophile-to-be-sent-to-uk-338355.html?m=false](http://www.breakingnews.ie/ireland/wanted-paedophile-to-be-sent-to-uk-338355.html?m=false)
\(^{248}\) [http://onlinenews.warwickshire.police.uk/wpnews_pressrelease/x/7933](http://onlinenews.warwickshire.police.uk/wpnews_pressrelease/x/7933)
\(^{249}\) [http://www.bbc.co.uk/news/uk-england-bristol-14735601](http://www.bbc.co.uk/news/uk-england-bristol-14735601)
\(^{250}\) [http://www.gloucestershire.police.uk/Latest%20News/Press%20Releases/2011/August/item29699.html](http://www.gloucestershire.police.uk/Latest%20News/Press%20Releases/2011/August/item29699.html)
\(^{251}\) [http://www.bbc.co.uk/news/uk-england-gloucestershire-14647763](http://www.bbc.co.uk/news/uk-england-gloucestershire-14647763)
Prosecutors later applied for a European arrest warrant. Police are not sure if Stagg knew the net was closing around him but, as officers were setting off to serve the warrant, he gave himself up at the British Embassy in Madrid and was extradited back to the UK where he was remanded in custody awaiting trial. In February 2011, after a week-long trial at Exeter Crown Court, Stagg, now 56, was convicted of causing death by careless driving while under the influence of alcohol and sentenced to nine years in prison.

**October 2010 – Fraud:**
Officers from Zephyr working with Devon and Cornwall police have executed a European arrest warrant. The team targets serious and organised criminals across the South West and is made up of officers from Avon and Somerset, Devon and Cornwall, Dorset, Wiltshire and Gloucestershire. A 31-year-old man, currently residing in St Ives, has been arrested on suspicion of a series of fraud and deception offences involving falsifying work documents and fraudulent use of chequebooks. The individual concerned was wanted in Poland and has been outstanding since 2002. He has appeared before the City of Westminster court. See [here](http://www.devon-cornwall.police.uk/NewsAppeals/Pages/NewsItem.aspx?Release=11412) and [here](http://www.zephyrsouthwest.com/2011/02/zephyr-execute-european-arrest-warrant/).

**March 2007 – Rape and Attempted Murder:**
A man arrested in Poland in connection with the rape and attempted murder of a Devon woman can be extradited to the UK, a court has ruled. The 48-year-old mother from Exeter was attacked in July 2006 and left for dead under a truck. A 24-year-old Polish national was arrested in Poznan on 9 February under a European arrest warrant. The victim was attacked while walking home after a night out with a friend in the city on 22 July. She remains critically ill in hospital with serious head injuries. A police officer from Devon travelled to Poland to oversee efforts to extradite the man. The arrest warrant included a number of offences including attempted murder, rape and robbery. See [here](http://news.bbc.co.uk/1/hi/england/devon/6455959.stm).

**DORSET POLICE:**

**June 2010 – Suspected Fraudster and Con Man:**
A Weymouth man has been arrested in France over allegations that he conned people out of tens of thousands of pounds in bogus business deals. Duncan Lawrie Herd, also known as David Mann, 44, formerly of Faircross Avenue, Weymouth is being detained south of Cherbourg in the La Manche region. His arrest comes after Weymouth magistrates issued a European arrest warrant for him in April after learning that police had tracked him to northern France. Dorset Police requested the warrant after being tipped off that Herd was living across the channel and had already been arrested on separate matters in France. See [here](http://www.dorsetecho.co.uk/news/localnews/8196317.Weymouth_fugitive__Arrest_in_France/?ref=rss).

**WILTSHIRE POLICE:**

**June 2005 – Suspected Murderer of Pregnant Woman:**
The prime suspect in the murder of Hayley Richards has arrived back in England under police guard. Hugo Quintas, who was arrested in Spain last week, will be accompanied by Det Supt Mike Yeale of Wiltshire Police and officers from the Metropolitan Police. Quintas,
23, flew to his native Portugal on Saturday, June 11, the day Ms Richards, 23, who was three months' pregnant, was found dead in her flat in Trowbridge. Quintas, a factory worker, then travelled to neighbouring Spain, where he was arrested last week under a European arrest warrant. See [here](http://www.dailymail.co.uk/news/article-353916/Hayley-murder-suspect-flown-England.html#ixzz239VjArZ3).

**NORTH YORKSHIRE POLICE:**

**February 2012 – Robbery and Theft:**
A fugitive is facing extradition to Poland after being tasered and arrested by police in York city centre following an international manhunt.
Tomasz Furmaniak, 30, was arrested in Swinegate by a team of officers from North Yorkshire Police, after he was spotted drinking in a bar. The man was wanted in connection with a domestic incident in the city on December 12, and although he was not charged with that offence, he received an adult caution for resisting arrest. The police spokesman said: “He was also detained in connection with a European arrest warrant.” The man was wanted in Poland on charges of robbery and theft, a spokesman for the Polish Embassy in London told The Press. See [here](http://www.yorkpress.co.uk/news/9560175.Polish_fugitive_tasered_and_arrested_by_police_on_York_street/).

**SOUTH YORKSHIRE POLICE:**

**February 2012 – Murder:**
A 20 year old pizza shop worker has today been sentenced to 26 years imprisonment for the murder of Sheffield father Zabihullah 'Zabi' Rafiq. Earlier today, a jury found Maruf guilty of Zabi’s murder which was the result of a failed robbery attempt.

On 29 May last year, Zabi left work with around £700, the days takings. Maruf, having worked at the pizza shop for some time, knew this and so he laid in wait outside of Zabi’s house in Gleadless. Armed with a knife he set out to rob Zabi. During the robbery, Zabi received a single, but fatal, stab wound to the chest. He died soon after, leaving his wife and one year old child. See [here](http://www.cps.gov.uk/yorkshire_humberside/cps_yorkshire_and_humberside_news/pizza_shop_worker_sentenced_to_life_for_murder_of_sheffield_dad/).

**2009 – Drug Trafficking:**
Under Operation Captura, Michael Eddleston, was accused of three counts of illicit trafficking in narcotic drugs and psychotropic substances by South Yorkshire Police. He handed himself into authorities in Majorca on 29 September 2009, see [here](http://www.driffieldtoday.co.uk/news/local/most-wanted-uk-drug-trafficker-michael-eddleston-hands-himself-in-1-832343).

**2008 - Violent Assault:**
Keith Burke was involved in a violent assault that took place in the toilets of “The Top Club” bar in Edlington, Doncaster on 8 July 2001. He was convicted and sentenced to three years imprisonment for affray. He was arrested in Spain in the UK 2008. See [here](http://www.crimestoppers-uk.org/most-wanted/catching-criminals-in-spain/arrests-to-date-operation-captura).

**2007 - Murder:**

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WEST YORKSHIRE POLICE:

**June 2011 – Bank Robbery:**
Two members of an armed gang who stole £43,000 from a Darwen bank were jailed yesterday. Lee Tansey, 33, of Pegwell Drive, Salford, was one of three violent raiders who smashed the door of Lloyds TSB, Duckworth Street, with a manhole cover on June 5, 2008. They fled with a total of almost £43,000 and jumped into a stolen Audi, later found abandoned. The gang also targeted Lloyds TSB in Elland, West Yorkshire, on June 18, 2009 and HSBC, Marsh, Huddersfield, a week later and got away with around £450,000 in total. Tansey was jailed for 11 years for the Darwen and Elland raids. Rickton Mark Henry, 31 of Merridge Walk, Salford, was jailed for eight years and eight months for the armed robbery of the HSBC bank. Blood left on the smashed door of the Lloyds TSB bank in Darwen, where Tansey cut himself on the way in, was part of the forensic evidence. Tansey and Henry were later extradited from Spain on European arrest warrants. See [here](http://www.lancashiretelegraph.co.uk/news/blackburndarwenhyndburnrubble9075096.Darwen_bank RAIDERS_jailed/) and [here](http://www.harrogate-news.co.uk/2011/06/08/two-men-have-been-jailed-for-their-roles-in-three-armed-robberies-at-banks-in-west-yorkshire-and-lancashire/).

**June 2011 – Fraudster:**
Two men responsible for a wine scam involving bogus newspaper adverts have pleaded guilty to fraud charges. Denis Le Franq, who is 35 and a Belgian national and Jeremy Gillis, 33, from Leeds, admitted conspiracy to defraud. Customers paid hundreds of thousands of pounds up front but did not receive any wine. Members of the public paid anything from £120 to £2000 a time. When police were alerted, they found the business had suddenly been wound up and Denis Le Franq had left the country. Police traced him to Prague where he was arrested on a European arrest warrant and brought back to the UK. See [here](http://www.bbc.co.uk/news/business-13712684).

**November 2010 – Bank Robbers:**
Police investigating a string of bank robberies, including thefts in Huddersfield and Elland, have arrested a man as he waited to board a plane in Spain. Lee Tansey, 32, from Salford, was stopped by police as he was about to board a plane at Malaga Airport on the Costa del Sol. He and another younger man were both arrested on suspicion of armed robbery. Both are now awaiting extradition to Britain for questioning by police from three UK forces including West Yorkshire. The raids which West Yorkshire detectives want to speak to Tansey about are raids on security vans in Elland and Huddersfield in June last year. A West Yorkshire Police spokesman said: "A 32 year old man and a 30 year old man were arrested on a European Arrest Warrant." See [here](http://www.examiner.co.uk/news/local-west-yorkshire-news/2010/11/17/men-arrested-in-spain-over-huddersfield-and-elland-bank-robberies-86081-27668687/#ixzz239Tlhq9O).

**2010 - Drug Trafficking:**
Operation Return, run jointly by SOCA, Crimestoppers, Dutch police and Europol, was launched in 2010 (following the success of Operation Captura in Spain) to track down and return the UK’s six most wanted criminals believed to be on the run in the Netherlands. In 2010, one of these individuals was found, returned to the UK under an EAW and sentenced
in Leeds Crown Court: Edward Morton from Yorkshire, see here\textsuperscript{266} and page 24 of 2010/11 SOCA annual report here\textsuperscript{267}.

**DERBYSHIRE POLICE:**

**February 2012 – Robbery:**
A man who was wanted for failing to appear at court to face a robbery charge in Derbyshire has been arrested. On February 19\textsuperscript{th} 2009 a 75-year-old man was assaulted and a substantial amount of money was stolen from his home in Acresford Road, Overseal. Vasile Mihai was one of three people arrested. He was charged with robbery on March 6\textsuperscript{th} 2009 and appeared before magistrates in Derby on March 7\textsuperscript{th} 2009.

He was granted bail by the court but failed to appear again. Mihai (25) was stopped routinely by traffic police in Germany in January, who then arrested him in relation to the outstanding matters in Derbyshire. He was returned to the UK under a European Arrest Warrant on Friday. See here\textsuperscript{268}.

**20 September 2010 – Drug Trafficking:**
Drug dealer Shane McMahon, who was located in the Netherlands following a Crimewatch appeal, was extradited back to the UK under a European Arrest Warrant in May. For full report see SOCA website here\textsuperscript{269}.

**HUMBERSIDE POLICE:**

**September 2006 – Rape & Child Sexual Assault:**
A Goole paedophile who was extradited from Ireland to face charges of raping and indecently assaulting an under-age girl has been given a life sentence at Hull Crown Court. Andrew Matthews (35) had never entered any pleas to 20 charges relating to the rape, indecent assault and the neglect of a young girl and was due to stand trial at Hull Crown Court in July. However, at the eleventh hour Mr Matthews pleaded guilty to nine of the charges - the other 11 will remain on file with the Crown Prosecution Service. See here\textsuperscript{270}.

**GREATER MANCHESTER POLICE:**

**July 2012 – Drug Smuggling:**
A key player in a major drug smuggling gang, who fled the country in 2004, has been jailed for nine years today for his involvement in an attempt to smuggle £2million worth of cocaine into the UK. Richard Wright (51), formerly of Chislehurst, Kent, who was extradited from the Netherlands, was sentenced today for conspiring to import Class A drugs via Zeebrugge back in 2004. He escaped before he could be charged but he continued his illegal activities and was arrested by HM Revenue and Customs (HMRC) officers after he had served a jail term in a Dutch jail. Mike O’Grady, HM Revenue & Customs Assistant Director Criminal Investigation said: “Wright fled the UK when circumstances got difficult and he saw we had arrested other gang members associated with the smuggling attempt. It became clear that he

\textsuperscript{266} [http://www.yorkshirepost.co.uk/news/at-a-glance/main-section/drug-gang-fugitive-jailed-for-24-years-l-3246702](http://www.yorkshirepost.co.uk/news/at-a-glance/main-section/drug-gang-fugitive-jailed-for-24-years-l-3246702)
\textsuperscript{267} [http://www.soca.gov.uk/about-soca/library](http://www.soca.gov.uk/about-soca/library)
had continued his illegal activities in the Netherlands in the intervening period when he was arrested by our partners there for similar drug smuggling offences. Combining our intelligence and expertise for both smuggling cases has protected UK citizens and wider European communities from this habitual organised criminal.” See here.  

June 2011 – Murder:
A man is due to appear in court this morning in connection with the murder of Giuseppe Gregory in Stretford in 2009. 18 year old Moses Mathias of no fixed abode, was arrested in Amsterdam on a European Arrest Warrant following a joint investigation by Greater Manchester Police and the Serious Organised Crime Agency. See here and here.

2011 – Firearms Offences & Conspiracy to Rob:
Sean Devalda, was wanted by Greater Manchester Police in connection with firearms offences and conspiracy to rob a Group 4 cash in transit vehicle in Agecroft in February 2007. He was arrest in Amsterdam in 2011, see here and here.

April 2011 - Murderer:
A teenager suspected of being involved in the killing of Giuseppe Gregory outside a pub in Stretford, Manchester, in May 2009 was arrested in the Netherlands yesterday. The 17-year-old was a target of Project Golf – a multi-agency initiative to tackle organised crime in Salford. He is the eighth fugitive to be caught since the project was launched seven months ago. Joint working between SOCA, Greater Manchester Police and the Royal Marechaussee in Rotterdam led to his arrest. He will be appearing at an extradition court in Amsterdam today. Giuseppe was gunned down as he sat in a car outside the Robin Hood pub two years ago. In March 2010 another two teenagers were jailed for life after being found guilty of murdering him following a month-long trial at Manchester Crown Court. See here.

November 2010 – Manchester Gangsters:
Two men have arrived back in the UK after being extradited from Spain under a European Arrest Warrant. Richard Smith of Pegwell Drive, Salford was charged with Escaping from Lawful Custody. He appeared at Salford Magistrates’ Court on Thursday 11 November 2010. Jared Jones of Helmsmore Road, Rossendale, was charged with Conspiracy to Commit Arson. He will appear at Salford Magistrates’ Court on Friday 12 November 2010. Both men were extradited from Spain following a joint investigation involving Greater Manchester Police, the Serious Organised Crime Agency and the Spanish National Police. Project Gulf aims to disrupt organised crime in Salford and arrest those responsible for it.

July 2009 – Human Trafficking, Sexual Exploitation & Forced Prostitution:
A father and son have been convicted of trafficking women into Britain from Romania and forcing them to work as prostitutes. If the women did not comply with the demands of their clients, they were beaten and raped by 23-year-old Marius Nejloveanu, who was found guilty of a series of offences following a trial at Manchester Crown Court. His father, Bogdan

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272 http://insidethem60.journallocal.co.uk/2011/06/17/extradited-teenager-in-court-over-giuseppe-gregory-murder/
274 http://www.bbc.co.uk/news/uk-england-manchester-12369174
275 http://www.londonwired.co.uk/news.php/128143-Salford-man-held-in-Amsterdam-police-raid
276 http://www.soca.gov.uk/news/327-teenage-murder-suspect-is-8th-project-gulf-fugitive-to-be-captured-
Nejloveanu, 51, was convicted of six trafficking charges for sexual exploitation and one of controlling prostitution for gain. He was extradited from Spain in July 2009. See here and here.

LANCASHIRE POLICE:

June 2011 – Bank Robbery:
Two members of an armed gang who stole £43,000 from a Darwen bank were jailed yesterday. Lee Tansey, 33, of Pegwell Drive, Salford, was one of three violent raiders who smashed the door of Lloyds TSB, Duckworth Street, with a manhole cover on June 5, 2008. They fled with a total of almost £43,000 and jumped into a stolen Audi, later found abandoned. The gang also targeted Lloyds TSB in Elland, West Yorkshire, on June 18, 2009 and HSBC, Marsh, Huddersfield, a week later and got away with around £450,000 in total. Tansey was jailed for 11 years for the Darwen and Elland raids. Rickton Mark Henry, 31 of Merridge Walk, Salford, was jailed for eight years and eight months for the armed robbery of the HSBC bank. Blood left on the smashed door of the Lloyds TSB bank in Darwen, where Tansey cut himself on the way in, was part of the forensic evidence. Tansey and Henry were later extradited from Spain on European arrest warrants. See here and here.

2011 – Child Sex Offender:
Crimewatch viewers were shown the remarkable story on how Colne paedophile Glen Tranter was caught thanks to a Benalmadena barwoman’s quick thinking. News soon got back to the UK and Lancashire Police. Investigating office DI Dave Groombridge from Nelson CID said: “It came as a real surprise. It was a race against time to apply for a European arrest warrant. We knew that the Spanish authorities probably would not be able to hold him for very long.” He was flown back to the UK and is currently serving six years in prison after pleading guilty to eight charges of sexual offences against children. The programme has been praised for helping to locate and convict Tranter. See here.

2011 - Paedophile & Child Abductor:
Patrick Pious Hancox, 68, from Dublin was arrested by the Gardai in County Longford on Tuesday 22 March. He was wanted on suspicion of child sex offences and child abduction and had broken the conditions of a notice precluding him having contact with the victim. When he failed to answer bail an arrest warrant was issued. See here and here.

2010/11 – Drug Trafficking:
Damien O’Connor, the head of an organised crime group involved in drug trafficking was surrendered to the UK by Belgium through a European Arrest Warrant. He was charged along with 12 others and was sentenced to 20 years and a 10 year travel restriction order. He was also ordered to pay £1,021,300. Involved Lancashire Constabulary Serious

279 http://www.guardian.co.uk/law/2011/jan/18/father-son-convicted-trafficking-women
283 http://www.bbc.co.uk/news/uk-12520150
284 http://www.crimestoppers-uk.org/most-wanted/catching-criminals-in-spain/arrests-to-date-operation-captura
November 2010 – Deporting a Granny Torturer & Murderer:
One of Europe’s most wanted men has been arrested in Blackburn town centre. Gunnar Simanis was being hunted on suspicion of torturing and murdering an 80-year-old woman in Estonia. On Thursday afternoon a car was pulled over by police in Barbara Castle Way, Blackburn, for having no insurance. The 39-year-old was taken to Greenbank police station - where officers realised he was on Interpol’s ‘most wanted’ list and subject to a European arrest warrant. Yesterday Simanis, who had been living near Blackburn town centre, was set to be deported after appearing at Westminster Magistrates’ Court at an extradition hearing. According to Estonian reports, Simanis fled court in Viru, Northern Estonia, in May while standing trial for the torture and murder of 80-year-old Maria Minejeva. See here.

August 2010 – Child Sex Offender:
A registered sex offender from Lancashire has been extradited from Holland after being on the run for three months. Dennis Bowskill, 43, from Padiham was wanted for making and possessing indecent images of children. He had been due to appear at Burnley Crown Court on 8 March 2010, but failed to appear. He was caught by Dutch police at Amsterdam railway station in June after a European arrest warrant was issued. Mr Bowskill, who has been described by Lancashire police as “one of the UK’s most wanted sex offenders”, was featured on BBC Crimewatch and in the Dutch media while he was wanted by police. See here.

June 2010 – Firearms & Drug Smuggling:
A man has been arrested in Poland as part of a Lancashire police investigation into the importation of firearms and drugs. The 22-year-old was held in Augustow, north-east Poland, by the National Polish Drugs Squad on a European arrest warrant, Lancashire police said. He was arrested as part of Lancashire’s serious and organised crime unit’s Operation Greengate. The man now faces extradition back to the UK. See here.

November 2009 – Bank Robbery:
A robber who was part of a Liverpool gang who threatened security guards with knives and a hammer has been jailed for seven years and three months after a Crimewatch viewer spotted him in Spain. Ian Jones, 24, from Missouri Road, Clubmoor, pleaded guilty to robbery at Preston crown court on October 16. The raid took place on February 17, 2006 when a security van was making a cash delivery to the post office in Liverpool Old Road, Walmer Bridge, Preston. After the guards were threatened Jones and two accomplices made off in two stolen vehicles later abandoned and set on fire. Having been arrested in March 2006 he skipped bail but was arrested in Spain under a European arrest warrant and returned from Madrid to Lancashire. See here.

2009 – Drug Smuggler:

http://www.soca.gov.uk/about-soca/library
http://www.lancashiretelegraph.co.uk/news/8678141.One_of_Europe_s_most_wanted_men_found_in_Blackburn/
http://www.bbc.co.uk/news/uk-england-lancashire-11003533
http://news.bbc.co.uk/1/hi/england/lancashire/7428421.stm
Nigel Hunt, from the Rawtenstall area of Lancashire, was jailed for five and a half years in 2004 for conspiracy to supply controlled class A drugs. A convicted drug dealer who has been on the run for 18 months has been arrested in Spain. Nigel Hunt, from the Rawtenstall area of Lancashire, was jailed for five and a half years in 2004 for conspiracy to supply controlled class A drugs. But he absconded from Kirkham Prison in August 2006, prompting a manhunt which ended in his arrest at Madrid airport after he flew in from Thailand. Lancashire Police said he was currently awaiting extradition to the UK. The force's Serious and Organised Crime Unit was granted a European arrest warrant in December 2006. See here.

July 2005 – Fraudulent Trading:
The defendant was extradited from Spain on a European arrest warrant in February 2005. The trial of three other defendants (which concluded in March 2005) had already commenced. Williamson was therefore proceeded against separately. He pleaded guilty to fraudulent trading contrary to section 458 of the Companies Act 1985 and was sentenced to three years' imprisonment, ordered to pay confiscation of £130,000 and disqualified from acting as a company director for twelve years. See here.

MERSEYSIDE POLICE:

July 2012 – Pensioner Murder:
Merseyside Police detectives travelled more than 2,000 miles to apprehend a murder suspect who fled to Romania after a pensioner was strangled in his Liverpool home. The 65-year-old was found at the address in Green Lane after a call from his concerned brother – retired Halewood priest Father James Finnigan – explaining that the retired teacher had not been in touch. It has emerged detectives identified their suspect within six months of Mr Finnigan's death but had difficulty locating him as it was thought he had left the country to return to his native Romania. Last year magistrates in Liverpool granted officers a European arrest warrant for Constantin, 27, who knew Mr Finnigan. See here.

April 2012 - Gangster:
Kirk Bradley was arrested under a British-issued European arrest warrant in an apartment in the Bijlmer area of Amsterdam, the Serious Organised Crime Agency (SOCA) said, with police indicating he was wearing flip-flops, shorts and a T-shirt when detectives swooped. His uncle Raymond Bradley, from Woolton, was also arrested for possession of cocaine with intent to supply. Kirk Bradley was shocked when officers burst through the door of his luxury apartment in Amsterdam. He had no idea we were on to him. See here.

January 2011 – Drug Gang:
Four members of a sophisticated drugs gang have been jailed for a total of 47 years after conspiring to smuggle 40kg of heroin into the UK. Brothers Ian and Alan Farley, who led the smuggling ring, were caught after a 12 month operation by Merseyside Police. This culminated in a third member of the gang, Malcolm Lewtas, being arrested in Ramsgate with 10kg of heroin packed in 1/2 kg blocks. Investigative teams also suspected Paul Merkelbach
of running the Dutch side of the operation and were determined to bring him before the courts in the UK with the rest of the gang. Police teams and prosecutors from the Crown Prosecution Service (CPS) worked with Dutch authorities to arrange a search of Merkelbach’s home where a further 30kg of heroin was found, also thought to be bound for the streets of Merseyside and the North West of England where it would be worth around £2million. Ian Davies, Head of the Complex Casework Unit, CPS Mersey Cheshire Group, explained: “Once we had our suspects arrested in the UK, we contacted the Dutch authorities to ask permission for officers from this country to go to Holland and collate evidence. When we were ready to charge, we issued a European arrest warrant and Merkelbach was quickly arrested by Dutch Police.” See here.294

CUMBRIA POLICE:

2006 – Prison Escapee:
An escaped prisoner who spent more than 10 months on the run has been tracked down to a Spanish tourist resort. George Skelton escaped from Haverigg Prison in August, last year. But Cumbria police have today confirmed Skelton was arrested in Alicante, Costa Blanca, and is now in custody. It is believed the 31-year-old was captured by Spanish officers for committing domestic offences. He has also been connected to a theft of a plasma screen TV from a bar in Benidorm. Skelton now faces extradition back to England. A Cumbria police spokesman today said: “George Skelton has been detained in prison in Alicante and a European arrest warrant has been executed by the Spanish authorities. Cumbria police are now going through the extradition process.” See here.295

2006 – Rape:
A teenager is facing extradition to England after being arrested in Ireland on suspicion of raping two teenage girls at last year’s Appleby Horse Fair. Detectives confirmed that a 17-year-old from Crory Ferns, County Wexford, was being held following an investigation launched after the 2005 fair. Formal moves to extradite him to the UK are now underway. The arrest follows a probe into the alleged rape of two 13-year-old girls and a 14-year-old girl who were visiting Appleby during last year’s fair. See here296 and here.297

SOUTH WALES POLICE:

2011 – Child Sex Offences:
Under Operation Captura, Dominic Stephen Powell, wanted for sex offences in Wales, was arrested in Spain in 2011, see here.298

GWENT POLICE:

February 2007 – Arson:
A man who has been wanted by police for the past six years will be extradited back to Wales within weeks, Dublin’s High Court has ruled. Roger Gardener, 61, from Blackwood, in Caerphilly county, is accused of conspiracy to commit arson with intent to endanger life in August 2000. He was arrested in Mill Town, Malbay, Co Clare, in October after a six-year

295 http://www.nwemail.co.uk/news/runaway_prisoner_captured_in_spain_1_486765?referrerPath=/2/3567
296 http://www.newsandstar.co.uk/news/horse_fair_rape_claims_teen_set_for_extradition_1_330197?referrerPath=/2/1692
297 http://news.bbc.co.uk/1/hi/england/cumbria/6194358.stm
298 http://www.bbc.co.uk/news/uk-15391748
hunt by Gwent Police. It followed the issue of a European arrest warrant last August. See here.299

NORTH WALES POLICE:

November 2006 – False Accounting & Deception:
Edward Cosgrove's business, Cosgrove Packaging Ltd, made video and DVD cases. The company moved from Manchester to Deeside (North Wales) in February 2003 with the aid of a Welsh Assembly development grant of £390,000. However, relocation did not improve the company's financial position and so, in order to paint a rosier picture for trade finance companies, Cosgrove began to raise false invoices and despatch notes to suggest that the business was still healthy. In April 2003 Cosgrove obtained approval for another grant (£200,000) from the Welsh Assembly having claimed that the company was trading profitably even though in reality it was now dependent on false accounting to maintain its relationship with the finance companies. Before the second grant was paid, the business was put into receivership and the receivers uncovered the truth, reported it to North Wales Police and in May 2005 an SFO investigation began. Cosgrove moved to Germany and refused to return to the United Kingdom to be interviewed. A European arrest warrant was issued and he was returned to the UK to be charged in June 2006. In October 2006 he pleaded guilty and was sentenced to four years' imprisonment on each of seven counts of false accounting (to run concurrently) and three years on the one count of attempting to obtain a money transfer by deception (also to run concurrently). See here.300

November 2011 – Drug Smugglers:
Weapons and £35,000-worth of hard drugs were seized yesterday in dawn raids linked to the murder of North Wales postman Paul Savage. Ten people - all with links to the Mold area - were arrested after police executed 13 search warrants in North Wales and Cheshire. One Mold man was arrested in Holland and was last night awaiting extradition. The 22-year-old Mold man held in Holland was arrested at Maastricht by Dutch police following the issue of a European arrest warrant by UK authorities. He was expected to appear in court in Holland this morning, pending a request by North Wales Police for his extradition. See here.301

SUFFOLK POLICE:

September 2012 – Major Fraud:
Toni Muldoon has pleaded guilty to two counts of fraud at Ipswich Crown Court. The 66-year-old Briton is facing a long prison sentence after admitting his part in a €7.4 million internet escort and ‘debt elimination’ scam. Muldoon was arrested at Miramar Hotel in Fuengirola in May under a European Arrest Warrant, following a long investigation started by Suffolk trading standards. A neighbour said after the arrest: “We hadn’t seen Tony Baloney for a while and wondered where he had gone. We have had to put up with years of late night parties, screening porn films and wife-swapping events.” He was extradited to the UK in June. Today the former timeshare entrepreneur, who enjoyed a lavish lifestyle in Spain with at least two yachts and several luxury cars, pleaded guilty to two counts of conspiracy to defraud at Ipswich Town Court. The swindle is alleged

299 http://news.bbc.co.uk/1/hi/wales/south_east/6336349.stm
to have involved 14,000 victims in the UK. No pleas were entered on the charges of money laundering Muldoon was also facing, which will lay on file. Muldoon will now be remanded in custody and sentenced at a later date. See here\(^{302}\) and here\(^{303}\).

**July 2012 - Murder:**
Suffolk Police can confirm that a man who been wanted for questioning in connection with the murder of 66-year-old Peter Avis at his home address in Bury St Edmunds on Friday 13 January 2012, and who has more recently been detained in Poland for another matter, has returned to the United Kingdom. Pytor Melaniuk, 28, returned to the UK this afternoon Tuesday 3 July under a European Arrest Warrant. Melaniuk is currently being held in custody at the Martlesham Police Investigation Centre and will appear before Ipswich Magistrates Court tomorrow Wednesday 4 July charged with murder. See here\(^{304}\) and here\(^{305}\) and here\(^{306}\).

**NORFOLK POLICE:**

**Sept. 2012 – Fraud:**
The trial of George Katcharian and Cemal Esmene is opening at Norwich Crown Court. They are accused of defrauding the New Apostolic Church in Germany and Mr Graham Dacre, a Norfolk businessman and philanthropist.

Jane Mitchell, reviewing lawyer for the CPS Central Fraud Division said: “George Katcharin was arrested in Germany in December 2011 on a European Arrest Warrant. The Crown Prosecution Service successfully sought his extradition so that he could stand trial here on serious allegations of fraud. When I considered all the evidence from this case, including much from abroad, under the Code for Crown Prosecutors, I concluded there was a realistic prospect of conviction and that a prosecution was in the public interest. Katcharin faces two counts of conspiracy to defraud over proposed investment schemes which the prosecution say mislead and deceived both the New Apostolic Church and Mr Dacre. Cemel Esmene is also accused of defrauding Mr Dacre. Both men face further counts for money laundering conspiracies for transferring alleged criminal property to bank accounts in the UK and Lichtenstein.” The trial is expected to last four weeks. See here\(^{307}\).

**June 2012 – Child Sex Offender:**
A man who sexually abused pupils in his care at a Norfolk boarding school has admitted a number of charges against him today. Alan Adrian Brigden was a maths teacher at a school in West Sussex between May and October 1977. He then taught maths at St George’s School in Wicklewood near Wymondham between September 1979 and August 1980, where he used the surname Morton. Following the publicity for the Slade trial, a complaint was received against Alan Brigden relating to the time when he was a teacher in West Sussex. Inquiries established that Brigden and Morton were in fact the same person. In both cases, Brigden took a boy on a trip and sexually assaulted him. Enquiries to trace Brigden were


\(^{303}\) [http://www.ipswichstar.co.uk/news/ipswich_spain_costa_del_crook_admits_role_in_multi_million_pound_web_fraud_l_1_529271](http://www.ipswichstar.co.uk/news/ipswich_spain_costa_del_crook_admits_role_in_multi_million_pound_web_fraud_l_1_529271)

\(^{304}\) [http://www.suffolk.police.uk/newsevents/newsstories/2012/january/burymurderlatest.aspx](http://www.suffolk.police.uk/newsevents/newsstories/2012/january/burymurderlatest.aspx)

\(^{305}\) [http://www.bbc.co.uk/news/uk-england-suffolk-18697846](http://www.bbc.co.uk/news/uk-england-suffolk-18697846)


carried out with the assistance of the Overseas Tracking Team from the Child Exploitation and Online Protection (CEOP) Centre and the Serious and Organised Crime Agency (SOCA). It was established that he had been granted Dutch citizenship and was living in Amsterdam. A European Arrest Warrant was sworn and in August 2011 Alan Brigden was arrested on behalf of UK police in Amsterdam. Extradition proceedings began, and Brigden was brought to the UK in January 2012. He was charged with indecent assault (6), assault with intent to commit buggery (4) and gross indecency with a boy (4). See here.

**August 2008 – Child Sex Offences and Child Pornography:**
A man has been flown back to the UK from the Czech Republic to face allegations he abused young girls. Patrick Burnell, 21, was arrested in Prague, where he had been living, in July after a European arrest warrant was issued at Norfolk Police's request. Police in the Czech capital said Mr Burnell was suspected of 16 offences. They include sexually abusing children, making and owning child pornography and other offences in Britain, allegedly committed between 2003 and 2006. See here and here.

**ESSEX POLICE:**

**2011 – Drug Trafficking:**
Jamie Dempsey, born 13/05/1978 in Essex was arrested this afternoon at about 2.40pm UK time at a residential property in Benahavis, Marbella, Spain by the Policia National and Guardia Civil. Dempsey was sought on an European Arrest Warrant for conspiring to supply cocaine and facilitation of the use of criminal property. It is alleged that between 30 March 2009 and 23 April 2009, Dempsey conspired with others to supply 299kgs of cocaine, with an estimated UK street value in excess of £80million. See here.

**2009 – Drug Trafficking:**
Adam Hart was wanted by the Serious Organised Crime Agency (SOCA) accused of being involved in the conspiracy to supply controlled Class A drugs, namely Cocaine. He was arrested in the Netherlands on 2 December 2009.

**NORTHAMPTONSHIRE POLICE:**

**May 2012 – Murderer Deported:**
A man wanted for murder in Poland was among several suspected violent criminals rounded up in a crackdown by police in Northamptonshire. Police arrested the man in Wellingborough on Thursday. He was detained under a European Arrest warrant. "He is to be returned to Poland on suspicion of a domestic-related murder," a police spokesman said. See here.

**HERTFORDSHIRE POLICE:**

**October 2005 – Murder:**

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308 http://www.norfolk.police.uk/newsevents/newsstories/2012/june/formernorfolkteacherabuse.aspx
309 http://news.bbc.co.uk/1/hi/england/norfolk/7543366.stm
313 http://www.bbc.co.uk/news/uk-england-northamptonshire-17967692

376
A husband held in France last month after his wife's body was found in the boot of her BMW car has been brought back to England for questioning. Derek Symmons, 62, has been arrested for the murder of his wife Christine, 59, at their £1m home at Loudwater near Rickmansworth, Herts on 5 September. He was arrested by French police at Macon the following night. Mr Symmons was held there while French police made sure Mrs Symmons, a hairdresser, had not died in France. Mr Symmons, a businessman, had been remanded at a detention centre at Varennes le Grand, near Macon. A European Arrest Warrant was granted to Hertfordshire police who brought Mr Symmons back to England on Wednesday night. See here.\[314\]

**NOTTINGHAMSHIRE POLICE:**

**October 2012 – Antique Rhino Horn Theft:**
UK police are seeking the extradition of a Co Limerick man they want in connection with the theft of a €200,000 rhino horn, the High Court was told today. Michael Kealy, of Abbeylands, Askeaton, Co Limerick, was released on €15,000 cash bail to await trial on a European Arrest Warrant. His case was adjourned until October 9. Detective Sergeant James Kirwan told the court he arrested Keily in a carpark at Fidtown, Piltown, Co Kilkenny today at 7:45am. He said he told him he had a warrant from the UK which alleged he had been involved in the robbery of a rhino horn from an antiques dealer at Nottingham and Newark, a market town in Nottinghamshire. See here.\[315\]

**July 2012 - Murder:**
A man has appeared in court charged with the murder of Bulwell dad Danny Parekh. Joshua Davey (20), of no fixed address, appeared at Nottingham Magistrates Court last Friday. He was detained in Malaga, Spain under a European arrest warrant and extradited to the UK. His arrest followed liaison between Nottinghamshire police and authorities in Spain. See here.\[316\]

**March 2010 – Violent Criminal Deported:**
Nottinghamshire Police’s Foreign National Crime Unit has tracked down and arrested a man in Ollerton who entered the UK illegally while on the run from custody in Greece. Abdesselam Rahrah, a 36-year-old Algerian national, is accused of entering the UK with a false passport to locate his former partner, who had moved here from Greece. He has also been arrested and interviewed regarding offences of violence and threats to kill the woman, who has since left the UK. Before arriving in the UK, Rahrah had been gaoled by the Greek authorities after being found guilty of fraud and theft offences, but he absconded from custody and went on the run. Rahrah traced the former partner to Ollerton, where he had begun living with her and where he was arrested last week. He was subsequently charged with committing fraud by false representation and possessing false documentation with intent and has been remanded in custody. Nottinghamshire Police say a European Arrest Warrant is expected from Greece to have him returned to prison there. See here.\[317\]

**LINCOLNSHIRE POLICE:**

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\[314\] http://news.bbc.co.uk/1/hi/england/beds/bucks/herts/4338044.stm
\[317\] http://www.newarkadvertiser.co.uk/articles/news/International-fugitive-arrested
January 2012 – Suspected Rapist Deported:
The UK Border Agency have deported a foreign national, wanted for serious crimes in their home country. A Latvian criminal, living in Lincolnshire, was deported on 5 January. Romans Jekabsons, aged 40, was arrested on 4 December 2011 by officers from the UK Border Agency's immigration crime team after a European Arrest Warrant was served. He was wanted by the Latvian authorities for raping a 15-year-old female at gunpoint in his home country in May 2005. Jekabsons fled Latvia before he could be sentenced, and came to the UK before the arrest warrant was issued. The Latvian authorities sentenced him in his absence to 10 years’ imprisonment. See here.

2008 – Robbery:
Under Operation Captura, Daniel Johnston, between September 2004 and January 2006 Johnston is wanted for carrying two robberies, one attempted robbery and one theft in licensed stores in Derbyshire, usually armed with a knife. He was arrested in Spain in December 2008, see here.

LEICESTERSHIRE POLICE:

October 2011 – Deporting Foreign Drug Smuggler:
A Polish man, convicted of drug trafficking in his home country, has found there is no place to hide in Leicester after being caught by officers. The courts in Poland issued a European Arrest Warrant for Slawomir Jasiecki, aged 37. Officers from the UK Border Agency and Leicestershire Police tracked the wanted man down to his home in Anstey Lane where he was arrested on the 7 October 2011. Fake Lithuanian identity documents in his name were found at the Anstey Lane property. Jasiecki appeared at Westminster Magistrates Court on 8 October 2011 where he was bailed before being extradited from the UK on the 18 October.

July 2009 – Violent Criminal Deported:
A violent criminal has been deported to his native Poland. Marcin Krol fled Poland before he was to serve sentences for robbery, causing death by dangerous driving and various drugs offences. The 31-year-old, whose crimes were committed in 2000 and 2003, travelled to the UK and was jailed for a serious assault in Leicestershire in 2007. Leicestershire police served a European arrest warrant on Krol this month – before he was to be released from prison. He was escorted to an airport where he was put on a Polish military flight to his home country, where he will serve the sentences for the crimes he committed there. See here.

DURHAM POLICE:

April 2012 – GBH and ABH:
An offender jailed for assaults carried out nine years ago has finally been brought to justice after fleeing to Spain. Rory Burn was arrested for assaulting two men in a confrontation outside the Whitehills pub, in Waldridge Lane, Chester-le-Street, in April 2003. Both men were injured, one seriously, suffering a fractured skull and loss of hearing. Burn, then aged 25 and living in nearby Glanton Close, was arrested and charged with causing grievous bodily harm with intent and assault causing actual bodily harm, as well as possessing an offensive

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weapon. He was bailed, but failed to turn up for a subsequent trial and was tried in his absence, at Durham Crown Court, in July 2004. A warrant was issued for Burn’s arrest by Judge Peter Armstrong, who imposed a four-year prison sentence. It emerged that Burns had fled to Spain before the crown court trial. His location in Spain came to the attention of Durham Police late last year and the force made a joint application with the Crown Prosecution Service for a European Arrest Warrant to have him returned to Britain. Officers from Durham travelled to Madrid on Tuesday and arrested Burn before escorting him back to the North-East. See here. 

NORTHUMBRIA POLICE:

December 2011 – Rapist: John Renner Dillon today appeared at Newcastle Crown Court and was given a discretionary life sentence, of which he must spend a minimum of three and a half years imprisonment for Rape. In December 1982 the victim of Dillon’s crime was asleep at her home in Walker, Newcastle upon Tyne when she awoke to find 16 year old John Renner Dillon in her bed. He then raped her. He was tried but found not guilty. In 2005 Northumbria police, as part of their continuing investigations into old and undetected crimes, sent samples taken from the victim for scientific examination. In 2006 scientific advances meant that scientists were able to obtain DNA from one of those samples. A search was made and a match was found. The DPP gave his consent for a re-trial. Dillon however could not be found. In 2002, after failing to attend court for an unrelated offence of rape, he had fled the country, eventually being located in 2007 living in Dublin. A European Arrest Warrant was issued for that unrelated offence of rape; but that arrest warrant allowed for Dillon only to be arrested for the unrelated rape offence. Prosecutors therefore had to apply to both the Court of Appeal and the High Court of the Republic of Eire to get consent for Dillon to be re-tried for the 1982 offence of rape. That consent was obtained and Dillon appeared once more before Newcastle Crown Court charged with the Rape that he had committed when he was 16 years old. Unlike 1983, this time he admitted his guilt and was sentenced to a discretionary life sentence. See here.

2007 – Child Sex Offence and Child Rape: A suspected paedophile wanted for questioning by police in the region has given himself up. Paul Anthony Bures was wanted over connections to an alleged sex ring. He was also wanted for 13 offences, including four rapes of boys and six serious sexual assaults on boys. They are alleged to have taken place over the last two years in the Kent area. Yesterday, a spokesman for Northumbria Police said: “Further to an appeal, a 53-year-old man has given himself up at Canterbury Police Station in Kent and will be appearing in North Tyneside Magistrates Court tomorrow morning.” It is understood Bures was being sought following the arrest of a 57-year-old man. Peter Melling, whose last address was Torrievieja in Spain, was charged with 24 sex offences against children. Melling was arrested by police in Bulgaria on July 22 on a European arrest warrant. The allegations relate to five child victims from North Tyneside, with offences allegedly taking place in Northumbria, Hartlepool, Kent,

322 http://www.thenorthernecho.co.uk/news/9636158.print/
323 http://www.cps.gov.uk/northeast/cps_northumbria_news/man_convicted_of_rape_more_than_28_years_after_the_offence/
London and Spain in an eight-year period between 1998 and last year. See here and here.

OTHERS:

27 February 2012 – Child Sex Offenders:
In just of a year of investigations, joint Operation Atlantic, coordinated through Europol, has identified 37 child sex offenders – 17 of whom were arrested for child sexual molestation and production of illegal content. See the report in full on Europol website here.

17 February 2012 - Smuggling Illegal Immigrants:
Coordinated action through Europol with France, Greece, Belgium and UK resulted in six arrests of members of a criminal network smuggling illegal migrants from Afghanistan to Europe. It is believed that the main organiser smuggled around 5000 individuals over a ten month period, collecting EUR18 million, making them one of the most prolific facilitators of illegal immigration in Europe. For a full report see Europol website here.

9 March 2011 - Document Forgery:
An organised crime group producing false documents for use by irregular migrants was successfully disrupted through a joint operation involving French, Belgian and UK authorities with the support of Europol. The operation, which resulted in the arrest of 12 individuals, targeted a French-based Pakistani and Bangladeshi organised crime network that provided fake EU passports and supplied them to migrants who used them to travel unlawfully to the UK. For full report see the Europol website here.

5 July 2011: Smuggling Illegal Immigrants:
An operation co-ordinated through Eurojust and Europol with participating authorities from France, Portugal and UK dismantled a Chinese network involved in the facilitation of illegal migration into the UK. For a full report see the Europol website here.

8 February 2011 - Smuggling Illegal Immigrants:
Co-ordinated action by five countries supported by Eurojust and Europol made nineteen arrests of individuals involved in the smuggling of illegal immigrants, mainly from Vietnam to the UK. For a full report see Eurojust website here.

15 December 2010 – Worldwide Paedophile Network:
Efforts of various national authorities, coordinated through Eurojust, uncovered a worldwide paedophile network. Offenders were identified and arrested and numerous victims were rescued. For a full report see Eurojust website here.

8 September 2010 - Pirated Material:
Justice Across Borders—Written evidence

Eurojust coordinated operation involving 13 countries, including the UK, has closed down or seized 48 servers and groups of servers as part of a network hosting pirated material. The pirated material was estimated to represent a loss of authors’ rights and income for production companies of up to EUR6 billion in Europe. Sixteen people were arrested. For full report see Eurojust website here.332

29 June 2010 – Human Trafficking and Forced Labour:
A man involved in the trafficking of illegal immigrants and forcing them to work primarily in cannabis factories in the UK, was surrendered to Hungary on a European Arrest Warrant. For the full report see SOCA 2010 Annual Report (p.18) here333 and here.334

12 May 2010 – Illegal Immigration, Drug Trafficking & Terrorism Financing:
Eurojust coordinated action against an organized criminal network operating in Afghanistan, Pakistan, Romania, Albania and Italy. The group was involved in illegal immigration (including to the UK) and drug trafficking in order to finance Islamist terrorism. Through international coordination eleven suspected ring leaders were arrested. For full report see the Eurojust website here.335

14 December 2007 - Armed Robbery:
A joint police operation involving Estonia, Finland and UK authorities and coordinated by Europol and Eurojust was carried out against suspected members of a criminal gang who were believed to have carried out a series of armed robberies in the UK.336

6 November 2007 – Terrorism:
Eurojust assisted in the issuance of European Arrest Warrants and coordinated action in several Member States (including the UK), resulting in the arrest of 26 suspects involved in terrorist activities. The group specialised in forgery of residence permits, ID cards and passports, as well as human trafficking and smuggling of cigarettes. These activities were designed to collect funds to be used in terrorist actions. For full report see Eurojust website here.337

13 June 2007: Organised Criminal Gang:
Eurojust and Europol coordinated action in six countries (including the UK), against a transnational Albanian criminal network involved in human trafficking through European Arrest Warrants issued by Belgium. For a full report see Eurojust website here.338

2010 – Armed Robbery:
Anthony Craggs, was wanted for two armed robberies using firearms that occurred in Bournemouth and Edinburgh in 2003. A total of £90,000 was stolen as it was being delivered to two branches of the Abbey National by Securicor guards who were violently assaulted during both of the robberies. He was arrested in Spain and returned to the UK under a EAW, see here.339

336 Europol, Annual Report, 2007
2008 – Drug Trafficking:
Alan MacDonald Gordon, was accused of supplying controlled drugs in the Scottish Highlands. He was arrested in Spain in November 2008, see here. 340

December 2011 – Child Rape:
Police have arrested a British man in Almería in connection with a string of sexual offences, including rape. Acting on a European arrest warrant issued by Maidstone Crown Court, plain clothes police detained 66-year-old L. Morris at his Los Gallardos home in connection with the rape and sexual assault of his step-daughter and his step-daughter’s child. The offences allegedly took place in the UK between 1972 and 1977 when his step-daughter was nine years old, and continued until she reached the age of 13. The attacks on the step-daughter’s child, who is not directly related to Morris, allegedly occurred much later, between 1993 and 1995. In total, Morris is accused of four counts of rape, 12 counts of indecent assault and 12 counts of gross indecency, according to Kent police. The arrest was made on November 23 at Morris’s home address, although Spanish police only released details of the case last week. See here. 341

2011 – Conspiracy to Kidnap & False Imprisonment:
After action under Operation Captura, Dean Lawrence Rice, born 12/06/1961 in Exeter, was convicted in his absence to life imprisonment for conspiracy to kidnap & false imprisonment. He was arrested in Spain on 23 February 2011, see here. 342

2010 – Drug Trafficking:
Glen Cornick, a former Royal Marine, suspected of being involved in a plot to import more than 20 tonnes of class A and B drugs into the UK, was extradited by Spanish police through a European Arrest Warrant issued by UK authorities. Through European networks, SOCA in partnership with police in Spain and the UK seized over 50 kilos of cocaine and four tones of cannabis. For full report see SOCA website here. 343

2009 – Currency Counterfeiting:
Under Operation Captura, Ronald Priestley, wanted for currency counterfeiting offences and arrested in Malaga, Spain, in October 2009 and returned to the UK under a EAW; he was tried and convicted in Leeds Crown Court, see here. 344

July 2012 – Murder:
A man will appear in court under a European arrest warrant for the murder of a Bolton woman. 31-year-old Kelly Davies was found in June at her home in Farnworth by paramedics. A post mortem examination revealed she died from stab wounds. A 35-year-old man from the Bolton area is due to appear in court after being arrested by Dutch police in the Netherlands last month. See here. 345

2010 – Drug Trafficking:

341 http://www.costa-news.com/content/view/8740/121/
342 http://www.crimestoppers-uk.org/most-wanted/catching-criminals-in-spain/arrests-to-date-operation-captura
Justice Across Borders—Written evidence

Terence Leslie Shields, wanted in connection with the importation of 5kg of diamorphine in 2000 was arrested in the Netherlands in January 2010, see here. 346

2009 – Drug Smuggler:
Under Operation Captura, Mark Ronald Brown, from Liverpool, was wanted in connection with the importation of class A drugs and was believed to be the head of an organised crime gang responsible for the importation of hundreds of kilos of heroin into the UK. He was arrested in the Netherlands on 17 December 2009, see here. 347

2008 – Shooting:
Under Operation Captura, Robert Spiers, was wanted in connection with a shooting in a UK public house, He was arrested in Spain in July 2008 after being on the run for two years and returned to the UK under a EAW to face trial in Manchester, see here. 348

2010 – Child Rape:
Under Operation Captura, Mark Anthony Smith, from North Shields, was wanted in connection with a rape of a child under 16, gross indecency with a girl under the age of 16, indecent assault of a girl under 16 and attempted rape of a girl under 16. He was arrested in Spain in 2010, see here. 349

2008 - Drug Smuggling:
Donald Haisman was wanted for drug offences and arrested in Belgium in February 2008. See here. 350

2008 - Mortgage Deception:
Lisa Sanderson was wanted for obtaining property mortgages by deception (3 offences in total, jointly with 7 others with a total monetary value of £1.2 million). She was arrested in Portugal in September 2008. See here. 351

2007 - Tobacco Smuggler:
Ian White, a tobacco smuggler who masterminded a £6million VAT scam, arrested in Spain. He was tried, convicted and sentenced to six years imprisonment in his absence on the 11th March 2004. He was returned to the UK on the 20th September 2007 and after appearing in court he was sent to prison to start serving his sentence. See here. 352

2006 - Drug Smuggler:
Anthony Simmonds was wanted for importing large quantities of cannabis from Spain and cheating VAT of £4million. He was arrested in Spain in December 2006 and returned to the UK in early 2007. After appearing in court his sentence of three year's imprisonment was confirmed. He was also given a three month sentence in respect of the absconding, which is being served consecutively. 353

348 http://www.salfordonline.com/lawandorder_page/7921-shooting_at_brass_handles_pub_-_man_charged.html
351 http://www.crimestoppers-uk.org/most-wanted/catching-criminals-in-spain/arrests-to-date-operation-captura
352 http://www.crimestoppers-uk.org/most-wanted/catching-criminals-in-spain/arrests-to-date-operation-captura

383
WEDNESDAY 23 JANUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Avebury
Lord Bowness
Lord Dykes
Lord Elystan-Morgan
Lord Hodgson of Astley Abbots
Lord Judd
Baroness Liddell of Coatdyke
Lord Mackenzie of Framwellgate
Baroness O’Loan
Baroness Prashar
Lord Richard
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Earl of Stair
Lord Stoneham of Droxford

Examination of Witnesses

Thais Portilho-Shrimpton, Director, and Jeremy Hill, Trustee, Justice Across Borders.

Q62 The Chairman: We are very grateful to you for coming to give evidence to our Inquiry into the UK’s 2014 opt-out decision. The Committees consider this to be a very important matter that may have far ranging implications for the UK and the EU. I would like to begin by briefly explaining the background to the Inquiry.

The Government’s “current thinking” is in favour of exercising the opt-out but they have promised to consult Parliament before making a final decision. In order to inform the House of Lords’s deliberations, we launched an Inquiry on 1 November, which is being conducted as a joint Inquiry between the EU Sub-Committee on Justice, Institutions and Consumer Protection and the EU Sub-Committee on Home Affairs, Health and Education. We received a great deal of written evidence before the end of the year, including from
yourselves, and we are now receiving oral evidence from lawyers, academics, think tanks and NGOs, as well as serving and former police practitioners and prosecutors, which will further inform our deliberations.

After the oral evidence sessions have concluded, on 13 February, which is the day on which the Home Secretary and the Lord Chancellor will both appear before the Committees, we hope to publish our report, which I guess will be just about at the end of the current Parliamentary Session in May. The report will cover both the merits of the opt-out decision and which measures the EU should seek to rejoin were it to be exercised. It is intended that the report will inform the House’s debate and vote in this matter, which is likely to take place before the summer; although that is a matter over which we are not in control.

As you know, the session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible via the Parliamentary website. A verbatim transcript will be taken of your evidence. This will be put on the Parliamentary website. A few days after this evidence session you will be sent a copy of the transcript to check it for accuracy. We would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points you made during your evidence, or have any additional points to make, you are welcome to submit supplementary evidence to us.

Perhaps you could introduce yourselves and, if you want to make some brief opening remarks, that would be very welcome to us. Equally, if you do not wish to make any opening remarks but want to go straight on to questions, that would also be welcome. I will turn the floor over now. Is it you, Ms Portilho-Shrimpton, who is the Director or is it Jeremy Hill?

Jeremy Hill: This is the Director but I will introduce myself briefly. I am Jeremy Hill and I am a Trustee and co-founder of Justice Across Borders. I would just like to explain a little bit about my background, although it is at the end of our submission. I am a solicitor by background. I joined the Foreign Office as a legal adviser in 1982 and through the 1980s I dealt with extradition in the Foreign Office. Then I went to Germany as legal adviser and dealt with judicial cooperation cases, amongst other things. In the 1990s I went to the UK representation in Brussels as both Legal Adviser and Counsellor for Justice and Home Affairs. I was therefore involved in the negotiation of the first tranche of these pre-Lisbon measures. Then I went on as Ambassador to Lithuania and Ambassador to Bulgaria. So I saw, from the view of the accession countries and operationally, how some of these measures worked in practice.

Thais Portilho-Shrimpton: I am a journalist by background. I have been a journalist since 2005. I am Brazilian, so I started working at a national newspaper in Brazil. In 2007 I moved to the UK and I continued to work as a journalist here. In 2011 I joined the Hacked Off campaign just before it started, and I worked with the Hacked Off campaign until October last year, when I decided to leave. I met Jeremy and others who were interested in the issue of the opt-out. All these brilliant legal minds needed somebody to do all the work, so I joined and we decided to found the campaign, Justice Across Borders. I am Director of Justice Across Borders.

Lord Rowlands: May we ask you how you are funded?

Thais Portilho-Shrimpton: Yes, absolutely. So far we have received a grant from the Joseph Rowntree Reform Trust. A couple of our trustees have also invested some money.
We also have a partnership with the Centre for British Influence through Europe and we share an office with them. Those are all the sources.

**Lord Rowlands:** You are not funded by any European sources?

**Thais Portilho-Shrimpton:** Not at the moment, no.

**The Chairman:** Presumably all the contributions are on your website. Are they public or not?

**Thais Portilho-Shrimpton:** We are launching officially today. Our new website will be up and, in the interests of transparency, we were aiming to put the sources of our funding up as well.

**Q63 The Chairman:** I wonder if we can go into the substance of our Inquiry now and ask you, as an opening question: do you believe that the Government should exercise the opt-out? If so, what would be, in your view, the legitimate grounds for exercising it? In the event that they do exercise the opt-out, how extensive a list of the measures covered by the opt-out should the Government try to opt back in to?

**Jeremy Hill:** No, we do not believe the Government should exercise the opt-out. In brief, the argument is that we believe that a significant number of the pre-Lisbon measures are vital or important for the protection of British citizens and the protection of our national security. Secondly, we believe that a number of the measures, which have been described by others as neutral—and indeed may be neutral as far as UK policing are concerned—may nevertheless be valuable in a broader perspective in building a stable Europe. Thirdly, we believe that the opt-out procedure is risky and that we should not risk it, in view of the issues at stake. Finally, we believe that, if the argument was that we could conclude separate arrangements outside these measures of EU police and justice cooperation, they would be much less effective.

**The Chairman:** If the Government were to decide, and the votes in Parliament were to support this decision, what would you say about the course that you describe as risky? You have covered a number of categories. Could you say whether you identified any of the pre-Lisbon measures as being actually damaging or unhelpful to the United Kingdom?

**Jeremy Hill:** We do not believe there are any measures that are damaging or unhelpful. There are some that are defunct, there are some that do not directly apply to the United Kingdom, and there are some that are likely to be superseded by measures already under negotiation, or proposals put forward before the deadline. I referred to a significant number of core measures, which are really vital to security. Estimates range between 29, which are on the ACPO list of vital or important measures, and others who have put it at 45. In that number, there are instruments like the European Arrest Warrant, Europol, Eurojust and access to European criminal records, which really are vital operational tools for UK policing and our security.

Just on the neutral measures, I would like to say a bit more about that. When ACPO described these measures as neutral they talk in terms of being neutral to UK policing. If you take some of the measures in that list, for example the asset confiscation measures—the confiscation of the proceeds of crime—these continue to be valuable in other Member States, particularly the newer Member States. It was clear from a Commission report in 2010 that at least 14 Member States had not yet implemented those instruments in full. In
fact, Bulgaria, which I know well, introduced its own asset confiscation legislation last year. It is very valuable for them and other Member States in attacking organised crime.

On the question of the opt-out procedure being risky, you will have seen evidence from Jean-Claude Piris, the former legal adviser to the Council and others. Firstly, the procedure itself is uncertain and subject to conditions. The sequencing is not clear. Some measures are subject to a decision by the Commission, but even those are subject to conditions that there should be the widest possible measure of participation and that it should not seriously affect the practical operability of the various parts and should respect their coherence. So there are conditions attached even there. In the case of the Schengen acquis, that is a decision by the Council by unanimity. So there is a negotiation to be had and conditions to be met. I think also that, if we get into the question of transition arrangements, they themselves might not be straightforward to negotiate and adopt. The provision says that transition arrangements are to be decided by the Council by a qualified majority, in which the UK does not have a vote. So there are uncertainties and difficulties in the procedure.

**Q64 Lord Bowness:** Some of the evidence, as you will have seen, suggests that, if the opt-out is exercised, it would protect the United Kingdom from the Commission’s ambitions for the development of a pan-EU criminal law code enforced by a European public prosecutor. Can I ask you what your view is on this? Can I also ask you what evidence you can see that the Commission has these ambitions? Certainly, when we saw the Commission and asked them about the European public prosecutor’s office, the plans were at such a stage that they were either unwilling or unable to articulate what they were.

**Thais Portilho-Shrimpton:** That is correct. There is a proposal for the European public prosecutor but the most important thing at this point is that the UK Government has chosen not to opt-in to the European public prosecutor. It is at a very early stage and we still do not know what it is going to look like or if we are in any way going to be forced under the jurisdiction of a European public prosecutor.

In terms of the ambitions for the development of the pan-European criminal law code, again, as far as we are aware, there is not a proposal for a harmonised criminal code. We would not be able to participate if there was. As it is at the moment, there is a policy of mutual recognition. That allows us to use our own criminal justice system and all other Member States to use their own criminal justice systems to fight cross-border crime. We do not think that any of that will change. I honestly think that to say that we should opt-out of these vital measures because of the possibility of the creation of a European public prosecutor, which we have not even opted-in to, is a bit of scare-mongering, to be honest.

**Lord Bowness:** Some of the evidence also suggests that there is an undermining of the UK’s common law system. Do you have any evidence or believe that any of the pre-Lisbon measures we are speaking about in connection with the opt-out have damaged the common law system in any way?

**Jeremy Hill:** No, we do not believe that they have. In fact, the system was created and designed—in particular the principles of mutual recognition and mutual trust—to preserve the essential features of each other’s legal system. For us and two or three others that is the common law system; for the rest it is the civil law system.

There is a difficulty in European cooperation, in the sense that there are very different legal systems with different backgrounds. You have to find a way of bridging the different procedures. Although there has been some approximation and harmonisation, instead of going down that route wholesale, a principle of mutual recognition was established to try
and preserve the essential features, while nevertheless bridging the gap. In our view it has been very successful in doing that. There are also one or two instances—in fact probably more—where the common law system and common law offences or procedures have actually influenced European cooperation as a whole. I will give you one example, which also illustrates the utility of some of these measures in a broader perspective across the European Union. That is the Framework Decision on conspiracy in 2008. It is called the Framework Decision on the fight against organised crime. Basically, it encourages Member States to create a new offence of what we would call conspiracy, where two or more people agree a criminal venture. There are two aspects to this. Firstly, as you will be aware, conspiracy was originally a common law offence in this country. It became statutory in 1977. We have a long tradition of conspiracy. This is an example of that practice and our success with that being transferred into European cooperation. Also, and I say this because of my experience in central Europe, one of the gaps in their fight against organised crime was that many of them did not have an offence of participation or conspiracy in this way. We spent some time encouraging them to introduce this and this was a result of that. So it is an example of the way in which our system and our participation has been able to benefit European cooperation as a whole.

Q65 Lord Elystan-Morgan: Could you tell us whether their concept of conspiracy is similar to our pre-1977 concept—in other words, that it was a general common law matter—or our post concept, with the sole exception of one branch of conspiracy, that it should be a conspiracy to commit a specific statutory offence?

Jeremy Hill: It is statutory but the way in which a Framework Decision is drafted, as it is in this case, means that it allows each member state some latitude in the way in which they define the offence for the purposes of their law. Some may take the absolute wording of the Framework Decision. Others may adjust the wording to suit their own system.

Lord Sharkey: We have seen evidence that considers the CJEU to be a political court of poor quality and evidence that is concerned about its alleged judicial activism. The Government has referred to the risk of expansive interpretation and of unexpected judgments. Do you have any concerns about the exercise of the CJEU's jurisdiction in the police and criminal justice field, including its role in delivering preliminary references?

Jeremy Hill: I should say that we are not holding ourselves out as experts on the details of the latest jurisprudence of the Court in the same way as practitioners or academic witnesses, but we have studied this issue and, obviously, I am personally drawing on my experience as a legal adviser who dealt in this area for 20 years. Looking at the jurisprudence, specifically in justice and home affairs over the last 10 years, we believe that its record is sound, that it has shown respect for the domestic criminal justice systems, that it has been helpful in clarifying points of difficulty and that its record cannot be described in this area as wayward or activist.

The second point is that we actually see advantages in the Court's jurisdiction over EU police and judicial cooperation. Implementation will be strengthened—for example I referred to the asset confiscation measures, which had only been partly implemented—and it will produce stronger application and also coherent application. There has to be a balance here for the Court to make sure that the system is coherent and works amongst the 27 Member States as a whole, but nevertheless to respect the individual criminal justice systems. We believe that its record so far in this area does that.
Lord Dykes: Are you worried that the inevitable slowness in dealing with cases—which I am not criticising; it is just a fact—does encourage people to have the wrong thoughts about the Court as well as political activism.

Jeremy Hill: Yes. Sometimes there have been delays and that is a question of the organisation of the Court. I know that that is being addressed by the Member States and the Court itself both in the context of general reform but also as it takes on these new jurisdictions. That is an issue to be addressed but I think that those involved are conscious of that.

Lord Rowlands: Some witnesses have told us that these pre-Lisbon measures were negotiated in an inter-governmental way, rather than stricter European legislative processes. Therefore, the drafting is not as good and therefore it will lead to greater interpretation by the Court of Justice. Given your own personal experience in all this, would you accept that as a valid point?

Jeremy Hill: There are two points: one positive and one a more negative note of caution. The positive one is that these were drafted as a legal text. Whatever you call them, whether joint actions or Framework Decisions, those drafting them were conscious that they were legal texts and were focused on the wording. So I do not see a particular issue with that. The note of caution, and this is a point that does not just apply to Justice and Home Affairs legislation but across European legislation, is that it is often drafted in more general terms than domestic legislation. If you look at the Framework Decision on the European Arrest Warrant there are something like 31 sections. If you look at our Extradition Act which implemented it—although it is dealing with other areas—there are something like 227 sections. It is drafted in more general terms and is the result of negotiation and compromise. So the Court is often faced with the challenge of how to interpret provisions that may not always be entirely clear in that context. That is a challenge that it faces across the board in European legislation and, in my view, it does very well in that task.

Q66 Lord Mackenzie of Framwellgate: On a practical level, would exercising the opt-out have any implications for British citizens working, residing or visiting other Member States?

Jeremy Hill: There are several categories of British citizens. If one started, slightly perversely, with British criminals and people who should be brought to justice, our worry is that, if we opted-out, we would risk creating the sort of Costa del Crimes that we saw back in the 1980s and 1990s. That is something that perhaps we can return to. For accused or convicted persons who are British citizens there is a risk that they might lose some of the benefit of the protection measures. This is quite a complicated area and depends on the status of the particular protection measure—there have been a raft of them over the last five years—and to what extent the UK remains in or out. Also, if some of these protection measures did not apply, hopefully some of the more general protections, such as under the European Convention on Human Rights Article 6 and Article 7, would continue to apply. Although I think, in the context of European cooperation, there is at least perceived to be a need to strengthen those.

More generally, for ordinary British citizens, we feel that British victims of crime benefit from the present arrangements. There have been a number of high profile cases which show that individuals have benefited from instruments like the European Arrest Warrant and there is a risk that they will not have that protection. They may do but it depends on the circumstances. More generally, in my view, we would lose leverage and influence in this field
and the development of this field and over the development of the rule of law in the rest of Europe. In my view, over time, that could weaken the protection and our leverage when it comes to dealing with cases dealing with British citizens.

**Q67 Lord Mackenzie of Framwellgate:** Given that we opted-out, what would be the fallback position, for example, with the European Arrest Warrant lapsing? Presumably there is some stand-by arrangement previously there, or would we have to renegotiate the whole thing?

**Jeremy Hill:** This is a difficult question. In our view, the fallback arrangements or substitute arrangements would be less effective. A number of options have been suggested, including, for example in the extradition field, falling back on the Council of Europe’s European Convention on Extradition of 1957. That is, in our view, not appropriate for fast-moving criminals and fast-moving crime. It contains a number of conditions that do not feature in the European Arrest Warrant. They may prove valuable in some contexts but overall, in the experience of Governments, had the effect of slowing the procedure down and creating hurdles, which defendants and accused people could exploit. So we do not think that is a satisfactory alternative. Also, there is a question, which I know you will have heard from others, about the extent to which the Council of Europe Convention is still in force or could be applied by some Member States, or theoretically whether they still had the legislation enabling them to apply it to the UK. I could say some more, now or later, about the arrangements outside of the Council of Europe Convention.

**Q68 Lord Hodgson of Astley Abbotts:** I wonder if I can press you a bit on this. You used the phrase Costa del Crime. It comes off the tongue very nicely and has a sound-bite quality that makes it attractive. But you are surely thinking about this in terms of 25 or 30 years ago. With or without this European arrangement, whatever it might be, there would be every interest in countries entering into bilateral arrangements to deal with crime, money-laundering and other offences like that. The idea that this is somehow going to suddenly create Ronnie Biggs lying on a beach in Brazil while he enjoys his ill-gotten gains is surely far too superficial an approach.

**Jeremy Hill:** It is not such a recent problem. If you take our extradition arrangements with Spain, probably the worst period was between 1978 and 1985, where we had no extradition Treaty because of various issues, including the incompatibility between the two systems. We did have arrangements between 1985 and 2001, but they did not work very well. The rate of getting people back was very slow and very difficult. The then Home Secretary in 2001 agreed to fast-track extradition procedures. We did not have a long enough time to see how those would work but it was really only when the European Arrest Warrant came in that we saw a step-change in the British Government’s ability to deal with criminals in Spain. You will be aware that Crimestoppers and others, with the police authorities and the Serious Organised Crime Agency, instigated Operation Captura, specifically based on the European Arrest Warrant, which has succeeded in bringing back 49 out of the top 65 most wanted criminals in Spain. These are murderers, rapists and robbers. These are serious criminals and serious people. My worry, if we did not have the European Arrest Warrant and tried to go for substitute arrangements, is that these would be different arrangements, which would create differences that criminals would exploit. What we have in the European Arrest Warrant is very effective and proven. It has some shortcomings, which we would like to see remedied, but we believe that it is a proven, effective instrument for law enforcement authorities.
Lord Hodgson of Astley Abbots: But it is fair to say that, even with all we have now, we are only getting a 75% success rate on the most serious criminals.

Jeremy Hill: I do not know the precise success rate but it is certainly a success rate which—

Lord Hodgson of Astley Abbots: You said it was 49 out of 65.

Jeremy Hill: I see, yes. The point is that it is a much better success rate over the last 10 years than it was before. It was not just with Spain. There is a highly relevant example quoted in the ACPO evidence, which is a comparison of two cases. One is the terrorist cases of Rachid Ramda, an Algerian national who was arrested in the UK in connection with a terrorist attack on the Paris transport system in 1995. France sought his extradition from the UK and it was not until 2005 that that extradition was finally completed. After the European Arrest Warrant, Hussain Osman, a naturalised British citizen born in Ethiopia, was identified as a suspect for the failed bomb attack at Shepherd’s Bush tube station in July 2005. His extradition was completed in September 2005, within two months. That is an example of a comparison between two cases concerning suspected terrorists.

Q69 Earl of Sandwich: You have given us very detailed extradition statistics and that is very helpful to the Committee. Can you analyse it a little more? You talk about the last 10 years but the dramatic increase of foreign nationals removed is actually much more recent. Do you think this is going to be a trend? Can you just analyse that for us?

Jeremy Hill: It is important to see this as an area of European cooperation, which has developed over a long period and has a long genesis. You will have seen evidence that it goes back to working groups within Government in 1982, 1984 and 1985, the Extradition Act of 1989, and a further review in 1998 and 1999. Through the 1990s, the European Union Member States wrestled with this problem. They first went for a simplified extradition convention dealing with some aspects of difficulty. That led, in due course, to things like the European Arrest Warrant. The point I am making is that this has been a very careful, long process, in which various factors have been carefully balanced. Cooperation has built up over a long period of time. I would see it developing in that way, in other words, as it has done in the past: ironing out the difficulties—and there are difficulties—making it more efficient in some respects, so we hope to see more criminals brought to justice, and, nevertheless, getting the balance with human rights protection much better and remedying some of the human rights issues with some of these instruments. That is the way I see it developing.

Q70 Lord Richard: I just want to follow up a little on the remarks Lord Hodgson was making about alternative arrangements. If you do not have European Arrest Warrants and you make alternative arrangements, you have to make alternative arrangements with each of the Member States that are at present covered by the European Arrest Warrant. It does not follow for a moment that the alternative arrangements you make with one country are going to be exactly the same arrangements as you can make with another country. So you could end up with 27 different sets of arrangements in relation to the extradition of people we want from the present countries that are subject to the European Arrest Warrant. I suppose there would then be a feeling that this is not good enough and we must coordinate. So we would go on coordinating and you would end up with something that looked rather like the European Arrest Warrant is now.

Jeremy Hill: The worst scenario is to have 26 or 27 separate bilateral arrangements with different terms, which have to be separately negotiated and, in other countries in their own parliaments, implemented by separate legislation, with differences which criminals exploit.
the modern world, that is what criminals are very good at. That is the worst-case scenario. Whether you could negotiate something that was similar or identical to the European Arrest Warrant I do not know. That would be a question that one would have to negotiate and consider with the other Member States. The risk is that it would not be as effective as the existing one.

**Q71 Lord Bowness:** Can I just go back to the question of the transitional arrangements that you mentioned and the fact that these are determined under qualified majority voting? Let us assume for a moment that the Government do want to opt back in to something. What is your view about the timing of all this? Clearly, from your evidence, there is a period to arrange the transitional arrangements. If they leave it to the last minute there could be a big gap. Can you perhaps expand a bit on the procedure and the dangers that follow?

**Jeremy Hill:** Yes, the sequencing and timing is very difficult. If you were to opt-out and then opt back in it would need a huge amount of thought and, even then, in our view, it would be highly risky. The first thing is that you have to have a correspondence between what the UK Government and UK Parliament decide they want and what the European Institutions will agree. In other words, there has to be some negotiation, decision and agreement in that respect. That factor will depend upon the timing of both Parliament’s consideration here and the UK Government’s final decision. There are problems of sequencing there.

The other question is that, if you are talking about opting back into instruments there has to be a negotiation there. There are time limits there. The question is whether you allow enough time for those negotiations to take place. If you were going to exercise the opt-out it would be a very risky process unless you had had a pre-negotiation of some sort. So, across a whole range of areas, you would need to consider what that would look like. It would need a very long lead-in time for that. Also, other political factors may come into play, which may delay things. Other Member States may say, for example, that you cannot be part of the Schengen Information System unless you are part of the European Arrest Warrant, or other instruments. So those sorts of difficulties would have to be planned out.

**Q72 The Chairman:** Could you, by any chance, cast any light on the Anglo-Irish situation in all this matter? We are just beginning to receive evidence but it is not yet very clear cut. From the written evidence we have received there clearly is a great deal of use of the European Arrest Warrant in both directions across the border. There are lots of people being brought to our justice system from the south and lots of people going in the other direction. The numbers vary as do the levels. Can you cast any light on that?

**Jeremy Hill:** I cannot, I am afraid. That is a very difficult issue, I am aware of the difficulties, and it has a lot of angles to it. I am afraid that I would not be confident in giving evidence.

**The Chairman:** Right. We are getting evidence from an Irish academic and from the Centre for European Reform, whose expert is a former Irish diplomat. So I hope we will be able to go more into that.

**Q73 Lord Rowlands:** If the United Kingdom Government identifies early which laws and measures it wants to go back into, you could actually devise a scenario where you could have a simultaneous opt-out and opt-in. There is enough time to do it is there not?

**Jeremy Hill:** Yes, although these things do take time. Your House and the House of Commons have to consider this matter as well. To exercise an opt-out without a very clear picture of what a future regime would look like would, in my view, be risky. As night follows day, you have all these instruments that are extremely valuable, which are vital for UK
national security, for the protection of British citizens, and before you abandon them you
would have to have a very clear picture.

**Lord Rowlands:** There is time to do that. There is time to negotiate that.

**Jeremy Hill:** There needs to be time for the Government and Parliament to decide. Then
there needs to be time to talk about that to EU partners and then there needs to be some
decision and time for legislation. So yes, there probably is time but the clock is ticking.

**Q74 Baroness O’Loan:** I have a question for clarification. As we talk about this opt-out
and opt-back-in again, is it the case that, in opting back in, we would be actually renegotiating
or could we be opting back in to the same measure, for example the European Arrest
Warrant? If that were the case, why should it take so long?

**Jeremy Hill:** If we were opting back in, in terms of Protocol 36, we would be opting back in
to the same measures—to the same European Arrest Warrant. That is unless we made it a
condition of opting back in that that should be changed or negotiated in some way. If I
understand your question, that is to be distinguished from a position where we do not opt
back in to certain measures, such as the European Arrest Warrant, but because we need
extradition arrangements, we would have to negotiate separate arrangements outside of the
EU measures.

**Baroness O’Loan:** But it would be possible for us to opt-out, as the Government are
indicating at the present time, to opt back in, for example, to the European Arrest Warrant
and maybe 10 or 12 other measures immediately in that process, and then to consider our
position in relation to rest?

**Jeremy Hill:** The difficulty with that is that it is not clear that other Member States and the
Commission would automatically agree to our list, particularly if it was a short list, as you
say, of 12 measures. For example, the Protocol talks about the widest possible
participation—it is a phrase of that sort—not the narrowest possible participation, and
coherence. So there is a question, when you are opting in to these measures, about what
the related measures are that would form part of the picture. So there is a negotiation to
be had, a procedure to be followed, and some uncertainties, even when you want to opt
back in. There is also the difficulty, where you do not opt back in, of what you do about
those whole areas of cooperation. We perceive that to be very difficult.

**Q75 Lord Avebury:** Could you say what the implications are, if any, of raising the
standard of trial rights and the rule of law in other Member States, including the UK’s role in
this of opting out? Secondly, which of the PCJ measures are most important for achieving
this in terms of citizens’ rights?

**Jeremy Hill:** I touched on that briefly when we were considering the effect of the absence of
these measures on British citizens. To add to that, on the European Arrest Warrant
specifically, we think that there are shortcomings that need to be remedied, the main aspect
being that it should not apply to trivial cases. In other words, there needs to be a test of
proportionality. It should not apply to minor offences where it would be unjust or
oppressive to extradite a person because of their particular circumstances, in our view.
That is something that may be remedied by itself. For example, there is a case before the
Court at the moment which provides guidance. Some of it has already been remedied in
practice by discussion between competent authorities. For example, I understand that there
are, and have been, discussions with Poland and some other Member States about some
cases. Or it might be possible to introduce an amendment—and there is some guidance on this—to the instrument itself.

More generally on citizens’ rights, we would strongly argue that there are a number of measures, some of which the UK has opted in to, some of which it has implemented and some of which it has not. For example, there is the prisoners’ transfer Framework Decision, the European Supervision Order and one on conflicts of jurisdiction. Then there are some newer proposals on guaranteeing the right to interpretation and translation in criminal proceedings, information on arrest, and right for suspects to have access to a lawyer on arrest. We believe that the UK should implement an opt-in where it has not opted in to these instruments because we feel that it is part of the balancing side of having tough measures. Where you are tough on crime you also need to balance that by proper protection for the citizens. We believe that these measures help to do that.

**Lord Avebury**: Would you not say that, in general, the UK’s influence on the observance of trial rights and the improvement of trial rights, and observance of the rule of law, is likely to be reduced if we are not part of these arrangements?

**Jeremy Hill**: Yes, I agree. That is a point we make in our submission. That is also important, not just in the context of the European Union as it is—the 27 or soon-to-be 28 Member States—but it also reduces our influence in the enlargement process, in terms of dealing with the newer Member States or those that will be Member States at some stage, or even with the Eastern Partnership countries. You will be aware of this, and I know there was a discussion on this, in the context of the Croatian Accession Bill in your House, where both the Government side and other peers flagged up the importance of the new Chapter 23 of the acquis on judiciary and rule of law, and also Chapter 24 on Justice and Home Affairs acquis. These are critical parts of the accession negotiations and on bringing in new Member States. In my view, the more we come out of this area, the less able we are to influence the rule of law; it weakens our influence in that process as well.

**The Chairman**: Does what you said about the European Supervision Order imply that the delay in our implementing it beyond the set date, which I think was 1 December 2012, actually mean that there are potentially now British citizens who are not getting the benefit of these improvements in the law in cases which they might be involved in?

**Jeremy Hill**: In our view, yes.

**Q76 Lord Dykes**: You say in your conclusions about the difficulties of going back and damaging citizens’ rights. Is that not reinforced, at the margin at least, by the fact that in Maastricht everybody automatically became a citizen of the European Union? Is that a general background feature that helps or is it of no connection?

**Jeremy Hill**: I am not sure I understand. Maybe you could clarify that a little more?

**Lord Dykes**: In cases where these cases might arise to enhance citizens’ rights, is that general Treaty background also helpful to the argument about not going back on that?

**Jeremy Hill**: Yes, exactly. There has been increasing concern to enhance the rights of citizens and also protect the citizen. We have seen this not just through specific instruments but also through instruments such as the Charter of Fundamental Rights and the application of other human rights instruments in the EU context.
Lord Hodgson of Astley Abbotts: I hope you will forgive me if I put it as brutally as this, but some of what you are saying sounds as if, if the UK is not there, the whole of the EU is going to go back into the dark ages, and that somehow there is not a real interest amongst fellow Member States in ensuring the highest possible standards in this area. I am not clear why we have to be part of that process. The real driver for improvements in this area is social networking, which we have seen developing the interest of citizens around the world about the way they are being governed and involving increasing participation, rather than this slightly clunking approach, which raises with it all the problems of integrating different legal systems and, in that way, may lead to perverse judgments—or judgments seen by our fellow citizens as being perverse—which bring the system into disrepute.

Jeremy Hill: There are obviously other Member States who are interested. All Member States have an influence on each other in terms of development of this area. All I am saying is that the United Kingdom, among others, has played a strong role in the development, in terms of coming up with initiatives, establishing the principle of mutual recognition at the Tampere European Council in October 1999, in encouraging various proposals to come forward, and in influencing the accession process. It is one of a number of Member States that has had that interest.

This is more a policy perspective but I would hope that the United Kingdom has always seen a stable Europe meant a stable United Kingdom. So having stable, geographical neighbours and a larger European Union, which was stable, was actually in the interest of the United Kingdom and was something in which we should play a positive role, rather than leave all the heavy lifting to others. I am saying that the more we participate in this area, the more we are able to do that.

On social networking and Government—maybe this is seen more prosaically and less technologically—the challenge is that, in Europe, you have a high degree of integration of people, goods and capital movements. There is a high volume of traffic with the movement of people, trafficking and goods, and yet you have a very low degree of integration of justice systems. Some of that is for very good reasons, because people want to respect the differences in their justice systems and constitutional differences. The real challenge is not one I would see in terms of social networking or that side of things; it is to try and bridge that gap between the justice authorities to make that work.

Q77 Lord Judd: How do you rate the effectiveness of the EU agencies, Europol and Eurojust, and what would be the operational consequences of any opt-out?

Thais Portilho-Shrimpton: There are several examples of very successful cases, which are operations with Joint Investigation Teams, and the use of the European Arrest Warrant by British police forces, sometimes coordinated by Europol and Eurojust, with other police forces across Europe. We have submitted an annex with our written evidence, which has several of those examples. Jeremy mentioned Operation Captura earlier, which was a successful use of the European Arrest Warrant, as in the case of Hussain Osman, the 21/7 terrorist. There are several others though. I could mention Operation Rescue, which was a three-year operation launched by the Metropolitan Police and coordinated by Europol across 30 countries, which led to the discovery of the world’s largest online paedophile network. 670 suspects were identified, 184 arrests were made and 230 sexually exploited children were released, including 60 in the UK. If you did not have this coordination by Europol of different police forces across Europe, this type of action would be much more difficult. I can cite another case. There was a Joint Investigation Team on Roma women trafficked into the UK for prostitution as well. That was set up between the UK, the Czech
Republic and Eurojust. It targeted an organised criminal network trafficking Roma women from the Czech Republic to the UK to work here as prostitutes. Eurojust provided analytical and coordination support for this operation and helped to resolve potential conflicts of jurisdiction early. This Joint Investigation Team operation led to the arrest of 11 ring leaders within three months of being set up. If you do not have the sharing of information and this willingness to work with a common agency, which will coordinate actions of this nature, it will be increasingly difficult for the UK and other Member States to achieve that level of success. That impacts greatly on British police forces.

**Lord Judd:** Are you aware of any support at all within the operational organisations in the UK for opt-out?

**Thais Portilho-Shrimpton:** I am not aware, no. I have read the evidence from the Association of Chief Police Officers. We have had a few events recently about the opt-out in the Law Society and in the Institute of Advanced Legal Studies. Most people I have met, including people who used to work in some of these agencies like Eurojust and Europol, are not in favour of this opt-out.

**Q78 The Chairman:** Could I just ask you a point about Eurojust? We have had different views expressed to us on that. One view is that Eurojust is a kind of slipway, leading inevitably to a European public prosecutor, and the other is that Eurojust is in fact a kind of mutual recognition system, which is an alternative to the approach of a European public prosecutor and the better it works, the less good the case for a public prosecutor. I wonder if you could comment on those two schools of thought.

**Jeremy Hill:** We adhere to the latter view: that it is based on mutual recognition and is a helpful and pragmatic body, which facilitates practical assistance between law enforcement agencies. The misunderstanding about this sort of connection with the European public prosecutor arises from a reference in a Treaty provision. I would need to write to the Committee about which one, but it is just a reference that seems to connect Eurojust with the European public prosecutor. The connection is more apparent than real, but it is something on which I would write to the Committee. In terms of how it has worked, it has helped to iron out the difficulties of practical cooperation, dealing with letters of request and coordination between law enforcement agencies.

**Lord Judd:** Particularly with reference to international terrorism, are there any grounds for anxiety that, under the present system of European cooperation, there a danger that critically important intelligence could be compromised?

**Jeremy Hill:** Not that I am aware of. The cooperation of which I have had experience or knowledge, such as through Europol or where you have operational officers working in other Member States, is that confidentiality is very strictly observed. People are acutely conscious of the need to preserve confidential information and secrecy as the case may be. I have, in my experience, never seen anything to cause me anxiety on that count.

**Q79 Lord Elystan-Morgan:** In the context of the European Arrest Warrant, theoretically, one can say that this could mean some small dent in our total independence and in our absolute sovereignty by definition. There was always an element of slight surrender in order to get other benefits, just because there is a judicial process here that has to deal with a judiciable issue. However, in relation to the other matters—Europol, Eurojust, the pooling of information about criminal convictions, the DNA and very largely, as far as the mutual exchange of evidence is concerned, because it does not change the basic rights that exist at the moment—those are administrative matters. Unless a person has a
totally jaundiced view of any sort of partnership of any basis with any other country, is there any case against them?

Jeremy Hill: Not that I am aware of, no.

Lord Elystan-Morgan: That was rather a leading question, I am afraid, but one I think that most people will have to face at some stage or another.

Q80 Lord Rowlands: You have partly answered this question, or at least touched upon it. The Government has chosen not to implement 14 measures, pending the decision on opt-out. Could you give us a brief scan of those 14 measures and tell us how many of those are important in terms of citizens’ rights?

Jeremy Hill: We have referred to a few. I do not know that I have 14 on my list but I have certainly looked at nine of these, some of which I have referred to briefly. We believe that all of them would help enhance the protection of British citizens.

Lord Rowlands: Perhaps you could give us the list of the nine.

Jeremy Hill: There is the Council Framework Decision 2009/299 on decisions rendered in the absence of the person consigned at the trial, trial in absentia; the prisoners’ transfer Council Framework Decision 2008/909; the Council Framework Decision 2009/829, which is the European Supervision Order; and the Council Framework Decision 2009/948 on conflicts of exercise of jurisdiction. Then there are some proposals under the so-called Road Map, guaranteeing the right to interpretation and translation in criminal proceedings and information on arrest, and a further proposal for the rights of suspects to access a lawyer on arrest. Those are the ones that we have looked at in particular and we believe would provide helpful protection for suspected persons.

The Chairman: Could you possibly let us have that list? We are going to have to come to grips with this particular area in our report. Although your list may not be identical to the Home Office’s list, we will have an opportunity to put questions to them, and we will want to try and achieve as clear a picture as we can of these measures that ought to be in force in this country but are not because of the shadow of the opt-out decision hanging over them.

Q81 Lord Rowlands: I do not know if you have seen Dominic Raab’s article in yesterday’s Times but he says that the proposal to sign up to pan-European data sharing on every citizen is “Orwellian and dangerous”. Do you think he has a point?

Jeremy Hill: I think he may be referring to what is called the Prüm Decision on access to data. That does offer key advantages to law enforcement authorities throughout Europe. On the other hand, it is important that the questions of data protection are carefully looked at. They are being carefully examined at the moment. There is a balance but I do not feel confident to express a view on that particular decision. There is a question of balancing rights here.

The Chairman: The Government has, of course, opted in to the draft Data Protection Directive, which is currently being negotiated, and which I do not think had the entire approval of Mr Raab.

Q82 Baroness Prashar: Earlier we began to look at the question of the Council of Europe Convention and bilateral arrangements but it would be helpful if you could elaborate
a little more on how feasible it would be for the UK to rely upon alternative international instruments, like the Council of Europe Convention or bilateral arrangements. Would there be any consequences in terms of cost and delay if we were to fall back on these measures?

Jeremy Hill: Yes, we have touched on the Council of Europe Convention. The general point is that there is uncertainty about its status, application and the ability of other Member States to implement it. Also, there is the general point that, in practice, it was cumbersome, it did cause delays and there were problems. It did have additional requirements and discretions. For example, some Member States could refuse to extradite their nationals. There was a requirement of dual criminality. Also, it allowed for a greater measure of executive decision or executive discretion, as compared with the European Arrest Warrant, which is more of a court-to-court process. So there are some serious questions about the effectiveness of that.

On the question of bilateral arrangements, which we have touched on, the worst scenario is that we end up negotiating a whole raft of instruments, not just on the European Arrest Warrant but on all these other measures, with differences in procedure that criminals exploit. The big experience from 1980 to 2000 was that, where you create differences, you create loopholes and weaknesses in the system. Clearly, there have to be adequate protections but the more you create a patchwork quilt of European arrangements, the less effective it will be.

Baroness Prashar: Will there be more delays? Will it be more costly?

Jeremy Hill: There could be delays in negotiation. Other issues in those negotiations could start to come into play, either things that other countries want from us or we want from them. There are also sensitive political issues that come up in negotiations, such as the application of some of these issues to Gibraltar. In the past that has proved difficult to negotiate in the European Union and you risk opening up those sort of issues again. Then there is the question of implementation. Once you have these things, we may have to legislate and other countries may have to legislate. That itself could be subject to delays.

Q83 Lord Avebury: Which of the measures that we are considering opting out of deals with the Child Exploitation and Online Protection Centre? Can you imagine what would happen to the ongoing cases where we are seeking information from CEOP at the time that we opt-out? How would we deal with that?

Jeremy Hill: There are a number of measures which, as you say, relate to online crime, online protection, human trafficking and the like, which we may lose the benefit of if we exercise the opt-out. That is important.

Lord Avebury: But how would we deal with that at the point of opting out, if we were in the process of making enquiries of one of these agencies about a particular case?

Jeremy Hill: There are two aspects to that. One is that it highlights some of the difficulties that could apply to transitional measures. Some of your previous witnesses have alluded to the possibility that people could exploit, or challenge these transitional arrangements in the courts, even if you concluded them effectively, so difficult legal issues could arise. The second aspect is that, if those transitional arrangements led to separate arrangements, it could have the problems of separate arrangements that I have described previously.

Q84 Lord Judd: I take your point about the weakness in a patchwork of arrangements, but if we are agreed that the reality of crime today and terrorism today is that it is global
and international, is it an argument to be completely dismissed that the Council of Europe has potential attractions, in that it involves more nation states than the European Union?

**Jeremy Hill**: In my view, the Council of Europe Convention was not designed to deal with the volume and difficulties of law enforcement that we now face. The number of EU nationals we have living in this country has increased. Some figures suggest that we have 600,000 members of the Polish community, 80,000 or more members of the Lithuanian community and 40,000 members of the Czech community. Then we have 850,000 British citizens living abroad and a very high degree of integration and movement between us and the rest of the European Union and our geographical neighbours. That also means a very fast movement of capital, goods and people, which means criminal capital, criminal goods and criminal people. Therefore, in this greater integration that has been caused by globalisation that has resulted from the European Union, you need much better, closer, more efficient instruments to deal with them. In my view, the Council of Europe Conventions and instruments may be good where you are dealing with fewer cases and less traffic, but when you are dealing with these close relations between geographical neighbours you need something more effective and more integrated.

**Lord Judd**: But it is not just total numbers; it is also the significance of people involved. There is a rather glaring omission from the present arrangements: for example, Russia.

**Jeremy Hill**: In what respect?

**Lord Judd**: In the sense that Russia is a member of the Council of Europe and any arrangements made through the Council of Europe would apply to Russia.

**Jeremy Hill**: Yes.

**The Chairman**: Perhaps you could comment on this. I was involved in the Inquiry that the EU Committee did on the relations between the EU and Russia some years ago. The evidence given to us in that Inquiry was that Justice and Home Affairs was an extremely important part of the European Union’s dealings with Russia. I do not know whether I am correct in guessing this, but that rather indicates that none of our Member States believe that just relying on the Council of Europe patchwork is the best way to deal with what is obviously an extremely serious problem of criminality in Russia.

**Jeremy Hill**: I agree.

**The Chairman**: I would like to thank you, Mr Hill and Ms Portilho-Shrimpton, for spending so much of your time with us this morning, giving us some clear and useful evidence, which I am sure we will find of great benefit. We will look forward to receiving those couple of points on which you have offered us more material. Thank you very much indeed.
Mike Kennedy—Written evidence

Background and Current Environment

To facilitate trade and commerce the European Union, has created an area within which there is free movement, or minimal restrictions on the movement, of goods, services, capital and people. This has been a considerable success for business driven on by the hugely increased capacity and use of the internet and the growth in availability of cheaper travel. Many thousands of EU citizens now live and/or work or have second homes in other EU states. Whilst the commercial benefits and advantages for individuals are clear, this new area created an environment in which criminals, and particularly organised crime networks, could also operate more easily.

The EU’s answer to the challenge presented by cross border crime was to develop the so called Third Pillar arrangements and an EU Area of Freedom, Security and Justice. A range of Third Pillar instruments and institutions have been introduced to assist in the exchange of information and in the investigation and prosecution of cross border crime. The institutions particularly Europol and Eurojust have improved police and prosecutorial collaboration to levels impossible to contemplate 20 years ago. These are required to keep pace with the new fast moving criminal environment within which national investigators and prosecutors now have to operate. They must tackle sophisticated criminal networks working individually or linked to other criminal networks committing crime across the EU and beyond, including complex fraud such as MTIC fraud, trafficking of drugs, people, vehicles and arms, sales of pornographic images of children and the laundering the proceeds of their success.

Twenty years ago Letters of Request to obtain evidence from abroad were relatively rare; the CPS sent out about 300 each year. Nowadays the new environment has meant that any prosecutor handling a serious case is likely to have to deal with an international element within it and has to have to have the skills to draft a Letter of Request. It is no longer true that only those dealing with complex fraud, organised crime and terrorism cases are likely to require assistance from foreign jurisdictions. Indeed a few years ago a senior Metropolitan Police Service officer told me that in London as many as 80 % of “non-domestic” homicide cases had an international element: victim, witness or other key part of the case linked to a foreign jurisdiction. I am sure the Committee would be interested to know what those figures are today.

Some of the Problems

The EU now has 27 member states, and Croatia will join in 2013, which means that domestic authorities in over 30 different jurisdictions have to work together on cross border crime in this new “open” borders environment. I say 30 jurisdictions as within the UK we have our own separate jurisdictions in Scotland and Northern Ireland and also Gibraltar which is considered part of the EU and under the UK umbrella for these purposes.

Not only are the 30 systems themselves different but the key players within each system have different powers and responsibilities. So, in France, the equivalent of a UK police superintendent with investigative powers and related authority would probably be an investigating judge and later in the enquiry a prosecutor. In Germany or Sweden the
equivalent is likely to be a German/Swedish prosecutor. A police officer of equivalent rank in those countries would be required to seek a prosecutor’s authority to permit action to be taken which the UK a police superintendent could take under his/her own authority.

The distinctions do not stop there. Whilst police in the UK can coordinate different investigations, national or international, in some civil law EU states police officers, and Belgium is one example, cannot co-ordinate investigations. They do not have that power; it lies with the prosecutor or the judge who oversees and has responsibility for the investigation. It is important for effective cross border investigation/prosecution that the key people with complementary powers can communicate with each other meaningfully whether they are police, customs officers, investigating judges, or prosecutors. The Eurojust arrangements allow that and frequently UK police officers have been able to interact with their EU equivalents who invariably are not police officers.

Restricted language and linguistic skills also create significant barriers to co-operation between practitioners in the field and should not be underestimated. Even when practitioners have some language skills these are frequently not good enough to communicate meaningfully and effectively on the technical legal and policing issues that need to be addressed in meetings to coordinate international investigative and prosecution action against criminal networks. To address this Europol and especially Eurojust have modern operational meeting rooms with state of the art technology to provide secure translation facilities with the additional capacity to video link securely to those who are unable to attend meetings in person as well as showing PowerPoint and video presentations.

**Key Third Pillar Measures**

The most important and challenging areas of PCJ co-operation to deal with cross border crime are set out below with the Third Pillar institutions that are charged with handling them:

- Obtaining and analysing investigative intelligence and information; (Europol)
- Obtaining “difficult” evidence for use in court for prosecutions and other complex proceedings e.g. asset restraint, forfeiture and confiscation; (Eurojust)
- Co-ordination of cross border investigative and prosecutorial activity; (Eurojust)
- Joint Investigation Teams (Eurojust and Europol);
- Extradition - surrender by European Arrest Warrant (EAW) (Eurojust)
- Clarification of judicial prosecutorial, court and other records (Eurojust)

I will comment on what in my view are the most important and effective operational Third Pillar measures designed to address, improve and expedite co-operation and so those that I feel area of most significance for the UK in the Opt Out/Opt Back debate.

**Europol**

I am sure others will comment and provide detailed evidence and data on Europol. I know Europol receives enormous support from UK police forces, ACPO and SOCA in terms of input to its information database, and the UK benefits from the analytical capacity it provides. Eurojust and Europol work together well; in addition to formal co-operation agreements, there is ever closer collaboration between the two organisations which were
located together in The Hague as their work is complementary and mutually beneficial. The comprehensive information analysis and work done to produce the EU Organised Crime and Terrorism Threat Assessments is of significant benefit not only in Europe and to the UK but also in the wider world. The work Eurojust and Europol do organisationally together on Europol’s Analytical Work Files (AWF) and the collaboration between the teams of staff at the UK desks of both organisations should not be overlooked.

**Eurojust**

Eurojust is first network of mutual legal assistance specialists to be established working permanently together in one location in any part of the world. Its 27 national members may be either: a prosecutor, a judge or a police officer with equivalent competence. This definition helps to break through some of the professional barriers that can frustrate and undermine collaboration between police, prosecutors and judges when authorities for different countries try to tackle cross border crime. Eurojust members work to assist prosecutors and investigators to deal with problems relating to investigations and prosecutions being conducted in their home countries as well as providing assistance to their counterparts. Eurojust’s particular strengths are being able to provide very rapid responses and solutions when needed by using Third Pillar instruments to resolve complex legal issues either in preparing or obtaining evidence for cross border investigations and prosecutions or in providing answers to problems in ongoing cases.

Eurojust also has the facilities and capacity to coordinate action cross border investigation and prosecutions ensuring that legal barriers are identified and issues resolved. Typically this might involve organising coordinated searches at the same time on the same day at the addresses of different suspects belonging to criminal networks operating across several jurisdictions; or the arrest of a number of members of a criminal network on the same day at the same time or similarly the coordination of the freezing of the bank accounts held in different jurisdictions by a number of suspects. I have mentioned Eurojust’s impressive formal meeting rooms allowing prosecutors and investigators to work together to exchange information, discuss strategies and agree coordinated actions. Eurojust Annual Reports provide data on the huge increases in case referrals since the organisation was established in 2002. The UK’s authorities are a leading user of Eurojust and a wide range of cases have been resolved there from serious fraud and terrorism to homicide and child pornography. Although EU member states are responsible for the salary costs of their own national members and deputies, who collectively act as the Eurojust Management Board, all Eurojust’s support staff, facilities and administration costs are funded by the EU. The direct cost to the UK is minimal involving the salaries of only two or three staff. Eurojust also funds the travel and subsistence costs of one prosecutor and one investigator to attend at approved co-ordination meetings. So the cost to the home authorities of furthering cross border investigations and prosecutions in the EU through Eurojust is much reduced.

Eurojust acts as a cement to bind together, improve and comment upon the operational effectiveness of a number of the Third Pillar instruments. Eurojust has many advantages for the UK authorities that would be lost if the Opt Out was not followed by an immediate Opt Back into the Eurojust arrangements. UK prosecutors and police officers would be unable to use an extremely valuable tool and denied access to a unique network of expertise.

There are some concerns in the UK that because the Lisbon Treaty stated that a European Public Prosecutor (EPP), to which UK has long been firmly opposed, should come from
Mike Kennedy—Written evidence

Eurojust and that retaining membership of Eurojust would be tantamount to the UK joining or approving the EPP. I feel this is a misguided view and that the UK like many other member states who hold the same anti-EPP view, would not be in danger of being part of the EPP simply by retaining a seat for the UK national member at Eurojust.

Such has been the success of Eurojust that the USA, Norway and Croatia have all paid for their own representatives to be present in The Hague and play a part when their countries are involved in the cross border cases with which have been referred to Eurojust. Other countries have appointed specific contact points, some of whom visit The Hague on a regular basis, to link their countries’ mutual legal assistance work with Eurojust’s members.

**European Arrest Warrant**

The EAW has in my view improved and streamlined the previous extradition processes enormously. It has been a great success. It has transformed the extradition landscape within the EU making the process entirely for the courts, removing political or diplomatic elements and making the process subject to strict and clear time deadlines and, importantly ensuring that countries must extradite their own nationals to face trial in other member states. However the procedures are not perfect and there are justifiable criticisms about EAWs being invoked disproportionately in minor cases. The UK is not the only country to be affected by such cases. Often EAWs are issued by countries which, because they must apply the legality principle, have no choice or discretion and must seek extradition. I believe these problems can be addressed quickly and effectively with EU partners who face similar issues by either negotiation with those states issuing EAWs in very minor cases by seeking an amendment to the Framework Decision on the EAW. These matters may be addressed favourably in the forthcoming judgement of the EUCJ in the case of Radu. The opinion of the EUCJ’s Advocate General is encouraging in this respect.

There is little doubt that the EAW is a far more efficient mechanism for dealing with fugitives more quickly than the Convention or Treaty extradition arrangements that existed between EU states prior to 2004. When I was head of the CPS International Division in 1994 it was not unusual after arrest for fugitives to take over two years to be returned from some EU states to face trial here. Nowadays the average time for return under the EAW is closer to 50 days. Good examples of the EAW are legion from failed terrorist bomber Hussain Osman in 2005 to the Kent school teacher recently returned from France for abducting a pupil. There is some evidence that the success of the EAW has encouraged criminals to base their activity outside the EU.I feel sure that any new arrangements to replace the EAW will almost certainly operate on a longer timescales. Quite apart from additional delays new arrangements will almost certainly involve extra cost for the CPS and foreign authorities that were formerly partners in the EAW scheme.

There is a huge public safety risk in removing the EAW arrangements. The numbers of fugitives wanted in other EU states who are arrested in London alone is significant. The absence of the rapid EAW process will inevitably mean that those people arrested, who are clearly a danger to society, must either be released on bail for longer with the attendant risk to the UK public, or be detained in custody here for longer at the UK taxpayers’ expense.

**Joint Investigating Teams (JITs)**
The Third Pillar instrument creating JITs team is one of the great innovations of the past decade in the fight against transnational crime. Again the UK authorities have been at the heart of this initiative and formed the first JIT with the Netherlands in 2004/5 to deal with a drug trafficking network and have been part of many other successful JITs. Eurojust and Europol have together developed considerable expertise and a support team to provide a wealth of advice, model agreements, and legal texts to form the basis of agreement to allow new JITs to be established quickly between the authorities in member states when those involved have not established JIT before. Most importantly significant EU funding for JITs is also available to investigating/prosecuting authorities in member states through Eurojust so these important but expensive investigations are not a burden the budgets of domestic authorities. Again I do not feel this is a Third Pillar tool that should be denied to the UK authorities.

An Opt Out - A giant step backwards

A block Opt Out with no Opt Back would remove UK police and prosecutors from participating in and contributing to Europol and Eurojust and mean a return to the uncertainty of ad hoc co-operation arrangements and that existed before the turn of the century. Does the UK really want to play no part in successful EU organisations in which non-EU states: Norway, USA, Switzerland and many others place their people because they see them as an effective tool and are eager to be involved?

Before Third Pillar institutions such as Eurojust were formed most of the work to facilitate international cooperation in criminal cases was done by individuals or a small number of specialists within each country who developed and maintained links with their relevant counterparts abroad. Although there was a formal framework to allow cooperation through the 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters, the UK did not ratify this until 1990. So the effectiveness of these relationships and the assistance provided depended on the trust and confidence of individuals who managed relationships personally relying on their address book of contacts to deliver results. Potentially unhealthy reciprocal relationships relying on the principle: “If you help me then I’ll help you” would develop. When individuals were promoted, moved on or retired that trust and confidence often took years to rebuild. The creation of Eurojust and Europol permanent networks of specialists located together, at low cost to member states, with the objective of supporting and improving the effectiveness of national authorities’ investigations and prosecutions. It has changed the way multilateral collaboration works and has dramatically improved the effectiveness of the response to organised crime networks that operate transnationally.

The Reason for the Opt Out Decision

The decision to consider exercising the Block Opt Out of PJC measure appears to be driven first by concerns that the Court of Justice of the European Union (CJEU) being able to exercise jurisdiction over the UK in respect of existing pre-Lisbon Treaty Third Pillar measures; and, second, that there is an avowed intention across the EU to create and EU criminal justice jurisdiction. The first seems a strange anomaly as the UK has recently agreed to submit to the CJEU’s jurisdiction to at least one measure the European Investigation Order (EIO) that is currently being negotiated. There is also a strong case to say that, where there are weaknesses, the UK should be able to influence the CJEU to rule to improve the fairness and the effectiveness pre-Lisbon Third Pillar instruments. The second point might
be a desire in the minds of a small number of committed Europhiles but it is a desire that can
be blocked in ways far less damaging to the UK than invoking an Opt Out particularly with
Opt Backs.

Equally the UK has high calibre prosecutors, police officer civil servant and diplomats who
are perfectly capable of negotiating and delivering the changes that might be needed to the
EU instruments that would obviate the need for an Opt Out.

**Opting Out then Opting Back - Risks**

Law enforcement and prosecutorial agencies as well as the courts, whether in this country
or abroad, require clarity and certainty to be able to operate effectively. This is all the more
important when they are dealing collaboratively with international counterparts. The Opt Out and
potential partial Opt Back will bring huge uncertainties.

Taking the EAW as the obvious example, unless there is an Opt Out with an immediate Opt
Back in to measures there will be uncertainty and an absence of clarity that will create scope
for a wealth of legal challenges to the operation of instruments such as the EAW. Anything
other than an immediate Opt Back in will create a gap which, if extradition is to continue,
will require carefully crafted interim legislative arrangements or measures. For example
EAW processes which are part way through the courts when an Opt Out occurs will be
challenge able in the courts on the basis the UK is no longer party to that process. I suspect
interim legislation will probably be required in both the UK and in partner states, to enable
fugitives to be returned and/or other co-operation to take place. Such interim measures will
also bring uncertainty and undoubtedly be subject to challenge regularly. Similar arguments
apply to other instruments.

The UK has been at the heart of and has led the EU in PCJ issues. No other country has had
held so many leadership roles in Third Pillar institutions. The UK credibility and contribution
is appreciated and valued by our EU partners and it would be undermined if not totally lost
were the UK to Opt Out whether or not there is an Opt Back into some measures.

Our own criminal justice system is not perfect but there is much we can contribute to
improve other EU systems both to our own advantage and in terms of those states
themselves. I will mention two areas touching significantly on the human rights of suspects
but which also affect prosecutors. First remands in custody prior to in a number of EU states
too often take an unacceptably long period and there is rarely bail pending trial. We could
and should influence the so called European Supervision Order to improve this situation.
Secondly the treatment of suspects in other jurisdictions is often such that those arrested
are denied the right of access to advice from a lawyer and/or to an interpreter in the course
of interrogation or questioning during an investigation.

As a former prosecutor I know that what prosecutors need to prove their cases is clear and
admissible evidence. They want to know that if evidence is obtained from abroad will not be
subject to challenge and be ruled inadmissible for being obtained unfairly, or subject to an
abuse of process challenge because a fugitive was interview without access to legal advice a
lawyer. There is much that needs to be done to improve criminal justice in the individual EU
states. The UK will be in a stronger position to do that by being part of the Third Pillar
structures; exercising UK influence from outside those structures will be difficult if not impossible.

**Conclusion**

Distinctions should be drawn between the Home Secretary’s list of Third Pillar measures under consideration. Most are Framework Decisions but some are Joint Actions which are less binding than the Framework Decisions and so likely to have little impact on the UK. I suspect that, if needed at all and if desired, they ought to be much more easy to Opt Back into than the Framework Decisions which are unanimously agreed by all EU member states and frequently require national legislation to ensure implementation in each member state.

There are many Third Pillar measures, some are extremely beneficial to the UK’s law enforcement and prosecution agencies and to the UK courts. Some have less impact and others are either obsolete or no longer relevant.

I can see no operational benefit to UK investigators or prosecutors in Opting Out of all the Third Pillar. On the contrary an Opt Out of these measures will create significant risks for the UK and huge operational benefits will be denied to UK authorities. Opting out of all Third Pillar measures and opting back into those measures it is deemed desirable to retain, also presents almost as great a range of practical and public safety risks and costs.

Either approach is additionally very likely to undermine the credibility of the UK police and prosecuting authorities, and the UK as a whole in the eyes of their EU counterparts. The UK will be seen as not committed to the fight against cross border crime in the EU, and or not committed to improving collaboration and the effectiveness needed to bring cross border criminals to justice. One wonders, even though it is legally possible, if other member states will have the necessary goodwill and be willing to allow the UK to opt seamlessly back into selected Third Pillar measures.

UK investigators and prosecutors will not be able, even at very substantial cost to the UK taxpayer, to replicate the 21st century arrangements, tools, facilities and networks that are currently available to them under the Third Pillar.

On the “polluter pays” principle there is an argument that as the UK, with other member states, have created an environment where commerce and criminals can operate more easily then the UK, along with other member states, has an international obligation to do all we can to ensure that best possible measures are in place to deal with the criminality bi-product.

**Finally**

If it has not been arranged I would recommend that the Committee takes a day to visit Eurojust and Europol in The Hague to understand fully how both organisations operate and the facilities they offer to UK investigators and prosecutors. I believe it is important to see at first-hand what will not be available to UK authorities if there is an Opt Out without an Opt Back into Third Pillar measures.

*14 December 2012*
Mike Kennedy, Association of Chief Police Officers, William Hughes and Aled Williams—Oral evidence (QQ 229-248)

Submission can be found under Association of Chief Police Officers
Timothy Kirkhope MEP and Anthea McIntyre MEP—Written evidence

This evidence is submitted on behalf of Timothy Kirkhope MEP Conservative Spokesman for Civil Liberties, Justice and Home Affairs, and Anthea McIntyre MEP. Both are members of the European Parliament committee on Civil Liberties, Justice and Home Affairs. Timothy Kirkhope is also a former Conservative Government Immigration Minister 1995 – 1997.

Introduction

Since 1999 the European Union has engaged in a policy of mutual recognition between Member States, which allows each one of them to fight cross-border crime using their own separate criminal justice systems, a system which emphasises the role of data exchange and mutual recognition.

The current Protocol 36 decision allows for the United Kingdom and Northern Ireland to opt in or out of the pre Lisbon measures in the area of police cooperation and law enforcement. When reviewing the list of measures which fall under this protocol, it is clear that a number of measures are of limited use, superfluous or are duplicated in other EU legislation. However, it is important to recognise that there are also a number of vital measures which serve the EU and the UK very well in the prevention, detection, investigation and prosecution of serious crime and terrorism, as well as in the protection of British citizens around the European Union. Such measures are those which aid the exchange of information and mutual recognition and trust in order to minimise bureaucracy and speed up processes and exchange. Through a number of these measures, we protect British citizens by providing them with cross border rights and cross border security. Such measures are essential when 2.8 million British citizens live outside of the UK, but within the European Union, and where millions more travel every year for either work or recreation. Equally, Britain’s continued involvement within certain measures is of value to other European Member States in order to provide the same comprehensive safety and security for their own citizens. The participation of all 27 Member States in measures provides for a more complete, therefore, effective system.

EUROPOL

At midnight on 31st May, the UK will, if opted out, be cut off from all measures, agencies, and databases covered under protocol 36. This creates a worrying gap in information sharing, and protections. Therefore, it is practical and prudent to use the time available to identify the measures we need to renegotiate into, in order to avoid such a situation.

One such important renegotiation would be a renewed relationship with EUROPOL. EUROPOL has a respected and competent British Director at its helm. Britain’s influence within this agency is clearly valued, and visible. Europol’s mandate ranges from combating organised crime, cybercrime, drug trafficking and terrorism to migration and border security, this is a vital role in protecting Europe, and the UK, which is often most affected by organised crime and terrorism. At a strategic level the UK often sets the EU agenda in internal security, and at a practical level UK law enforcement has played a leading role in
transnational investigations and best practice, which have often also been led by EUROPOL. The UK remains one of the most active and supporting Member States within the Agency.

In April 2013 the European Commission is due to come forward with a new proposal for a Regulation for EUROPOL, which will review its function and powers. Under the conditions laid out by Protocol 36, the UK will have 3 months to decide if it wants to participate in the proposal. If the UK does opt into the new EUROPOL Regulation then it can not opt out again. This measure will also be subject to the jurisdiction of the European Court of Justice, as is the case with the 27 measures which the UK has opted into since the Lisbon Treaty came into force. If the UK does not opt in to the Regulation, it will be able to negotiate the eventual outcome but it will not have voting rights and will have to withdraw all British staff from EUROPOL.

New trends in crime point towards the need for increased European coordination and cooperation, not less. Organised crime, cybercrime and terrorism, can all originate in one place, be planned in another, and executed in a third. The reality is that the UK in combating cross border crime can no longer go it alone. To replace the relationship EUROPOL has with the UK with bilateral relationships would be expensive, time consuming, and less comprehensive. If the UK were not to participate in EUROPOL, in practical terms it would be far more difficult for police agencies to investigate crimes with a cross-border element.

EUROPOL possesses a number of cross-European intelligence databases on organised crime and terrorism. The UK’s Serious and Organised Crime Agency increasingly relies upon these databases, which provide a hit rate of between 10 and 20 percent of information which was not already available. EUROPOL has 800 Members of staff, many the best in their field, from as many as 40 countries. There are 140 liaison officers who handle around 14,000 cross-border operations each year. EUROPOL’s work on cases such as Operation Golf, and Operation Rescue provided results which the UK and other countries could not achieve alone. In 2012 the UK sent approximately 4,500 requests for information to Member States and third parties via the Europol network. It received approximately 3,000 requests for information from other Member States or third parties. In 2011/2012 UK law enforcement agencies were involved in more than 300 of the 600 major operations against serious and organised crime and terrorism supported by EUROPOL.

Data sharing of criminal data on previous convictions in another EU state is shared under the (ECRIS) system. In the UK, cooperation is dealt with via the United Kingdom Central Authority for the Exchange of Criminal Records, run by the Association of Chief Police Officers (ACPO). ACPO states that in 2009 it received 5,750 notifications of convictions for UK nationals in other EU states and in return sent 32,833 notifications regarding foreign nationals who have been convicted while in the UK.

**The UK’s role in internal security**

The UK has one of the highest security threat levels within the European Union, and we gain much by our continued participation in some European measures. By not participating in these measures, there will be a long lasting impact on the UK’s ability to prevent and prosecute cross border threats, and to influence future EU policy in this area. Increasingly the corners of the world become closer, and the internet’s grasp wider. Quite simply, in some areas of law enforcement we cannot go it alone. Our influence at present in areas which the UK cares about is significant. We hold the Directorship of EUROPOL. The last
two Chairmen of Eurojust and the last two Director Generals of the Commission’s JHA directorate have been British. Our influence throughout the EU agencies and the Commission is significant.

Eurojust oversees a range of other agreements including agreements on data sharing and freezing orders and European Arrest Warrants. The UK is a major participant in Eurojust, with the highest number of cases (205) referred in 2009-2010. Eurojust is currently chaired by a Briton, Aled Williams. Of course our relationship with Eurojust comes with the caveat that the future holds the possibility of Eurojust overruling the UK’s future judgements, and the possibility of Eurojust potentially being given powers of initiative though a European Public Prosecutor. The UK must also consider how if it is to return to Eurojust, it can achieve future involvement without being required to participate in the European Public Prosecutor’s office.

As previously stated the UK has always, and we hope will continue to play a vital and leading role in shaping strategy towards European and global security. For example, in the days after 9/11 EU Ministers held several urgent meetings to coordinate how best to respond to the situation. An overhaul to the Schengen Information System (SIS) was identified as a priority. During this process the UK provided the vast amount of functional requirements for SIS II, based on the Police National Computer and the UK’s own border protection system. The UK’s influence and contribution was vital, and hugely valuable, despite being outside of the Schengen area. Other examples of British contributions include the implementation of Intelligence-led policing (ILP) and a European Criminal Intelligence Model (ECIM). Such systems have not just been replicated within EUROPOL but also with Member States’ individual systems across the Union. More recent examples of British influence in this area include the creation of an EU PNR system (Passenger Name Records) which is based on the UK’s e-borders system, and of which Timothy Kirkhope MEP is the European Parliament’s rapporteur.

Planning for the Opt out

If the UK exercises its opt out, it would be advisable to explore a one-by-one approach to opting back in. This will be subject to the approval and good will of the European Institutions; Schengen instruments will require hard fought for unanimity within the Council. For non-Schengen measures, Article 4 of the Title V Protocol would apply to the vast majority of the laws concerned. This is the process of opting in to a measure post-adoption and allows for conditions to be set by the Commission. Such a decision will also impact upon the UK’s relationship with third countries. Third countries will have agreements with the EU, beyond their relationship with the UK. Increasingly the EU tries to prevent third countries from passing on European Union data through bilateral agreements. However, in exercising the UK’s opt out, there is a real possibility that our influence will undoubtedly be diminished in this area in all future legislation. However, there will of course be other, if not limited measures at an EU level. For example the Council of Europe conventions and other bilateral agreements which can be used to fill the void; but they are not as sophisticated, they do not cover all areas, they are not all ratified by the UK, and they are not all ratified in all other EU Member States. This leads, consequently, to a lack of practical operability.

The UK should attempt as soon as possible to use this time through consultation with the Council, Commission, Parliament and ECJ, and other Member States to build a collegiate and
understanding environment, as well as practical and meaningful reform of certain measures in order to gain the best possible outcome for the United Kingdom’s future cooperation in this field. This is a task best undertaken sooner rather than later.

**The European Arrest Warrant**

In trying to secure meaningful reform of measures which are flawed but valuable, the UK must look at the European Arrest Warrant. There are examples of where the European Arrest Warrant has not been used for its intended purpose. However, this has proven to be a powerful tool in extraditing serious criminals in a quick and effective manner. To avoid the situation where the EAW is not applied in the correct manner, a proportionality clause would provide for a significant improvement of its implementation.

The UK is one of the biggest recipients of EAW requests in the EU, with 4,000 requests made a year and it is true that some of these cases are comparatively non serious. However, the UK may request fewer EAWs than others, but its effects for the UK gaining justice have been significant. Whilst used less publicly as examples of the EAW, it has been integral in bringing to justice a number of terrorists, murderers and rapists. The EAW has also managed to cut down the lengthy extradition process from an average of 18 months to 3-6 months. Equally the UK’s significant number of received requests is a useful bargaining tool in order to request reform from other Member States, in exchange for remaining within the instrument.

**European Cooperation and the cost of ending it**

The European Arrest Warrant is just one of any number of data sharing agreements in place that our government relies upon to control who enters our country and to track terrorists through their financial movements and their flights. This is further complimented by the Visa information System, parts of the Schengen Information System, the European Criminal Records Information System, and EUROPOL.

The loss of these systems will not only lead to a blackout of data on which many of our domestic security systems rely, it will also require us to set up new systems and mechanisms to replace those that we have lost; systems which cost millions of pounds to create in the first place. The costs have yet to be identified, but there will be significant costs as well as considerable technical planning required. The European Treaty protocol states that the UK “shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.”

Perhaps one overlooked consideration of budgetary implications, is that in these financially challenging times, the UK has found it to be cost effective to share criminal databases, and that the UK must increasingly have to look for more cost effective and international ways of doing business. Having 27 bilateral agreements will always be more costly and less time effective than operating from one central structure. In the last few years the UK has closed a number of bilateral out posts, and has instead invested in joint law enforcement projects and agencies within the European Union. The UK will also have to pay for all its future bilateral agreements, and building up its own future criminal databases, where it has currently relied upon the EU’s.
Further examples of the potential economic impact are seen in how European wide investigations counter the severe and increasing economic impact of organised crime and money laundering. For example EUROPOL has previously helped identify a criminal ring which enacted four million benefit fraud actions in the UK.

However, costs go beyond that of the economic and consideration must also be given to how the opt out will affect the rights of British citizens living and working abroad in other EU Member States. Such an example would be a British national who is released awaiting trial in another Member State on a pre-trial supervision order (under Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention) and another British national who would be held in detention after the opt-out. Beyond catching criminals the EU has created a set of rights for European citizens, which protects them across the Union if they are ever accused of a criminal offence. This provides for a letter of rights, the right to translation and interpretation, and access to legal representation and consular protection: all of which has been adopted under ECJ post Lisbon jurisdiction.

Conclusion

Our primary objective should be in framing the upcoming decision, and possible renegotiations in such a way that displays the added value of UK future participation. The UK must also allow for plenty of time for this process to take place, and therefore, the UK’s parliamentary timetable on this issue should reflect this accordingly. We must also demonstrate our strong commitment for meaningful and effective reform, and in achieving a smooth transition which prevents gaps in security and protections for UK citizens, which inevitably criminals will seek to exploit. Whatever the government’s final analysis might be, there must be a thorough and practical evaluative process and back-up regime ready and in place for those measures which the UK does not opt-back into immediately. Considering the timeframe in place and the importance of not exposing the UK to national security threats, this will be a challenging yet achievable task, if handled correctly.

18 March 2013
Lynda Lacy—Written evidence

Introduction

My Lords, Ladies & Gentlemen as an MoP (Member of the Public) and OAP (Old Aged Pensioner) I would like to take the opportunity to submit this document to your select committee. This has been my second attempt and turned around within a 2 day period. I'm at a disadvantage as I'm naive of the Law and not legally trained. I've aimed to be more provocative than the politically correct because we the public don't get a vote on the Government at the heart of Europe and our only contribution is the ever increasing burden of taxes. Realising Eastern Europe has been broken down into in component parts (ie. LV, LT, etc) each with a single vote whilst the United Kingdom of Great Britain and Northern Ireland as a whole (4 separate nations within 1) has just a single vote and soon a defunct veto. Rightly or wrongly we are disadvantaged in the current voting system and consistently in a minority with more than 14% of the EU's population and less than 3.7% of the voting power.

As the political dynamics of the EU change the West will be forced to surrender more democracy & freedom than we were lead to believed when I voted “Yes” for back in 1973.

Should the Government Exercise its Block Opt-Out?

Many miscarriages of justice are envisaged in relation to “Crime Does Not Pay” and the “Right to Remain Silent” in criminal Money Laundering by switching the “Burden of Proof” from the prosecution to the defence. This would not be so bad if EuroJust allowed your defence to be heard in court. And for good measure if found guilty of charges of Money Laundering you automatically default into the league of “Organised Crime”. Thus a single conviction has a double indemnity clause.

The 3rd Directive “Money Laundering” & “Terror Financing” revokes the right to remain silent but under the Acts of Terrorism the right to remain silent is already written into case Law. How can you receive a fair trial if you are dammed if you do and dammed if you don’t? If criminal law cannot prove Money Laundering due to a lack of prima facia in the majority of cases, this is not the fault of the criminals but the fault of the criminal law itself. Civil Law and / or a Criminal Assets Bureau would also have a similar desired effect “Crime Does Not Pay” minus the injustice of the existing EU Laws which are not fit for purpose.

If EuroJust proves successful with this type of white collar crime, it’s likely to revoke the right to remain silent in similar cases such as tax avoidance or insider trading, etc. Thus many more people could be convicted without evidence and an unwillingness to talk and thus by default this system of justice removes innocence.

Financial Effects of Opt-Out

The social & financial cost of the unmanned EU frontier has a multiplying effect which boarders on the obscene with devastating effects on society at every level including the public purse. The density & velocity of Economic Migration is about to reach supernova with disastrous and dangerous consequences, especially if it were to explode.
The new monopoly of the European Central Bank is another danger zone as it hopes to gain access to 6000+ banks and their entire accounts. With these laws the first priority should be to protect the UK and minimise Capital Flight to tax heavens in an effort to preserve the wealth of the nation. As the laws become more arbitrary throughout the EU this could have a greater impact at the national level. More specifically since EuroPol & EuroJust are working in tandem to extract monies via a “Gestapo Regime” and writing the laws in favour of “bag the swag” irrespective of solving crime or investing in proper Law & Order.

Heavy judicial costs could be minimised through greater efficiency, standardisation, shared good practices and cutting back on waste whilst offering citizens, businesses, crown & country more security and giving back responsibility for good financial practices. The tax payers those forgotten & ignored people who ultimately pick up the tab are increasing dismayed at the industrial machine and army of administration, bureaucrats and legal eagles all wrangling away on our behalf based on the assumption they have the advantage of asymmetrical information. If given a say we would prefer to invest in accountants who could audit and sign off the accounts. Since the information revolution has happened and the general public can become a “DIY lawyer” if one has enough cheek and defiance.

**Wider Implications if the Government’s Opt-Out**

A David & Goliath scenario could follow pursuant to an Opt-out with the EU exerting its muscle over the little Britain’s using its economies of scale.

A tactic increasing used by the EuroPol is the propaganda machine, a tool to “character assassinate” individuals hence unfair trial by media and there are plenty of recent examples (i.e. Jimmy Saville or tax avoider Jimmy Carr). A malicious and vindictive EU could easily set up a propaganda campaign by blackmailing the Nation thus we are pulled back into line by the negative impact.

However, the most likely event would be a Swiss type relationship with the UK being released amicably. Thus the UK could relish in its “escape to victory” and move forward in pursuit of good tiding and re-joining the rest of world, whilst the rest of Western Europe in particular look on in envy and regret at the loss of their Democracy & Freedom.

**The Most Beneficial PCJ Measures**

Since becoming an Orwellian society surveillance equipment has become a major tool in crime prevention, detection & criminal prosecution such as street cameras and access to data & multimedia equipment. The London Riots exposed the BlackBerry Gap, the use of social media to organise and the Polices inability to halt or intervene whilst the civil unrest happened, mostly due to social conditioning of the police. Hence they stood back, watched, recorded and waited whilst the eerie aftermath of the public mood soon became apparent. Only once the public verdict was known were the police confident to round up and successfully prosecute the rioters without fear of recrimination on grounds of race using the surveillance of the City.

Diplomatic intervention in relation to extradition ensured prima facia evidence was available and a high probability that a case could be successfully prosecuted before a person was dispatched aboard.

**Home Secretary Statement 15/10/2012**
The Home Secretary made a good speech indicating that it’s better to Opt-Out and renegotiate on those PCJ’s that are in the national interest. Here! Here!

Reliance on the PCJ & EAW
MS have the opportunity to release EU citizens & residents on bail allowing them to return home prior to trial reducing pre-trial detention. If an individual fails to show up at court then an EAW can be issued for their surrender to face prosecution or detention, if an appeal case. Database systems such as SIREN are available in 27 MS’s recording & alerting all police forces of warrants issued which also flag up at various hotspots such as airports, etc.

No diplomatic incidents have been publically reported in relation to cross boarder covert operatives in relation to an EAW. But under the existing system there would be no choice but to surrender these government agents if requested with or without evidence. The most simple and innocent example could include a person drunk & peeing in the street whilst this would be a fine in the UK, another EU country may have sentence of a year or more.

Failure to Implement & Open to Infringements
The UK has partially opted out of the order to freeze assets & evidence which is documented, thus no infringements for this particular none implementation. Freezing Assets is not part of the UK remit as they have already realised the inadequacies of the EU Laws in relation to “Crime Does Not Pay”.

The European Investigation Order could have consequence for the UK and Europe.

ECJ having Jurisdiction
The laws of Nature and the Laws of Man are there to be broken especially if they create a sense of burden or a hurdle to be overcome. Newton discovered gravity and wrote a Law but the Wright Brothers broke that Law with the creation of flight. This paradox is often highlighted between National & EU Law when reality doesn’t fit the paradigm. With the nation expected to suffer direct effect and the ECJ suffering no effect directly or indirectly as it’s nothing more than an empty vessel without a soul.

Not Opting Out Benefits
With the Lisbon proposal the UK could opt out of the EAW FD and replace it with a system of Agreements & Arrangements. NL & BE have been experimenting with a “Free Movement Zone” through the "Penal System" rendering "Surrendered" prisoners across their boarder to serve a detention. With the Penal System outside the jurisdiction of the EU Commissioner, the commissioner has already official responded to a citizen that Article 31 supersedes Article 26 and thus the EAW FD and more specifically the Surrender is already defunct prior to the enactment of Lisbon.

The UK could take advantage of this Free Movement Zone and remove all undesirables off the Island. Alternatively, Lisbon is about to create an Economic Boom in the Prison Rental Business and Northern Ireland has plenty of spare capacity. It also makes good business sense to be able to release prisoners in any MS where there is an arrangement and further charges pending. If there are multiple MS interested in an individual you could open up an auction and collect premium fees but it could also cost you premium rates if the situation is vice versa.
This could be the start of a new Free Market Economy with the “Horse Trading” of Prisoners without the hassle of surrender or access to Judicial Systems and Human Rights thus removing the expensive Lawyers and passing the reign of power in these matters to the civil servants of the Justice Department and Prison Commissioners of the individual MS’s because once a person becomes locked up they automatically become less than human.

**EAW Advantages & Disadvantages in Continuation**

This report has been based on an individual case, a dual national (GB/IE) prisoner extradited pursuant to a European Arrest Warrant (EAW) from Spain (ES) to Belgium (BE) to serve a Detention Order in July 2011 (whilst out on appeal and free to return home). Initially the prisoner was deposited in a high security remand centre Forest Vorst Prison (BE), then January 2012 the prisoner was moved to Wortel (BE) before being annexed to Tilburg Prison (NL) a rental caretaking facility across the NL International Boarder.

At the time of writing this report the individual concerned is still serving out his BE sentence in Tilburg NL whilst his BE Surrender Certificate is safely under lock & key in Wortel BE. Thus Prisoner & Surrender Certificate are separated by an international boarder, each residing in their allocated kingdoms and this has been confirmed by the Prisoner himself. At this point you will realise the EU Commissioner has sanctioned a “Free Move Zone” via “The Penal System”. The EU doesn’t recognise “Surrender” on a par with “Extradition” and thus has failed in all its obligations to Mutual Recognise other MS in relation to the EAW & the subsequent surrender of citizens and thus no barriers to potential abuse of civil liberties throughout the “Penal System” as it is outside the EU Commissioners remit.

The Lisbon Experiment – A tenancy agreement and contract to supply workers supported by BE, NL and the EU Commissioner unbeknown to the remaining 25 MS parliaments and the peoples of Europe. Thus there are no guarantees or safety nets in relation to “Surrender Certification” which is already enacted by the act of omission of BE, NL & the EU Commissioner and thus Julian Assange was right to take refuge in Ecuador as he could have been sent to the USA via SE with a private arrangement as confirmed by the words of the Commissioner Letter.

Here is a list of documents legalising "Free Movement" via the "Penal System"

- BE/NL Copin 51, EuroJust 28
- BE/NL Bilateral Agreement & EN Google translate
- BE Senet Q&A’s
- Accessibility of the Bilateral Agreement
- Article 25 - Impunity
- EU Commissioner Sanctioning a “Free Movement Zone” through the “Penal System”.

**Institution Costs of Opt Out**

As the EU is working to implement the Community Method, EuroPol will become more like “Bounty Hunters” & “Treasure Hunters” which is a misuse of real Police resources. This will have a greater Human Cost as Europe becomes increasing lawless with old criminal gangs being replaced by new criminal gangs as crime prevention has not been part of the EU’s strategy as they only want to disrupt crime. I believe the EU wants to use “Criminal Assets” to help prop up the ailing €uro by cyphering off captured assets via a secret tier within EuroPol, with real police only getting involved in targeting and the initial investigations.
Italy is an ideal place for Criminals to start disappearing through the Penal System as nobody is likely to bother doing a headcount on the Camorra. The Vatican City (Not a member of the EU or part of the EAW) has a Bilateral Agreement to house its prisoners in Italy. They are now holding onto the pope’s former Butler and this makes one curious to why the change of tactics especially since the Church is also coming under mounting suspicion of covering up paedophiles and money laundering, is this another attempt for the EU to breakdown wealthy institutions and erode European faith as in the case of Gay Marriage. EuroJust also has a remit if the existing laws do not produce the desired outcomes then they can be rewritten, many these new laws do not adhere to the human rights. Currently they are writing new laws to take the Shoes of the Children of people convicted of particular crime.

In an ideal world you want your police & justice on the right side of the law, not left of the political agenda.

**Which PCJ should the Gov Opt into**
The Government should be very careful about what they opt into as the EU is heading towards a communist regime. They should only opt into EU laws which are compatible with Human Rights & existing UK Laws.

**Opt in on a Case by Case Basis**
This might be the most desirable option as it gives the UK real flexibility to take advantage of the just and omit the unjust, as time goes by the EU abuses will become more apparent.

**What Form would Co-Operation Take**
Co-operation should continue along a similar line as the EU but the UK should add in its own safety features. The EAW is not all bad but it does need to be improved with the right to say “No” or where is the evidence.

In an effort to co-operate more efficiently the UK should deny the incorrect use of EAW’s, currently the EAW has been used as an EIO which is not properly ratified throughout the EU.

Surrender of GB citizens should be guaranteed as agreed in accordance with the certificate prior to surrender thus maintaining the integrity of both the person & the certificate. Those surrendered from home & abroad should be given the same assurances which is not the case under existing arrangements.

A System of bilateral & multilateral agreements & arrangements can be used providing they are not secret & published in accordance with the freedom of information to ensure equality of access to the Law.

In the event that Prisons become big business then the rules should be tightened up to exclude none EU MS’s to prevent prisoners being moved to countries such as the USA or Russia.

**Article 276 TFEU**
I have not researched EuroJust greatly but I’ve come across their “Not fit for Purpose” justice but I do believe this is a very dangerous article and I’ve already come across both EuroPol and EuroJust having no accountability from reading various websites and
publications. At present EuroPol comes under the remit of the de facto Malmstrom Commissioner who is the Public Relations Officer for that department as an academic idealist as opposed to a realist. Thus the real power of the Police & Justice come under a figure head unknown to the public, this is the EU’s Achilles heel.

**Implications for Rep of Eire**

Ireland already has reservations about surrendering its peoples and its experienced first-hand the “Stick & Carrot” policies of the EU. The vast majority of Ireland exports including its people are for the UK Market. The UK is IE’s biggest export market and both countries have common language, a good working relationship, history and tradition including Law & Order. Since home rule IE law has been based on UK Law and points debated by the House of Lords and their outcomes are used as case law within the Republic.

*6 January 2013*
Law Society of England and Wales—Written evidence

Written evidence from the Law Society of England and Wales

1. The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law. This memorandum of written evidence has been drafted in close consultation with the Society’s Criminal Law and EU committees, both of which are comprised of leading practitioners in their fields.

The 2014 opt-out decision

Question 1: Should the Government exercise its block opt-out?

2. In the Society’s view the case for exercising the opt-out has not been made and doing so is likely to cause significant difficulties for criminal investigations and to lead to increased costs.354

3. The Society starts from the premise that systems need to be in place to facilitate effective cross-border co-operation in criminal justice matters between Member States and provide for corresponding procedural rights for victims and suspects. There is no reason related to the operation of the criminal law in England and Wales to opt out of the pre-Lisbon EU police and criminal justice (PCJ) measures that the UK previously chose to opt into. There also appears to be no benefit to the UK in exercising the opt out if all that is ultimately achieved is that the UK will subsequently opt back into some of the more beneficial measures, whilst at the same time incurring considerable cost. The Government has not pointed to any harm arising from the existing provisions.

4. Clarifying misconceptions

5. Subsequent to the ratification of the Lisbon Treaty, the UK has opted into a number of further PCJ measures, including the Directive on minimum standards for victims of crime, Measure A (on the right to interpretation and translation) and Measure B (on the right to information in criminal proceedings) of the procedural rights framework as well as negotiations for a European Investigation Order. The exercise of the opt-out would not therefore remove the UK from the sphere of EU criminal justice. Nor would the exercise of the opt-out remove the UK from the jurisdiction of the Court of Justice of the European Union (CJEU), in respect of which it has already accepted the jurisdiction in relation to the post-Lisbon measures which have been opted into and would further need to do so for any pre-Lisbon measures into which it wishes to opt back.

6. The UK would not, as of right, be able to opt back into the instruments from which it opts out. It may only do so, following negotiation, with the agreement of the relevant EU institution.

7. The Society believes that the European Arrest Warrant (EAW) Framework Decision can be improved but offers a better and more efficient system than the previous arrangements. Whilst it may be possible to revert to such arrangements in some cases, these are likely to prolong extradition proceedings thereby increasing detention and...
court costs incurred by the UK. The Society believes that it will be easier to influence the reform process if the UK does not exercise the opt-out.

8. For any further measures the UK retains the right to consider whether to opt in on a case-by-case basis. The debate as to whether or not there should be a European Public Prosecutor is therefore a separate issue.

9. Effect on substantive law

10. It seems unlikely that a decision not to exercise the opt-out would have a detrimental effect on English substantive law. The measures concerned (only a few of which could be argued to have a link to substantive law) are simply the development of practical means for the Member States to investigate and prosecute crime with a cross-border dimension, and execute criminal justice decisions in cases involving multiple Member State jurisdictions. Many are mutual recognition measures, an approach developed as a means of facilitating cooperation without impinging on Member States’ legal systems.

11. Concern regarding potential cost

12. The costs of exercising the opt-out, given the lack of potential gain to the UK, should be highlighted as a significant concern, particularly at a time when the budgets of all UK criminal justice agencies are facing unprecedented reductions.

Question 2: What are the likely financial consequences of exercising the opt-out?

13. The costs of exercising the block opt out will include not only the costs imposed by the Commission and the Council but also any domestic costs (including those of any transitional arrangements). It is impossible to estimate what these costs will be without knowing (a) what measures, if any, into which we will opt back; and (b) how exactly the Commission and Council will identify and assess the direct financial consequences ‘necessarily and unavoidably incurred as a result of the cessation of [the UK’s] participation in those acts’ (as envisaged in Protocol 36).

14. These costs could incorporate not only costs to the EU institutions but also the costs to the other 26 Member States of instituting changes which could be substantial.

15. Moreover, both prosecutors and defence practitioners (from the UK and in the other Member States) would require training to understand which measures the UK is still subject to, any transitional measures and any new framework.

Question 3: What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

355 TFEU, Protocol 36, Title VII, Article 10.
356 There could also be further losses: for example, it is believed that the UK has already spent a considerable amount on preparations to join the Schengen Information System II, both through paying 18% of the contributions to the EU budget in this regard between 2007 and 2012 and also making domestic preparations. See House of Lords, EU Committee, 9th Report of Session 2006-07, “Schengen Information System II (SIS II)” HL Paper 49, paragraph 32. Paragraph 33 sets out the Home Office’s estimate of the cost for UK implementation at £39 million. In addition, if the UK’s involvement in the European Police College (CEPOL) (currently located in the UK) ended, the Society believes that this would need to be moved to another Member State, at further cost.

357 As an example, the Republic of Ireland has repealed the extradition arrangements that existed with the UK prior to the adoption of the EAW Framework Decision. If the opt-out were exercised, there would need to be a new extradition arrangement between the UK and Ireland.
16. The UK has over many years helped to shape the development of EU criminal justice policy, for example, through the development of the concept of mutual recognition, which has enabled measures to be developed that do not impinge on substantive national laws. As the third largest Member State by population size, the UK plays an important role in the EU in fighting serious cross-border crime. If the UK were to opt out, the impression may be created that it does not see a high level of co-operation with other Member States as necessary in order to address cross-border crime. This could extend to other areas of policy as the Commission and other Member States may view an exercise of the opt-out as yet another instance of the UK failing to engage in EU justice initiatives. Account should also be taken of intangible costs such as the UK’s potential loss of influence within institutions like Eurojust, Europol and the European Police College (CEPOL).

The UK’s current participation in PCJ measures

**Question 4:** Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

and

**Question 5:** In her 15 October statement the Home Secretary stated that “… some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

and

**Question 12:** Which, if any, PCJ measures should the Government seek to opt back in to?

17. The Society refers the Committee to the very careful and thorough analysis of the benefits and disadvantages of all the measures in the paper produced by the Centre for European Legal Studies. None of the measures can be characterised as harmful to the criminal justice system. Overall, many of the measures offer benefits to the UK. Some measures may be obsolete. It is not clear why the UK needs to opt out of these rather than negotiate with other Member States to have them amended or annulled.

18. In this evidence, the Society broadly identifies the benefits of the various measures, and the consequences should these be lost. If an opt-out occurs, the Society would therefore urge the Government to seek to opt back into the majority of these measures (besides any that are obsolete), unless they are already superseded by new provisions. In particular:

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358 The Society understands that Europol is currently supporting approximately 700 investigations concerning organised crime and terrorist networks, and that the UK is actively involved in over 200 of these.


18.1. mutual recognition measures, including the EAW (ideally modified (see endnote xvi), though this may not be practical); the European Supervision Order (see response to Question 7); the measure concerning the mutual recognition of custodial sentences (so UK prisoners can serve their sentences here, and non-UK residents convicted here can serve their sentence in their own Member State); the measure concerning the mutual recognition of financial penalties allowing fines over a certain threshold to be enforced in another Member State;

18.2. measures establishing the organisations Europol and Eurojust, which facilitate cross-border co-operation in the investigation and prosecution of offences; and the

18.3. various mutual legal assistance police and prosecution cooperation measures, which allow information and data-sharing, and cooperation in cross-border investigations.

19. There is particular value in Europol, Eurojust and CEPOL. Many of the measures are intrinsically linked and will all come into play during the course of an EU-wide investigation and prosecution: for example, the use of data sharing measures to detect a crime, or the whereabouts of a suspect; the involvement of a liaison magistrate; the obtaining of an EAW; the setting up of a joint investigation teams.

Question 6: How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?

20. The Society understands that the UK relies to a significant extent on the EAW to ensure a more efficient surrender of persons than was possible under the previous regime. Statistics show that in 2003 (the final year under the old system) globally the UK received 114 extradition requests and surrendered 55 people. In 2010, the UK surrendered 1,068 people to other Member States, issued 256 EAWs, and 116 people were surrendered to it.

21. The Society understands that it takes roughly between 14 and 17 days to surrender an accused who consents to such action from one Member State to another and 48 days if he or she does not consent. Under the previous regime, it could take approximately one year for a successful extradition process with some famous examples lasting for many years, costing taxpayers a significant amount of money.

22. Opting out of the EAW scheme would be unlikely to reduce the number of extradition requests made to the UK as this appears to be more a function of free movement rather than any aspect of the EAW procedure.

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361 A Review of the United Kingdom’s Extradition Arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010): Presented to the Home Secretary on 30 September 2011 (known as the “Scott Baker Review”), Appendix D Extradition Figures, page 461.
362 Ibid, pages 462-463. The Society understands that the statistics quoted are for calendar years. In Part 5.3 of the report (pages 116-117), figures up to 2009-10 are available for business years.
Question 7: Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

23. The UK's implementation record in relation to PCJ measures is generally very good and the risk of infringement proceedings is therefore seen as small. In general, the Society understands that the Commission only tends to initiate infringement proceedings after a Member State has systematically breached its obligations for a sustained period.

24. A notable measure that the UK has not yet implemented is the European Supervision Order (ESO), which is designed to institute a system of 'Eurobail' (in essence, pre-trial bail to enable the person to continue to be at liberty but subject to supervision in one Member State, pending their trial in another).\(^{364}\) This is unfortunate as it is believed that the ESO could alleviate some of the difficulties encountered by individuals extradited under an EAW before an issuing Member State is ready to try them.

Question 8: What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

25. The CJEU's role is:

25.1. to interpret EU legislation so that it can be applied uniformly across the Member States; and

25.2. to settle legal disputes between Member State Governments and EU institutions, including infringement proceedings.

26. The Society is not aware of any CJEU judgments relating to PCJ measures that have posed problems for the UK.\(^ {365}\) Of the relatively small number of cases that had been referred for preliminary rulings, many of those proved to be useful in clarifying uncertainty. Recent cases including the joined cases of Magatte Gueye and Valentín Salmerón Sánchez, X and Maurizio Giovanardi and Others also seem to indicate that the CJEU is respectful of the criminal justice systems of the Member States.\(^ {366}\)

27. The UK is already subject to the jurisdiction of the CJEU in all other fields of EU law. It has also accepted the jurisdiction of the CJEU for the post-Lisbon PCJ measures it has opted into and would further need to accept its jurisdiction for any further measures into which it wished to opt back. Accepting the CJEU's jurisdiction for some measures but not others would risk incoherence and further complexity. It also appears that the UK courts would benefit from having the right to issue references for preliminary rulings in PCJ matters. For example, in the recent Assange case, the Supreme Court was required to consider the meaning of 'judicial authority' in the EAW Framework Decision.

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\(^{364}\) The deadline for implementation was 1 December 2012.

\(^{365}\) Article 276 TFEU also seeks to provide what practitioners view as fairly broad guarantees that the EU institutions cannot interfere with the functioning of Member States' domestic criminal justice systems.

\(^{366}\) Magatte Gueye (C-483/09); Valentín Salmerón Sánchez (C-11/10); X (C-507/10); and Maurizio Giovanardi and Others (C-79/11).

\(^{367}\) Assange (Appellant) v The Swedish Prosecution Authority (Respondent), [2012] UKSC 22. Please see inter alia Lady Hale at paragraph 185.
The Supreme Court noted that it was not possible to refer the matter for interpretation to the CJEU and so considered the CJEU’s approach to interpretation and the likely conclusions that the CJEU might have come to.

28. One concern being raised in some quarters in relation to the CJEU being able to take jurisdiction over the pre-Lisbon PCJ measures is that this might create uncertainty for Member States. This, however, is an inevitable feature of all legal systems where courts have a role in interpreting legislation. As noted, the limited PCJ case-law from the CJEU has to date generally been helpful in clarifying uncertainty. Furthermore, uncertainty is unlikely to be avoided in the case that the opt-out is exercised. The opt-out itself is likely to raise complex legal questions in the UK, in other Member States and in the CJEU. For example, there will be issues as to whether, if the UK leaves some of the measures concerned in its national legislation (for example, the EAW), requests could still be recognised and adhered to by other Member States (which would seem to depend on how they had enacted the EU legislation in their own domestic law); and whether, if previous Council of Europe agreements have been superseded by new legislation in other Member States, those Member States could still revert to them. Legal lacunae are also likely to arise in any transitional period.

Question 9: If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

29. As explained above, the benefits of being subject to the jurisdiction of the CJEU would be to enable UK courts to make requests to the CJEU for preliminary rulings to obtain guidance on interpretation leading to greater clarity and, potentially, less delay on further cases raising the same point.

30. Concerns have been raised about the time that it could take to deliver rulings. The Society understands though that the CJEU has expedited procedures available, including the urgent PPU procedure, should the case be particularly urgent. The Society understands that the shortened time limits are adhered to, so that rulings can be issued quickly in such cases. For example, according to the CJEU 2011 Annual Report, the average time taken for such procedures was 2.1 months in 2008 and 2010 and 2.5 months in 2009 and 2011.

The potential consequences of exercising the opt-out

Question 10: The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

31. The EAW has improved the process of surrender between Member States within the EU. The time to extradite a person has been significantly reduced. Legal representatives are therefore able to deal with extradition cases much faster than was the case with the previous extradition system in place in the UK and this has also reduced the amount of

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368 The Society also understands that there is a separate criticism that the CJEU is not accountable to the European Parliament or national parliaments in its decisions. This is no different from the UK courts and reflects a misunderstanding about the role of a court.
time that a suspect could be held in pre-trial detention. If the UK ceased to participate, these benefits would be lost.

32. The Society believes that the EAW can be improved\textsuperscript{369} but that it remains a better system than the previous arrangements (see response to Question 14). The flaws in the current functioning of the EAW Framework Decision existed (together with others) under the system in place prior to the EAW. The Government should seek to work with the other Member States, many of whom have similar concerns, to improve the EAW and supplement it with further safeguards. Moreover, measures to improve the use of the EAW are already available. For example, section 21 of the Extradition Act 2003 provides that if an extradition would be incompatible with rights contained in the European Convention on Human Rights within the meaning of the Human Rights Act 1998 then the individual concerned must be discharged.\textsuperscript{370} There is also a pending case before the CJEU concerning the relationship between Convention rights and the EAW. The Advocate General's Opinion\textsuperscript{371} suggests that in cases involving an EAW:

32.1. it should be considered whether detention is proportionate; and

32.2. it should be possible for the competent judicial authority of the executing Member State to refuse a request for surrender on human rights grounds in exceptional circumstances.

**Question 11: What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?**

33. There is already a practical effect on clients who could potentially face extradition, who are being advised that it is possible that the current framework in place may be changed as from December 2014. This has led to a great deal of uncertainty. Transitional measures have not yet been agreed if the opt-out is to be exercised, leading to further uncertainty.

34. The offences which involve mutual legal assistance through Europol and Eurojust are in the main the most serious and complicated investigations and prosecutions involving cross-border organised crime in a number of Member States and concerned with terrorism, trafficking in drugs and human beings and firearms, money laundering or VAT carousel or missing trader fraud. If any one Member State were either permanently or temporarily unable to participate, complex prosecutions in more than one Member State would be prejudiced because it would be difficult to coordinate simultaneous arrests. Furthermore, mutual trust and confidence between pan-European police officers and


\textsuperscript{370} In a case this year, the Supreme Court held, taking into account the section 21 requirement (and Article 8 of the Convention on the right to respect for private and family life), that an individual who was the subject of an EAW should not be surrendered. R. (on the application of HH) v Westminster City Magistrates' Court and F-K v Poland, [2012] UKSC 25.

\textsuperscript{371} Opinion of AG Sharpston in Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanţa v Ciprian Vasile Radu, Case C-396/11, delivered on 18 October 2012.
prosecutors would be reduced impacting upon the effectiveness of investigations. The ability of the UK to participate in joint investigative teams would also be prejudiced.

**Question 13: How straightforward would it be for the Government to opt back in to specific PCJ measures on a case-by-case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?**

35. The Society is not convinced that it would be straightforward for the Government to opt back in to specific measures on a case-by-case basis. Different procedures would apply depending on the treaty protocol applying to the measure concerned.\(^{372}\) Some measures require unanimity of the Member States while others only require the approval of the Commission. This is likely to be a complex process.\(^{373}\) Protocol 36 states that both the EU institutions and UK ‘...shall seek to re-establish the widest possible measure of participation of the United Kingdom in the acquis...without seriously affecting the practical operability of the various parts thereof, while respecting their coherence’. The Society does not know how this requirement will be interpreted, but the EU institutions are likely to want any outcome of negotiations to represent a coherent package of measures. Consequently, if the UK only wishes to opt back into a small number of individual measures, it may be required to opt back into further related measures to avoid concerns regarding inoperability or incoherence.

**Question 14: What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?**

36. The functioning of the Council of Europe Conventions, particularly the 1957 European Convention on Extradition\(^ {374}\), was inefficient leading to unnecessary cost and long pre-trial detention periods for suspects. The new EU measures, such as the EAW, have in general been seen as improvements. Where some Member States were not signatories or have not implemented the conventions or there is a risk that such conventions can no longer apply due to superseding legislation in particular Member States, the UK may be required to negotiate bilateral arrangements which would be time-consuming and increase complexity.

14 December 2012

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\(^{372}\) Either Protocol 19 on the Schengen acquis integrated into the framework of the European Union or Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

\(^{373}\) On 10 December 2012, the Financial Times article "UK warned over bloc opt-out" included the following: ‘... Cecilia Malmström, EU home affairs commissioner, told the FT that all other member states would first have to agree on each such step. "On each of these opt-ins, there will have to be a negotiation and the other member states will have to agree," she said, adding that it would be complex because "of these 136 laws, many are very connected".‘

\(^{374}\) Council of Europe, Paris, 13.XII.1957.
Law Society of England and Wales, Bar Council of England and Wales, Faculty of Advocates, and Law Society of Scotland—Oral evidence (QQ 46-61)

Submission can be found under Bar Council of England and Wales
Law Society of England and Wales; Bar Council of England and Wales—Supplementary written evidence

Law Society of England and Wales; Bar Council of England and Wales—Supplementary written evidence
Submission can be found under Bar Council of England and Wales
Law Society of Scotland—Written evidence

Introduction

1. The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

2. To help us do this, we use our various Society Committees which are made up of solicitors and non-solicitors and ensure they benefit from knowledge and expertise from both within and outwith the solicitor profession.

3. The Criminal Law Committee of the Law Society of Scotland (the Committee) welcomes the opportunity to respond to the call for evidence published by the House of Lords Select Committee on the European Union with regard to the UK’s 2014 Opt-out Decision (Protocol 36) and should like to respond as follows:-

2014 Opt-out Decision

Question 1: Should the Government exercise its block opt-out?

4. The Committee notes the Prime Minister’s statement at a press conference in Brazil on 28 September 2012 that United Kingdom would exercise its “Opt-out” in terms of Protocol 36 to the Lisbon Treaty before the end of this year albeit that this can be done at any time before June 2014. The UK may give notice that it no longer accepts the acts of the Union in the field of police co-operation and judicial co-operation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon. The Committee notes that in giving such notice, all measures will then cease to apply in the UK as from the date of the expiry of the transitional period being 31 December 2014. The Committee further notes that the UK must therefore opt-out of all these measures or none at all. The UK also has the right to opt into individual measures.

5. On 5 October 2012, the Law Society of Scotland, together with the Law Society of England & Wales and the Law Society of Northern Ireland stated that “the wholesale opt-out could have very serious consequences in fighting cross border crime from both a practical and cost perspective. Such a decision should not be taken before a thorough consideration of the implications with input from the experts who are certainly not all working in Government. Even if the UK is able to “opt back in” to some measures, this is likely to lead to confusion, complexity and cost. This important decision should not be seen as a totemic pro/anti EU issue. It should be taken on its own merits, based on practical experience and objective information.”

6. The Committee’s position on the proposed opt-out remains very much in accordance with these comments.
7. The Committee believes that the pre-Lisbon PCJ measures which can be opted out of en bloc are in the main reciprocal and the UK accordingly benefits as do all other Member States in fighting cross border crime. The European Arrest Warrant in its current form has been subject to some criticism from various parties, notably Fair Trials Abroad but operates better than previous Council of Europe Conventions or bi-lateral arrangements. Also, there are a number of post-Lisbon Treaty PCJ measures to which the UK has opted into or is in the process of opting into and is accordingly subject in these areas of jurisdiction of the Court of Justice of the European Union (CJEU). It is wrong to suggest that any UK opt-out would remove the UK from that Court’s jurisdiction.

Question 2:
What are the likely financial consequences of exercising the opt-out?

8. The Committee believes that there would be considerable costs involved in exercising the block opt-out. The Committee notes that there would also be a need to develop measures and mechanisms in order to substitute for the pre-Lisbon measures opted out of which would in itself be expensive.

9. The Committee makes specific reference to extradition proceedings which would now of course become more prolonged and, in custody cases creating significant additional cost.

10. Also, costs would not only apply to the UK but also to the EU Institutions and the other EU Member States.

Question 3:
What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

11. Reference is made to the Centre for European Legal Studies Working Paper entitled “Opting out of EU Criminal Law: what is actually involved?”(i) the Committee notes paragraph 32 of the Paper and agrees that “the UK’s withdrawal from these instruments would seem to send a negative message as regards the UK’s attitude to law and order, and international efforts to further it. By withdrawing from them, the UK would appear to be telling the other Member States (and indeed its own citizens and the rest of the world) that it considers the forms of anti-social conduct they are aimed at – terrorism, money laundering, people smuggling, cyber crime and so forth – are not so grave as to require international cooperation to deal with them effectively.

12. Also, it should be noted that significant numbers of UK citizens already live within the EU but outwith the UK and, on the basis that the opt-out is exercised, they will continue to remain subject to these measures while they remain outwith the UK.

13. The Committee is concerned that any disengagement rather than attempts to reform such difficulties there are with European Arrest Warrant procedure will result in harming the interests of UK citizens living elsewhere in Europe.
14. Also, it is likely to create tensions with other Member States where law enforcement agencies will be hampered in assisting them.

15. The Committee notes that there is a possibility that an isolated incident could create significant tensions e.g. one suspected of an act of terrorism elsewhere in the EU who subsequently flees to the United Kingdom with a resultant prolonged extradition process due to the unavailability of the European Arrest Warrant.

The UK’s current participation in PCJ measures

Question 4:
Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

16. The Committee refers once more to the Paper produced by the Centre for European Legal Studies (CELS) which analyses the benefits and disadvantages of all the measures.

17. In summary, and given that a number of pre-Lisbon measures will be superseded by subsequent measures or indeed characterised as ‘defunct’, there seems no point at all in an opt-out particularly as none of the pre-Lisbon measures can be considered harmful to UK interests.

18. The CELS Report at paragraph 25 thereof divides the measures into the following categories (1) instruments intended to influence substantive criminal law; (2) instruments intended to influence national criminal procedure; (3) police cooperation measures and (4) instruments designed to secure mutual recognition.

19. The Committee draws particular reference to the principle of mutual recognition which has enabled measures to be developed without adversely affecting domestic legislation.

Question 5:
In her 15 October statement the Home Secretary stated that “Some of the pre-Lisbon measures are useful, some less so, and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

20. While the Committee recognises that the Home Secretary’s categorisation is a useful basis for their consideration, the question must remain as to whether opting out of a measure which is defunct serves any useful purpose. The Committee noted that the roles played by Europol, Eurojust and CEPOL (the European Police College network) should not be underestimated as these agencies participate in EU wide investigation of crime and subsequent prosecution by way of data sharing measures, identifying the whereabouts of a suspect and the obtaining of a European Arrest Warrant.

Question 6:
**Law Society of Scotland—Written evidence**

**How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?**

21. The review of the United Kingdom’s extradition arrangements presented to the Home Secretary on 30 September 2011 (the Scott Baker Review) which provides, at paragraph 5.3 thereof, the number of surrenders to the UK and surrenders from the UK under Part I of the Extradition Act 2003 which brought the European Arrest Warrant Framework into domestic legislation.

22. In particular, the Committee notes in the last business year 2009 to 2010 there were 71 surrenders to the UK and 699 surrenders from the UK.

23. The Committee also refers to the Official Report of the Scottish Parliament of 25 October 2012 where, in answer to a question from Colin Keir MSP to ask the Scottish Government how many criminals have been brought back to Scotland through the European Arrest Warrant, the Cabinet Secretary for Justice (Kenny MacAskill), responded ‘separate statistics for those returned under European Arrest Warrants and those returned under other arrangements have not been kept in all years. However, since the beginning of 2004, between 60 and 70 persons have been returned to Scotland under a European Arrest Warrant’.

24. In response to a further question on the opt-out, the Justice Secretary stated that reversion to the Council of Europe Convention on Extradition of 1957 would not be as satisfactory and that the actions and attitude of UK Government towards Europe are jeopardising the Administration of Justice in Scotland. The Committee is concerned that opting out of the European Arrest Warrant would result in increased burden for all agencies of the Criminal Justice system then having to operate on a more cumbersome extradition process.

**Question 7:**
Has the UK failed to implement any of the measures and thus leave itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

25. The Committee is not best placed to respond to this question but understands that infringement proceedings will only be initiated by the European Commission where a Member State has been in systematic breach of obligations for a sustained period. It is the Committee’s understanding that the United Kingdom’s implementation record in relation to Police and Criminal Justice measures is very good and the risk of infringement proceedings accordingly is minimal.

26. The Committee notes further that once the European Supervision Order (ESO) has been implemented this should minimise some of the practical difficulties encountered by accuseds who are extradited under a European Arrest Warrant before the issuing Member State is even prepared for trial.
Question 8:
What would be the practical effect of the Court of Justice having jurisdiction to interpret these measures? Have past Court of Justice Judgements caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

27. The Committee is not aware of any complication caused by CJEU Judgements regarding the operation of PCJ measures in the United Kingdom.

28. It should be noted that the United Kingdom is already subject to the jurisdiction of the Court in all other fields of EU Law and, in particular the jurisdiction of the Court has been accepted for the post Lisbon Treaty PCJ measures which have been opted into.

Question 9:
If the opt-out was not exercised, what would be the benefits and the drawbacks once the United Kingdom becomes subject to the Commission's enforcement powers and the jurisdiction of the Court of Justice.

29. The Committee emphasises the benefit of being able to seek clarification from the CJEU by the UK Courts for preliminary rules in order to obtain guidance on interpretation. The Committee notes that there has been significant implementation of the relevant measures and it is accordingly difficult to envisage any situation where European Commission enforcement would cause concern.

The potential consequences of exercising the opt-out

Question 10:
The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

30. The Committee notes that Scotland has been making use of the European Arrest Warrant.

31. The Committee recognise that issues of proportionality, the Issuing State’s state of preparedness for trial and the Issuing State’s obligation to remove the warrant if extradition refused are some of the criticisms of the European Arrest Warrant and the Committee accordingly agrees that it is in need of reform.

32. The Committee further notes however that the Council of Europe Convention on extradition is returned then, while this applies to all Council of Europe Countries, it is restrictive in that extraditable offences are limited to those attracting a year or more by way of imprisonment or (if a sentence has already been imposed) actual sentences of over 4 months.
33. The Committee believes that there are good reasons for these restrictions in extradition generally, but not in an environment where there is considerable travel due to freedom of movement.

34. Accordingly, it would not be in the UK’s interests for individuals who commit crimes in other EU Member States to be able to treat the UK as a safe haven, knowing that their offending was either non-extraditable or that it was likely to be subject to a more cumbersome extradition process for another country to seek return by that route.

**Question 11:**
What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross border crime?

35. The Committee notes, that if the measures pre-Lisbon are already entrenched in practice. Also, other EU Member States have drafted their domestic legislation with reference to the existing measures and there is the unintended consequence that the law of another Member State could be left with a UK shaped gap on the basis of an opt-out which only transpires after the opt-out has been exercised.

36. These are matters which are not insuperable but there are of course time and cost implications not to mention the possibility of accuseds escaping justice.

**Question 12:**
Which, if any, PCJ measures should the Government seek to opt back in to?

37. The Committee is not in a position to comment on each measure in detail but refers to mutual recognition measures including the European Arrest Warrant.

38. The Committee refers again to paragraph 32 of the CELS Report and questions whether such a negative message should be sent out by the United Kingdom.

**Question 13:**
How straightforward would it be for the Government to opt back in to specific PCJ measures on a case by case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?

39. The Committee believes that this would not be straightforward at all. It is the Committee’s understanding that this could not be done until after December 2014 and that some measures require the approval of all Member States, but others only the approval of the Commission. The Committee highlights a potentially curious situation where there is mutual recognition in terms of the European Investigation Order (Post Lisbon) but not with the EAW.
Question 14:
What form could co-operation with other Member States take if the United Kingdom opt-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements, including Council of Europe Conventions?

40. The Committee highlights the probability of delay in a revert to alternative international agreements including Council of Europe Conventions. It should be noted that such delays brought forth the introduction of new EU measures such as the European Arrest Warrants which have been considered improvements to extradition between Member States in the first place. Accordingly it would not be practical or desirable to rely upon alternative international agreements including Council of Europe Conventions. The Committee note that some EU Member States were not signatories nor have implemented the Council of Europe Conventions and accordingly such conventions would no longer apply due to superseding legislation. Therefore, the UK may well be required to negotiate separate arrangements with each and every Member State in this position.

Question 15:
Is Article 276 TFEU which states that the Court of Justice has no jurisdiction to review the validity or proportionality of operations regarding the maintenance of law and order and the safeguarding of internal security, relevant to the decision on the opt-out?

41. The Committee is concerned that the fact that this Article limits CJEU jurisdiction over pre-Lisbon EU Criminal Justice and policing measures appears to be a factor in the Government’s current thinking on exercising the opt-out. Accordingly it is irrelevant to the decision on the opt-out and what should be considered the fact that post Lisbon measures, a number of which have been previously referred to and which the United Kingdom has opted into, are subject to the jurisdiction of the CJEU.

Question 16:
If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area?

42. It is the Committee’s understanding that the Republic of Ireland has repealed pre-existing extradition arrangements with the UK prior to the adoption the EAW Framework decision. Accordingly, if the UK withdraws from the EAW, new extradition arrangements would require to be entered into between the UK and the Republic of Ireland.

14 December 2012
Law Society of Scotland, Bar Council of England and Wales, Faculty of Advocates and Law Society of England and Wales —Oral evidence (QQ 46-61)

Law Society of Scotland, Bar Council of England and Wales, Faculty of Advocates and Law Society of England and Wales —Oral evidence (QQ 46-61)

Submission can be found under Bar Council of England and Wales

436
Evidence from Liberal Democrat Members of the European Parliament

1. This evidence is submitted on behalf of the delegation of Liberal Democrat Members of the European Parliament. It is drafted largely by Baroness Sarah Ludford MEP, who has worked on EU justice & home affairs (JHA) measures since 1999 as a full Member of the Civil Liberties, Justice and Home Affairs (LIBE) committee which deals with all European JHA legislation including in the field of policing and fighting crime, working closely with what are now the European Commission’s Directorates-General for Justice and Home Affairs.

The importance of EU JHA measures and UK participation

2. It is well acknowledged that free movement of goods, persons, services and capital in the EU single market (even for those like the UK not in Schengen) brings in its inevitable wake the ability of major organised crime to operate freely, such as in smuggling of drugs and people, terrorism, cybercrime, financial crime and money-laundering, thus making crossborder police cooperation essential. It was also recognised, and enshrined in the EU’s 1999 Tampere programme which launched the 10-year programme of criminal law measures - legislated in the so-called ‘Third pillar’ as ‘decisions’ and framework decisions’ - that there also needed to be much swifter and more effective procedures to bring suspects to arrest and trial. This was to be achieved, and was in fact achieved, through alignment of definition of crimes and penalties and through mutual recognition of judicial decisions.

3. Successive UK governments, not least the present coalition, have all strongly supported the EU single market and its completion. That very fact alone makes non-participation in the crime-fighting elements of the single market illogical. But in addition the practical worth of tools like the European Arrest Warrant, Europol, Eurojust and Joint Investigation Teams, criminal record-sharing, the Schengen Information System and the various law enforcement and judicial networks has been amply demonstrated and the committee will no doubt receive detailed evidence in this regard from experts and practitioners.

4. The pressing need for the UK to remain a participant in EU police and judicial cooperation cooperation has already been recognised publicly by many senior former police, intelligence officers and prosecutors, and indeed now serving police officers. The former head of the Serious & Organised Crime Agency Bill Hughes has been vocal in the last six months on this subject. At a European Criminal Law Association seminar on Dec 10th, former senior UK prosecutor and former President of the European prosecutors' body Eurojust Aled Williams explained the problems for law enforcement in the UK if the opt-out deprived the UK of effective European cooperation. In addition, and significantly, serving Metropolitan Police Commander Gibson at the same event reportedly explained the worries felt by the police at the prospect of the opt-out depriving them of a range of instruments they consider to be vital in the fight against trans-border crime.

5. UK influence and leadership in this area has been amply demonstrated by the presence of British personnel in senior positions - 2 former Directors-General of the European Commission’s Justice & Home Affairs Directorate-General, 2 former Presidents of Eurojust, and the serving Director of Europol Rob Wainwright - as well as the location in the UK at Bramshill of the European police training college CEPOL. The UK also has one of five permanent CJEU Advocates General. The UK has been particularly prominent in anti-terrorism and in the exchange of information between law enforcement authorities. UK officials both in Brussels and London who advise MEPs on JHA matters appear indeed to be more active, better organised and better briefed as to how to inform the EU policy-process than their counterparts in other Member States.

6. It would seem not only perverse but dangerous to throw away that tradition of leadership by choosing to become a bystander, losing influence on vital issues of international security which will continue to affect UK interests irrespective of any decision on opt-out, and thereby prejudice the safety of British citizens. Indeed, it could risk Britain becoming a haven for international criminals if they felt that they were less likely to be extradited and brought to justice due to UK non-participation in the normal streamlined EU investigation and prosecution instruments.

The UK’s record in EU JHA cooperation post-Lisbon

7. Since the Treaty of Lisbon came into force the UK has opted in to a majority of measures under Chapters 4 and 5 of Part III TFEU. The 8 opt-ins are 6 Directives which have already been adopted and 2 still being negotiated. This shows that far from wishing to pull out of EU JHA cooperation, the UK generally considers that it is valuable. There are also a few measures under negotiation to which the UK has not yet opted in, but even in these cases MEPs can observe that the UK seeks actively to influence the decision-making process in Brussels so as to allow the UK to opt in to the measure post-adoption.

8. Although the 2014 opt-out of course does not cover the post-2009 policing and justice measures, it does affect them in the sense that UK influence and political capital is undermined by the knowledge among our partners that the UK may withdraw from a considerable chunk of pre-2009 measures. Indeed, there is considerable misunderstanding of the Protocol and of the Home Secretary’s 'minded to opt out' announcement, with some having the impression that the UK intends to pull out, or indeed has already pulled out, of all EU policing and judicial cooperation. This inevitably makes our European partners less likely to engage to create legislation which accommodates the UK and/or the common law.

9. The active involvement of British MEPs in the intensive and complex legislative process in the European Parliament contributes to there being a better understanding of the specificities of the British common law system. When arguments are put in a cogent manner, with support from UK officials and experts, they go down very well and colleagues tend to be flexible in searching for solutions, not least because of the regard in which the UK legal system, judiciary and police are held.

Factors in the opt-out decision

10. The decision on whether to exercise the mass opt-out under Protocol 36, and indeed the decision on the list of measures to seek to opt back in to, must be based on rational analysis of the practical and operation effectiveness of these measures, not on ideological
prejudice. It would be unacceptable if the need to keep the UK secure was overridden by political considerations to satisfy Eurosceptics.

11. In a more satisfactory world, the previous government would not have left the present one with the toxic legacy of Protocol 36. It is difficult to discern why they did so. It is worth recalling that all the 130 or so measures that are covered by the Protocol were adopted by unanimity by the Member States, which means that the UK government could have vetoed any one of them. The absence of any veto suggests that texts were satisfactorily negotiated so as not to prejudice any vital national interests. The Home Secretary at the time of the negotiations, Charles Clarke, has acknowledged in evidence to your committee that the Protocol was unnecessary even in political terms, saying:

'I regret that the opt-out in these areas was agreed by the British Government - the Labour Government - at the time. I do not think that the so-called red line on this was necessary either in public opinion terms or in terms of the overall political situation'.

And of course it needs to be recalled that the UK (or any other Member State) could now pull the 'emergency brake' under Articles 82 or 83 of the TFEU if ‘the fundamental aspects of its criminal justice system’ are affected, which is an effective protection.

Mr Clarke went on to say to your committee:

'I believe that co-operation with other European police and security agencies and with other governments in these areas is an absolutely central part of our capacity to police and make secure our country - the national interests of the UK - against the various threats that come from international criminality. To weaken that capacity would be very serious and problematic'.

11. Exercising the Protocol 36 opt-out, at least as an ideological gesture, would compound what seems to have been neither an evidence-based nor even a politically 'necessary' decision by the last government to demand the Protocol. All the practical implications must be properly explored before any such decision could be contemplated, and your committee is to be applauded for stepping up to the mark in this respect.

12. One main argument put forward by those advocating an opt-out is that it will ensure the UK is safe from European Commission and EU Court of Justice (CJEU) enforcement powers. This derives from a myth that the Luxembourg Court threatens 'expansive' judgments in the area of police and criminal justice. In the Pupino judgement the Court did uphold the legal validity of framework decisions (in the case in point, the framework decision on victims' rights) and the obligation on the courts of Member States to interpret national law in conformity with them, but this was hardly surprising or shocking.

13. This judgement indeed did not seem to cause consternation in London; in fact the UK has opted in to the new post-Lisbon Directive on victims' rights in criminal proceedings and was not frightened off by the CJEU jurisdiction that it entails. The fact that the UK has opted in to 8 policing and criminal law measures since the Lisbon treaty came into force suggests that enforcement powers are not a ‘bogey’ for the Ministry of Justice and Home Office. They may well have been reassured by the CJEU ruling in Gueye and Sanchez in September 2011.

377 Judgement of 16 June 2005
378 Judgment of 15 September 2011
which, while confirming the obligation to implement a framework decision, made clear this included considerable leeway for Member states to interpret it. This seems to demonstrate a willingness to respect Member States’ criminal law regimes and not ‘over-interpret’ EU measures in this field. The fact that the UK is opting in to the vast majority of ‘repeal and replacement’ versions of measures that fall under the mass opt-out, thereby accepting that continuing participation in those measures entails CJEU jurisdiction, seems also to suggest that the Court’s jurisdiction is not in reality a problem for the UK in the JHA area.

14. No evidence has emerged to suggest that the UK runs a substantial risk in practice of infringement proceedings. The UK has a good implementation track record compared to some other EU Member States. It is true that a small number (14) of adopted pre-2009 measures
379 have not been fully implemented by the UK, causing a theoretical possibility of post-2014 infringement proceedings. Some are admittedly caught in a ‘freeze’ of Protocol 36 deliberation and it is unfortunate that they are not implemented (eg those on bail and probation would usefully ease some of the EAW problems, as mentioned below). However others are minor or redundant, while yet others are the subject of revision in Brussels, for example the European Evidence Warrant (EEW) which is set to be superseded by the European Investigation Order (EIO).

15. The European Commission’s workload is too great and its resources too few for it to pursue non-implementation of old decisions or framework decisions. It is far more likely that if the Commission considers a measure to be of importance, but sees that it has been poorly implemented in Member States, it will make efforts to propose a new and more workable Directive or Regulation to replace the old measure. This has indeed been the case with the EEW of which implementation proved very problematic across the EU. As the capacity of the police to gather evidence in criminal cases in foreign jurisdictions is an important one, a new Directive was mooted, and there was no talk of the Commission launching into aggressive infringement proceedings in respect of the EEW. (In the event, the proposal by 8 Member States of the EIO preempted a Commission proposal on this topic).

16. In any case, Commission and CJEU enforcement powers are needed just as much in the JHA area, and are just as valuable to the UK, as they are in fields like the single market, regulatory, environment law etc to ensure full and consistent implementation by all Member States. The CJEU’s fairly recently acquired right to adjudicate over Chapters 2 and 3 of Title V TFEU on border checks, asylum and immigration law as well as civil law
380 has passed largely unremarked in the UK. The possibility for UK judges to ask for preliminary rulings from the CJEU will also offer the UK - through its legal system - an extra opportunity to seek to shape EU law.

17. UK police need to be able to count on smooth and effective cooperation with the rest of Europe and UK citizens need to be able to rely on certain minimum standards when travelling abroad. Therefore, far from being afraid of CJEU powers, it is in the interests of UK policing and of our citizens who might be arrested, extradited or the victim of a crime abroad that they should exist and be used when necessary to ensure fair and responsible behaviour by all 27 states in properly implementing EU rules. The jurisdiction of the CJEU

379 See 2 written answers to Lorely Burt MP in July 2012 saying that a total of 14 measures had not been implemented or fully implemented:
http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120703/text/120703w0004.htm#120703137003316
http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120704/text/120704w0001.htm

380 Preliminary rulings permitted since the Lisbon Treaty came into effect (Art 267 TFEU).
should not be viewed as unacceptable meddling in our legal system, but as an opportunity to ensure that the rule of law triumphs over political backsliding or inept administration in other Member States.

**Challenges in seeking to exercise the opt-out**

18. Proponents of exercising the mass opt-out suggest that the UK has little to lose as it can opt back into the most operationally vital ones as well as into future new proposals. However the prospect of a UK even partial pullout from police and justice instruments and inconsistency of UK cooperation in Europe does not endear us to our EU partners whose patience is already stretched by UK cherry-picking. The Council has in the past turned down closer UK involvement in Frontex as well as participation in the Visa Information System database. Sarah Ludford regularly tables legislative amendments in the European Parliament which seek to ensure a fuller UK participation in operationally important Schengen instruments, but the success of such endeavours depends on the goodwill and cooperation of colleagues from the other Member States and their general belief that ‘more UK’ is better than ‘less UK’.

19. Britain is of course already a non-participant in the major EU projects of the euro and Schengen, has an individual opt-in for justice and home affairs, a special protocol interpreting the charter of rights, and a uniquely protected rebate on the budget. While the reasons for all of these special measures may – to some extent - be understood by other Member States and non-British MEPs, it would be very unfortunate to add to that list a mass opt-out from policing and crime instruments. This could create the perception of disengagement for no good substantive reasons and mean that UK interests carried far less weight in negotiations, including on post-Lisbon JHA measures we do opt in to. One could even ask whether questions could be raised in a future Treaty revision about UK retention of its Advocate-General at the CJEU, or at least the permanent right to one, if it opts out of yet another major area of the Court's jurisdiction?

20. Some commentators\(^ {381}\) have postulated that the UK should be able to participate in some measures post opt-out on some kind of ‘voluntary’ basis which would not imply CJEU jurisdiction, but the Protocol of course opens no such option. Indeed, the Commission has on the contrary the right to limit the UK’s cherry-picking, even of measures that it would fully participate in under normal EU rules, by applying a test of ‘coherence’ given that many measures are inter-related. Likewise the Council must decide by unanimity on any application from the UK to opt back into measures which build on the Schengen aquis. A block opt-out under Protocol 36 followed by pick-and-choose as to the opt-back-in may be quite difficult even to achieve technically in a way that would be efficient. The EU Home Affairs Commissioner Cecilia Malmstrom was reported recently as saying that ‘on each of these opt-ins there will have to be a negotiation and the other member states will have to agree,’ adding that it would be complex because ‘of these 136 laws, many are very connected’\(^ {382}\).

21. Therefore the picture painted by some of the UK’s ability to choose at will into what measures and how it opts back in simply does not stand up to scrutiny. Professor Steve

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\(^{381}\) For example Open Europe in Cooperation not Control; the Case for Britain Retaining Democratic Control over EU Crime and Policing Policy by Dominic Raab MP, November 2012

\(^{382}\) Financial Times, Dec 9th 2012
Peers in particular has explained the labyrinthine and uncertain processes involved in opting back into particular measures, should the block opt-out be exercised. The Westminster Parliament needs to be fully briefed on the level of certainty of the UK being able to opt back into a certain list of measures prior to it taking a final decision on the opt-out.

22. Westminster will also of course need to be aware of the possibility, even likelihood, of costs falling on the UK, as is permitted under the Protocol, in certain cases of withdrawal or even of withdrawal and later re-entry. One example might be if the UK disconnected from the Schengen Information System as this would have direct measurable costs.

23. The notion that policing relationships between the UK and the rest of the EU could be conducted through 'Memoranda of Understanding' referring perhaps to old Council of Europe Conventions exposes the major disadvantage of withdrawal from EU measures which are precisely designed to cut red tape. For the UK to seek to engage from outside the EU legal framework would inevitably cause legal conflicts and extended procedures which would be not only ineffective but costly. It would be unwise to assume that other EU states could or indeed would simply and quickly revert to any pre-existing arrangements. There could be risky gaps in the capacity of UK law enforcement and judicial authorities to deal with cross-border criminality and indeed for other EU states needing to work with the UK.

24. Some propose that the UK should seek to negotiate a new deal along the lines of Denmark’s in 1992. While this may not be entirely out of the question, it would require a great deal of legal preparation and negotiation, and would not be in time for the opt-out deadline. In any case it should be borne in mind that the Commission has turned down about half of Danish requests to join EU instruments and there are considerable political forces in Denmark now seeking a UK-style arrangement on police and judicial cooperation with the EU. It would also mean the UK being excluded from its privileged position of being able to take part in Council negotiations even when it has not opted into a certain instrument at the time of proposal. From the European Parliament it can be observed that UK officials find it extremely useful to be in effect involved in negotiations as this ensures detailed oversight of proposed wording in legal instruments and enables coalition-building. It also allows close working with the European Parliament and provides MEPs with an understanding of UK positions.

The European Arrest Warrant

25. This deserves special mention as not only the most important but also the most (in the UK) contentious EU measure in this field. The European Arrest Warrant is not without problems and the European Parliament has been seeking to address these for many years together with NGOs and legal experts. We have pushed for observance of Council and Commission best practice guidelines on how it should be implemented and for flanking measures on defence rights to ensure fair trials and avoidance of unnecessary detention or serving of sentences away from family and friends. In that respect, it is unfortunate that the UK has chosen not yet to implement the framework decisions on bail and probation as these would help not only ameliorate harsh treatment in individual cases but also deflect
some of the luridly critical headlines. A legislative amendment of the EAW text could also be an option, although that is not without some risks.

26. Some Member States, though not the UK, have opted to allow CJEU preliminary rulings prior to the normal jurisdiction of the Court in 20014. This has resulted in a case on the proportionate and proper use of the EAW being brought before the CJEU from Romania, and an opinion from Advocate General Eleanor Sharpston, which we see as very helpful, has been issued386 If the Court follows the AG, this will be a demonstration of how reform is both possible - through the very same CJEU which raises apparent fear of oppression - and happening. It is clear that the UK can do more to influence the way Britons abroad are treated by the law enforcement authorities of other Member States by working within the system than by leaving it.

Conclusion

27. It is against the interests of UK security and legally unnecessary to exercise the mass opt-out. UK ability to negotiate satisfactory outcomes on post-Lisbon JHA instruments we wish to participate in will be weakened as we will not be seen to have a continuing and reliable engagement in JHA. There are also likely to be wider political and economic costs through a diminished negotiating hand on other EU matters. If Protocol 36 is triggered, the mass opt-out must in be accompanied by strong efforts to ensure that key measures are opted back into.

19 December 2012

386 Opinion of 18th October 2012
Anthea McIntyre MEP and Timothy Kirkhope MEP—Written evidence

Submission can be found under Timothy Kirkhope MEP
Submission can be found under Crown Office and Procurator Fiscal Service
I wish to update the committee further to my appearance on 13 February 2013.

The provisions of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 apply in respect of incoming requests for the freezing of assets located in Scotland; incoming requests seeking the freezing of evidence would probably be made by means of an international letter of request received by either the International Co-operation Unit or the Serious and Organised Crime Division and executed by the relevant law enforcement agency, as instructed by Crown Office. I was asked to confirm if assets around the globe can be seized and I confirm they can be always subject to the domestic law of the requested state.

The measures which I suggest the United Kingdom should opt into are as follows:

COUNCIL DECISION of 6 April 2009 establishing the European Police Office (Europol) 2009/371/JHA

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention


Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record

Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

Council Decision 2009/315/JHA of 6 April 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

COUNCIL FRAMEWORK DECISION of 13 June 2002 on joint investigation teams (2002/465/jha)

Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System

Framework Decision 2000/375/JHA to combat child pornography


COUNCIL FRAMEWORK DECISION 2005/222/JHA of 24 February 2005 on attacks against information systems

Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters

In his evidence, Mr Dickson made reference to the case of

1. BH and KAS v Lord Advocate and Scottish Ministers [2012] UKSC 24 and

2. Cazan. The full citation for that is The Queen on the application of Cazan –v- Judge Trandafir Bagriela, Huneadora Court of Law, Romania [2012] EWHC 3991 (Admin)

Since my appearance before the Committee, the case of Gita Fridenbergā v Public Prosecutor, Prosecutor General Office for the Republic of Latvia [2013] EWHC 317 (Admin) has been reported where it was found to be disproportionate to extradite a person to face trial for a charge of possession of 3.12 grams of amphetamine with intent to supply.

8 March 2013
I am grateful for the opportunity to submit evidence to the Committee on the UK’s Opt-out Decision (Protocol 36). My response focuses on question 16 – If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area.

The last decade has seen enhanced co-operation between authorities in Northern Ireland and the Republic of Ireland in the field of criminal justice. In July 2005, the Irish and British Governments signed the Intergovernmental Agreement on Co-operation on Criminal Justice matters. This agreement has provided a framework for effective practical co-operation across a wide range of areas including rehabilitation of offenders, probation, forensic science, support for victims of crime and sex offenders.

The devolution of justice powers has provided a real opportunity to further enhance working relationships between and across the criminal justice agencies on both sides of the border.

There is consequently a close working relationship between my Department and the Irish Department of Justice and Equality. This relationship is crucial given the practical and operational considerations arising from the UK’s only land border.

It is this border that gives rise to distinct issues for my Department to consider in the context of the UK’s 2014 Opt-out decision. For example, operationally there have been significant benefits arising from the European Arrest Warrant. My Department also plans to legislate in the forthcoming Justice Bill to permit the mutual recognition to judgments and probation decisions across EU member states. The mutual recognition of judgements imposing custodial sentences is considered of benefit to Northern Ireland, given our cross-border co-operation with the Republic of Ireland.

I have discussed this matter with Alan Shatter TD, Minister of Justice and Equality, at a recent IGA meeting. He shares my concerns at the potential effects of, in particular, abolishing the use of EAWs by the UK and highlighted that the Republic no longer has in place the legislation that preceded FAWs.

I have been told by the Home Secretary and the Lord Chancellor that in making the final decision the devolution settlements will be taken into account, together with the practical implications of all the options for all parts of the UK. I welcome both the recognition that there may be different operational impacts of an opt out decision for the constituent parts of the UK and the assurance to consult with the devolved administrations before final decisions are made. However, I remain concerned that the potentially very significant effects on Northern Ireland may not be fully recognised in Whitehall. It is vital that the decisions made are those in the best interests of all parts of the UK.

David Ford MLA
Minister of Justice

12 December 2012
Dr Maria O’Neill, University of Abertay Dundee—Written evidence

Measures subject to the 2014 Decision -15 October 2012.

This response will focus on the cross border law enforcement provisions in the former Police and Judicial Cooperation in Criminal Matters (PJCCM) measures. It is written from an EU legal academic perspective. The writer is not in a position to discuss the actual use of these provisions by prosecutors or the UK’s law enforcement authorities, or is in a position to comment on administrative costs. In addition it should be noted that this writer is of the view that this is a very important and complex area, and cannot be adequately examined in six pages of text. The writer has recently written a full book on just one aspect of the PJCCM provisions, namely counter-terrorism (from a cross-pillar EU perspective).

The writer is of the view that it would be a mistake to opt out of the existing PJCCM provisions. The writer does not believe that the current situation is perfect. Many of the provisions were written in haste, to deal with particular circumstances on the ground, or originated from different (institutional/ member state) authors. A project bringing coherence and further refinement of the measures, to make them more efficient, effective, and only used in the most serious of circumstances, would be welcome. This however would require all EU member states, and their various government departments and law enforcement agencies to be involved in this review. It is the writer’s view that the UK should not use it’s opt out, but rather use its leadership role in this area to engage in reform of the legal and practice framework.

The 2014 opt-out decision

1. Should the Government exercise its block opt-out?

No. The EU PJCCM cross border legal provisions have been developed over a long period of time, and are based on cross border law enforcement experience in particular geographic areas of the EU. There has been an argument for a long time that these provisions should be codified, and be available in an easier to use format for law enforcement officials and prosecutors. The split in roles between police, investigating magistrates and prosecutors differs quite widely across the EU. These differences have been reflected in EU legal provisions in this area. The role of the police in the UK is filled by not only police in other EU member states, but also by investigating magistrates. This “translation of concepts” applies, in one context of another, in most EU member states, not just the UK.

The cross border law enforcement provisions are currently difficult enough to find for academic lawyers who have time to do research. They are even less accessible for active law enforcement officers who are engaged in cross border law enforcement operations at, say 3.00 am in the morning, when only Eurojust’s 24/7 on call centre (since the recent reform of Eurojust) is available to deal with complex cross border criminal law and evidentiary enquiries. A piecemeal opt back in is going to add complexity to an already complex situation. In any event, any post opt out cross border law enforcement will happen with the UK’s EU neighbours, who will be continuing to use the current provisions, regardless of the

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UK’s position on the opt out, and will require UK law enforcement officials to continue to follow the well-trodden path which has been developed for the balance of the EU. It is highly unlikely that our EU partner countries are going to develop new systems and mechanisms just for one EU member state. Many of these provisions also apply to the EFTA states of Norway, Iceland, Switzerland and Lichtenstein. Denmark is increasingly taking a different course from the rest of the EU. This writer is unable to comment on the position of Denmark. No academic research appears to have been published in English on the current position of Denmark.

2. What are the likely financial consequences of exercising the opt-out?

Not known by this writer.

3. What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

Presumably it will be seen as an unnecessary annoyance. In addition the UK will lose what is in effect its leadership role in the area of cross border law enforcement. This is evidenced not only by the UK’s current leadership of both Eurojust and Europol, but also the UK’s “intelligence led policing” model, which was designed by Kent County Constabulary, as the policing model that is to be used in cross border law enforcement operations.

The UK’s current participation in PCJ measures

4. Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

These are practical/practice issues. This writer, as an academic, will not comment on these issues.

5. In her 15 October statement the Home Secretary stated that “… some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

This question cannot be addressed in a 6 page document. In addition a number of provisions, in particular the EU Convention on Mutual Assistance in Criminal Matters 2000, passed pursuant to the PJCCM third pillar, is not listed in the minister’s joint letter of the 15th October 2012. In addition provisions need to be understood in the context of their interaction with international, national provisions as well as pre-Lisbon first and third pillar provisions. Looking at PJCCM provisions in isolation is going to provide a distorted view of reality.

6. How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?

This is a question for the Crown Office.

7. Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

This is a matter for the Home Office and Ministry for Justice to examine, on a case by case basis. Given the complexity of this area, and the interaction with other legal provision of the EU, this will be a lengthy task. In addition a number of the measures may be reflected in classified practice manuals, not available to the general public/academia. State liability for non-implementation of directives is not going to apply to the pre-Lisbon legal tools of common positions, framework decisions, decisions and conventions (international treaties), as provided for in Article 34 EU pre-Lisbon. Framework decisions, decisions and conventions require action by individual member states. None of these documents, however, or the few joint actions which continue to be relevant, which originate from the post-Maastricht version of the EU Treaty (Article K.3.2.(b) EU), have direct effect. Both framework decisions and decisions are binding on the member states. Conventions follow, for the UK, the usual international law dualist approach, requiring "adoption in accordance with their respective constitutional requirements". Member states are, however, required to implement the laws within the required time limit set by the Council.

8. What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

The issue of the interaction with common law is irrelevant to the provisions on cross border law enforcement. There are substantially different policing and prosecution structures and laws across the EU. This is respected by the EU. The EU can only, post Lisbon, act on cross border law enforcement provisions in accordance with the provisions of the post-Lisbon Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). Article 4.1 TEU expressly states that "competences not conferred upon the Union in the Treaties remain with the Member States." Article 5 TEU post-Lisbon, deals with the principle of conferral. The long standing principle of subsidiarity, which the UK parliament has a role in protecting, will post-Lisbon apply to the PJCCM provisions for the first time, as PJCCM becomes subject to the "main-stream" EU law, and be supranational, rather than intergovernmental. This will happen post the five year phase in period of the Lisbon Treaty.

Further, Article 4.2 TEU which provides that Union will respect member's "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." This is reinforced by Article 72 TFEU which provides that the EU will "will not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." Internal security in this context is understood to mean standard law enforcement functions, drug trafficking, organised crime, etc. It also covers the policing aspects of counter-terrorism. There are framework decisions in place providing standardised base line

389 Case C-6-9/90; Francovich and Bonifaci v. Italy [1991] ECR I-5537.b.
390 Protocol no 2 on the application of the principles of subsidiarity and proportionality attached to the post-Lisbon TEU and TFEU, Article 6.
391 Pursuant to Protocol (No 36) on Transitional Provisions attached to the post Lisbon TEU and TFEU.
legal frameworks across the EU on both drugs trafficking\textsuperscript{392} and organised crime,\textsuperscript{393} in order to insure that there is a shared basic understanding of what these crimes are across the EU, and thereby facilitate, \textit{inter alia}, cross border law enforcement, prosecution, and the European Arrest Warrant.\textsuperscript{394} Also Article 73 TFEU provides that it is up to individual member states, and therefore not the EU, to deal with any arrangements that they want to enter with regard the coordination of “competent departments of [member state] administrations responsible for safeguarding national security”, such as the UK Secret Service or the Secret Intelligence Service in the UK, thereby respecting individual member states’ national sovereignty.

In addition to the above further differentiation needs to be taken into account post-Lisbon for cross-border law enforcement provisions. A different, ‘special’ legislative procedure is to be used for cross border law enforcement operations,\textsuperscript{395} while the ‘ordinary’ legislative procedure is to be used for other aspects of the AFSJ policy area. The ‘ordinary’ legislative procedure is the re-branded co-decision procedure, has a high level of involvement by the European Parliament. The ‘special’ legislative procedure involves the Council acting unanimously, after having consulted the European Parliament. More sovereignty therefore rests with the individual EU Member States under the special legislative procedure, with the Home Office ministers very much in control of developments in this area.

If, given the above very clear red lines do not resolve matters dealing with the shared competence of EU- member state relations then the standard EU wide principle of subsidiarity will apply. This matter is governed by Article 5.3 TEU, which, as with previous versions of the treaties, provides that the “Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

At a Court of Justice level there have been few cases on law enforcement provisions given the three options for accessing the ECJ under Article 35 EU, pre-Lisbon. There have been three cases\textsuperscript{396} when the UK tried to opt back into provisions that it was formally out of, pursuant to its Visas, asylum and immigration Schengen opt out, which continues in the post-Lisbon legal framework. In all three cases the UK was refused admission to what were deemed developments of that part of the Schengen acquis which the UK maintained an opt-out. This was on the basis that there was a block of legislation in a particular area, and the UK was not going to be left back in to bits and pieces of it. There are two important cases worth noting at this point, the \textit{Maria Pupino} case,\textsuperscript{397} which required national laws to be interpreted in a way which was consistent with the provisions of Framework decisions, used to approximate laws in the pre-Lisbon era. Also the key case of the Court of Justice ruling,\textsuperscript{398}

\begin{footnotesize}
\begin{itemize}
\item 395 Treaty on the Functioning of the European Union, Article 89.
\item 397 Case C-105/03, Reference for a preliminary ruling from the Tribunale di Firenze (Italy), in criminal proceedings against Maria Pupino, OJ C 193, 06/08/2005 p. 3.
\end{itemize}
\end{footnotesize}
in Grand Chamber in *Kadi* should be noted.\(^3\) In that case Advocate General Maduro stated that (para 35 of his opinion) “extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions”, however “where the risks to public security are believed to be extraordinarily high” there is a requirement on the courts to “fulfil their duty to uphold the rule of law with increased vigilance”. This would be a clear indication as to the approach of the Court of Justice in post-Lisbon cross border law enforcement and counter-terrorism provisions. Any further efforts to anticipate how the Court of Justice would rule on a particular case would, at this stage, be guessing.

What is going to be much more problematic to the UK is the use the Court of Justice will make of the post-Lisbon upgrade of the EU Charter of Fundamental rights, despite the UK and Polish opt out of this upgrade. Academic commentary is questioning the potential legal effect of these opt outs, given that the EU Charter was already having an effect on ECJ case law pre-Lisbon when the charter had only a “guidance” effect – the current legal status of the charter vis a vis the UK. However these are concerns with regard to a different UK protocol attached to the post-Lisbon treaty framework, and are not concerning the effect of the use of the option under this protocol.

9. If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

The European Commission would have the same competence, once EU laws have been passed, in policing and criminal justice, as it always has had in commercial matters. Presumably the same adjustments that were made to ensure compliance with commercial matters will now have to be made in government departments dealing with justice and home affairs matters.

**The potential consequences of exercising the opt-out**

10. The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

The main benefit of the European Arrest Warrant is that it removes politics from the “extradition” process. The UK has encountered a number of problems recently trying to extradite individuals to the US and Jordan. These experiences need to be contrasted with the relatively smooth running of European Arrest Warrant (EAW). Prior to the entry into force of the EAW politics interfered with the operation of extradition requests of suspected terrorists from the Republic of Ireland, and Costa del Sol was known in the UK as Costa del Crime. Large numbers of fugitives from UK justice residing in the south of Spain were returned to the UK using the EAW. In addition, criminals and terrorists know that problems traditionally arise at borders between jurisdictions, and seek to exploit these jurisdictions. Unexpected jurisdictions can assist in matters which would traditionally be seen as bilateral. See for example the news report of a Real IRA conviction in Lithuania.\(^3\)

11. What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?

Not known by this writer.

12. Which, if any, PCJ measures should the Government seek to opt back in to?

All those which are currently in force. It is difficult to anticipate what type of crime will turn up next. Even if a provision has never been used in the past, it might be needed in the future. Making cross border law enforcement more difficult could lead to serious operational consequences. Uncertainty and a lack of clarity could be equally damaging.

13. How straightforward would it be for the Government to opt back in to specific PCJ measures on a case-by-case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?

This is a matter which should be addressed to the other Ministers for Home Affairs/Justice of the EU, and the Commission. Opting back in is a two way process. The three occasions the UK wanted to unilaterally opt back into PJCCM provisions permission was refused, at both the Council and European Court of Justice level.

14. What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?

This writer would assume that it will be exactly the same as before, with the UK having less of a say on the further development or amendment of the provisions. In addition there is a risk of the UK’s interests losing priority vis-à-vis other EU member states, say if it requested the return of a fugitive under an international extradition request, at the same time that same fugitive was being sought by another EU member state using the EAW. If another EU member state has negotiated a complicated legal and practice framework for working with 26/27 other EU member states, and a number of EFTA states, it is highly unlikely that they would be prepared to design and implement a separate legal and practice framework just for one country.

15. Is Article 276 TFEU, which states that the Court of Justice has no jurisdiction to review the validity or proportionality of operations regarding the maintenance of law and order and the safeguarding of internal security, relevant to the decision on the opt-out?

Yes, it should be. The EU, pre Lisbon, was only interested in cross border law enforcement provisions. Post-Lisbon, laws which this UK government have opted into are going to have a much more profound impact on UK law enforcement and prosecution. This writer is specifically referring to the recent directive on the trafficking in human beings, which required a profound change in the (internal to the UK) legal framework in the treatment of

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400 See fn. 10 above.
victims of trafficking. It is understood that these changes reflect what the UK has always regarded as “best practice”. The recent directive on victims rights is also likely to have a profound effect. This government has also opted into this provision.

16. If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area?

Most of the UK/ RoI cross border law enforcement provisions are on the basis of traditional bilateral arrangements. The European Arrest Warrant is, however, important in the UK/ RoI relationship in this area. This question should be addressed to the RoI authorities.

19 November 2012

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Stephen Booth and Dominic Raab MP, Open Europe.

Q85 The Chairman: Good afternoon, Mr Booth and Mr Raab. Thank you very much indeed for coming to give evidence to this inquiry which the two Sub-Committees of the House of Lords European Union—Sub-Committee E, Justice, Institutions and Consumer
Protection, and Sub-Committee F, Home Affairs, Health and Education—are conducting into the United Kingdom’s proposed or suggested 2014 opt-out.

This is obviously an important matter. You are both aware, as we are, that the Government’s current thinking is to exercise the opt-out, but they have said that they will consult Parliament before they make their decision. The purpose of our inquiry is to produce a report which will cover the merits of the opt-out and which measures the UK should seek to rejoin if it is exercised. The principal object of the exercise is to inform the House for the debate and the vote, whenever that takes place.

We hope to publish our report before the end of the current session. We have a great deal of written evidence, which you may or may not have looked at on our website. We are now taking the oral evidence. Before the recess, we will expect to see the Home Secretary and the Lord Chancellor as our final witnesses.

As a matter of form, although I am sure you are both aware of it, this session is open to the public. It is webcast; it goes out live. It is subsequently accessible via the parliamentary website. A transcript is taken. That goes straight on to the website. We will send you a copy to give you an opportunity to check it for accuracy and make any minor corrections that you may wish. After the session, if there is anything that you wish to add in writing, please do feel free to submit some supplementary evidence.

When you first give evidence, I would be grateful if you would formally introduce yourselves especially for the record. I do not know whether you wish to make an opening statement. If you do, that is perfectly satisfactory as far as we are concerned; otherwise we can go directly to questions.

Lastly, I should say that Members of the House of Lords have declared their interests in the Register of Lords’ Interests. They will declare their interests when they first speak, and I do so as a holder of a practising certificate as a solicitor and notary public in so far as that might be relevant.

I do not know whether you have agreed who is going first. Who would like to introduce themselves first and make an opening statement?

**Stephen Booth:** My name is Stephen Booth. I am the Research Director at Open Europe. I do not wish to make an opening statement other than to say thank you for inviting me.

**Dominic Raab:** Lord Chairman, my name is Dominic Raab. I am the Member of Parliament for Esher and Walton. I have no opening statement either.

**Lord Rowlands:** I have a preliminary question. Could you tell us, please, how Open Europe is funded?

**Stephen Booth:** We are funded by individual donations.

**Lord Rowlands:** Purely individual donations; there is no corporate sponsorship of any kind.

**Stephen Booth:** No.

**Lord Avebury:** Could any of your donors be described as “fat cats”?

**Stephen Booth:** I would not describe them as that. I am happy to answer any questions after this session. I do not think this is the place to discuss the finances of Open Europe.

**The Chairman:** I think what is behind the question is that there is no institutional funding.
Stephen Booth: No; there is no public funding.

The Chairman: There is no public funding of any kind whatsoever.

Stephen Booth: No.

Q86 The Chairman: I will ask the first question. We do not normally assume what witnesses are going to say to us, but it is fairly clear from what you have both said in various forums that you consider that the United Kingdom should exercise the opt-out. Can you explain to us what the grounds for doing that would be, and, if it is exercised, whether the United Kingdom should rejoin any of the measures and whether you are decided on which measures it should rejoin? Do you agree with the publication by Fresh Start, which is a group you are associated with, Mr Raab, which opposes the Government seeking to rejoin any of the measures were the opt-out to be exercised? In fact, I think it may go even further than that and suggest that we should somehow or another extricate ourselves from the matters that we have opted in to post-Lisbon.

Stephen Booth: Yes; you are right. We recommended that the Government take the opt-out. Our reasoning for that was, first, because we think that the risks of accepting full European Court of Justice jurisdiction in this area outweigh the benefits of not opting out at the moment. Martin Howe gave evidence and suggested some reasons why there might be a concern about the ECJ taking a greater role in this area.

It is important to remember why the opt-out exists in the first place. The previous Government clearly thought that this was an issue. The particular point about the European Court’s jurisdiction was an issue, which is why the opt-out is here. Again, the current Government clearly have concerns about the role the Court might take over some of these pre-Lisbon measures, which were drafted without a role for the Court in mind. The Government have said in its evidence that they are concerned that some of these measures may be interpreted widely and that could have a severe negative consequence for the UK.

In the wider political debate, given that the UK, as the Prime Minister has said this morning, is entering a new phase of discussions with our EU partners about the level of integration, it is right that we take the opt-out and assess in detail how much integration we really want in this area. The opt-out gives us the chance to do that. It also gives us the chance to put pressure on our EU partners to negotiate on reform of some of the individual measures that we are concerned about.

Q87 The Chairman: Do you want to add anything, Mr Raab?

Dominic Raab: Yes. You have asked three questions there. I will try and be as crisp as I can. I will break it down into the three constituent questions. The crux of it is that I do not personally sign up to the federalist vision of heading towards the gradual harmonisation of national criminal laws—we are already starting to see some of that—or a pan-European justice system with supranational bodies: the Commission, the Court of Justice and, as President Barroso has said in his recent State of the Union address, an EU public prosecutor. Once you know that, then this block opt-out is quite an important historic juncture.

Therefore, I would exercise it for three reasons. First, the UK criminal justice system is different from the continental ones, not least because of our common law system and the things that flow from that. I am not trying to make a quaint historical point there. Underneath it—and we could have an interesting symposium on it—that is an issue of values.
The second reason is that I think the EU agenda places far too much emphasis on supranational control over operational effectiveness. Just to give you one example, we have six EU anti-corruption laws, but Transparency International says that EU standards have barely moved. In fact, they have got worse in 10 Member States.

The third reason is that, where EU co-operation is valuable, which I do not doubt it is in a number of areas, we should be able to pursue co-operation in a way that does not require sacrificing democratic control; and I think that is possible.

Should we rejoin any of the measures once we have exercised the block opt-out? Yes, there are certain candidates. I would not rule anything out; it would depend on the whole package. There are things like criminal records checks. They are clearly valuable, although, frankly, that is a matter of administrative efficiency. It does not require overarching control by the Commission or the ECJ.

There is obviously the vexed question of extradition. I certainly do not intend to advocate throwing the baby out with the bathwater, but I do think it needs reform. Our leverage, given that we take a third of all European Arrest Warrants, would be stronger if we opted out and then said that as a condition of opting back in we would like to see some modest reforms. I have already had consultations with various embassies about that, and actually it was rather sympathetically entertained.

Q88 Lord Hannay of Chiswick: I would like to follow that up. I am afraid I am still not quite clear about where you stand on all this. I believe that you are a supporter and signatory of the Fresh Start Group’s document published last week, which, if I have not misread it, advocates triggering the opt-out, not reinserting ourselves to any measures and repatriating the opt-ins to the post-Lisbon measures that this Government have made.

I assume that as a signatory or named author of Fresh Start that is your position, but then in The Times yesterday you said that you were in favour of opting back in to the European Arrest Warrant, admittedly hoping to negotiate some changes, and in your earlier Open Europe report you said there were about 60 measures that could conceivably be opted back in to. I just wonder if you can clarify which of those positions is yours.

Dominic Raab: All three. The point is this. In relation to the opt-out, I think we should exercise the block opt-out and then look at all of those areas where the measures add value. As I say in the Open Europe paper to which you are referring, and which I think is the underlying premise of the Fresh Start chapter—I think you have rather overstated it—we should also use this as a juncture and a point at which to say, “Look, we have this block opt-out. We are going to exercise it and we would like to settle this issue once and for all. The block opt-out only deals with 135 measures. We would like to look at the issue in the round as well as those specific measures, and the more you can offer us flexibility on form, the more we want to be a good operational partner in practice.” I do not think those two positions are inconsistent.

On the EAW, extradition clearly requires an underlying legal basis. It does whether it is on a Treaty basis or otherwise. The optimum situation would be to opt out and press for the modest reforms advocated by the Joint Committee on Human Rights. Lord Bowness has been a member of the Committee that produced that report. I also think there is an underlying issue about ECJ jurisdiction, which, technically speaking, is not something that is part of the opt-out decision but is something which this is a prime opportunity to address. Do we want the Supreme Court of the ECJ having the last word on extradition of British nationals? I hope that reconciles, at least to some degree, your concerns about it.
Lord Hannay of Chiswick: I hope that, if the Government ever were to use the language you have used, our European interlocutors would understand it better than I do.

Dominic Raab: We can agree on that.

Q89 Lord Richard: Mr Raab, I read your pamphlet for Open Europe with a great deal of interest. I took a great deal of care in reading it. I also read your article in The Times yesterday. Indeed, the same comment applies to that. In your pamphlet you finish up by analysing the 135 measures. You break them down into seven categories: first, measures of practical value to the UK, of which you say there are 60; secondly, measures intended to achieve legal harmonisation across the EU; thirdly, measures of little, if any, use to the UK; fourthly, measures which duplicate existing UK law; fifthly, measures whose impact is unknown; sixthly, measures which have not been implemented in the UK; and, seventhly, measures which are redundant. That is what you say in your document.

The one thing that is not in there are measures that are harmful or inimical to the UK’s interests. Are there any of the 135?

Dominic Raab: I think they are covered. There is an issue with categorisation. There are lots of different ways you could—

Lord Richard: Spell it out then, please.

Dominic Raab: If you would allow me to—

Lord Richard: I want to know, of the 135, which ones you say are inimical to the UK’s interest and harmful to us.

Dominic Raab: If you would allow me to answer the question.

Lord Richard: Certainly; please.

Dominic Raab: I think you could slice or dice the categorisation in a number of different ways. I have tried to use moderate language. You will notice that my figure of 60 out of 135, which range from marginal to a high level of value to the UK, is a much higher estimate than ACPO, which reckon that only 29 are.

Lord Richard: Maybe, but it is your slicing that I have used.

Dominic Raab: Absolutely, but I am a pluralist. That is my whole approach to these things and I am happy for you to disagree about the categorisation. I think there are areas that are positively harmful. The European Arrest Warrant at the moment is very harmful if you care about British justice. I would quote to you Lord Justice Thomas, this country’s most senior extradition judge in the High Court, who has said in public evidence to the Baker Review on Extradition that there are huge problems as a matter of fairness. There are cases like the Symeou case, the Turner case and the Dines case—a constituent of mine—and others. He said that the system had become unworkable. I do think that is something, notwithstanding the countervailing law enforcement benefits, where that is currently harmful to British interests.

Lord Richard: Can I put a point to you on this?

Dominic Raab: Can I finish before you come in with your second supplementary? Another example is the provision for data sharing. A lot of people would be very sympathetic, and certainly I am, to the idea of criminal record checks. But the idea that we have fingerprint, DNA and vehicle registration exchange of data on conceivably every law-abiding citizen,
whether they have committed or are suspected of crime or not, goes too far. If you do not trust Whitehall to handle your personal data, what chance if it is shipped off to Warsaw?

**Lord Richard:** I see. In effect, what you are saying is that the two items that you find harmful to British interests are the European Arrest Warrant and the sharing of basic criminal data.

**Dominic Raab:** No; there are others, but I thought I had set it out in my paper. If you find that unsatisfactory, that is your judgment. What I have tried to do—

**Q90 The Chairman:** Mr Raab, if I may just interrupt you, we might make a bit of progress. I do not think Lord Richard is trying to trip you up. For the record, it would just be helpful if you could expand on the items that you are referring to rather than leaving us to our own individual judgments.

**Dominic Raab:** Lord Chairman, there are 135 measures. I am not going to go through and catalogue them again one by one. I have taken a slightly different approach. I have tried to highlight the ones that have some positive value. That is the paradigm I adopt.

**Lord Richard:** Mr Raab, I am sorry to come back to the point, but you list seven categories of measures. None of them is a category in which you say there are measures that are harmful or inimical to the interests to the United Kingdom. I just want to know why.

**Dominic Raab:** Because that is not the approach I took. I approach a different and more positive paradigm, which was to work out which areas were positive for the UK. I would say there is an underlying negative in opting back in to any of these measures, which is ceding supranational control to the Commission of the ECJ. That is stated very clearly in the introduction or throughout the report. Therefore, what I do is look for the countervailing positives that might trump that.

**Lord Richard:** But there is nothing in the 135 measures that you can say is positively harmful to the interests of the UK.

**Dominic Raab:** No; I think I have given you at least two examples. I am not going to go through—that is not the way I have approached the report.

**Q91 Lord Avebury:** You have said that European Arrest Warrant is harmful to the British interest. I want to ask you about a previous answer you gave concerning the six EU anti-corruption laws. Which of these measures is contained in the list of 135?

**Dominic Raab:** I cite them and go through them in detail in the report. They are all in there.

**Lord Avebury:** The whole of them—all six are contained in the list of 135.

**Dominic Raab:** That is my understanding, and that is certainly the Government’s understanding because we have taken their list of the candidates for the opt-out.

**Lord Avebury:** Are you saying there is a note on the list of the six anti-corruption measures?

**Dominic Raab:** It is in the Open Europe report that I published and which is, I think, the reason I am here.
**Lord Hannay of Chiswick:** On this point about the anti-corruption measures, I think what you said in an earlier reply was that they were not fully implemented in some other Member States. What on earth is the relevance of that fact to the opt-out?

**Dominic Raab:** The point I was making was a more general point, which is that there has been a preoccupation in Brussels among EU Member States with legislating hyperactively without these things adding any value. My point, whether as a domestic lawmaker or when I consider the EU context, is that I do not hyperactively legislate unless I can prove it provides positive value. I do not take the view, which I know is one of the questions that comes later on, of what harm it does just because it does not do any good. I actually do not think we should be legislating unless there is a positive reason to do so.

**Lord Hannay of Chiswick:** Do you not think it would do some good if those 10 Member States implemented them?

**Dominic Raab:** I certainly agree that the focus should be on improving national capacity rather than legislating as if that is some sort of panacea for the problem, which it clearly is not.

**The Chairman:** Lord Elystan-Morgan, and then I think we must move on to the next question.

**Q92 Lord Elystan-Morgan:** Mr Raab, I am sure you would agree with me that we live in an imperfect world. If you look at 130, 133 or 135 provisions, there will always be some element of imperfection in many of them. It would be very strange if that were not so. Even going back to the European Arrest Warrant, there are many benefits there, are there not? One has to look very carefully at the situation to see whether there is a net benefit even in regard to that particular heading. A block opt-out means, does it not, that, whereas losing all these benefits is a fact, whether you are entitled to opt in has a huge question mark over it? It may well be that the 26 other states exercising unanimity will not want us. It only needs a few, I suppose, to block us altogether.

In the circumstances, have you ever sat down and asked yourself, “What is the net benefit or disbenefit in relation to all 130-odd?”

**Dominic Raab:** First of all, in terms of the net benefit, I think I make it clear that there are a number that have some net value, but that is not the choice we face. Under the Lisbon Treaty, we have an opt-out negotiated by the last Government. The assurances we were given by the Home Secretary, the Prime Minister and the Foreign Secretary at the time is that that is a bona fide opt-out that can be exercised. We have had a number of issues in relation to it trailed in the media and you highlight one—that they can all say no—but that would be bad faith because, at the time it was agreed, a block opt-out presupposed that we would have the right to selectively choose which to opt back in to.

I raise one other issue. If I may characterise it as such, you take a rather utilitarian approach. I understand it and I respect it. I take a slightly different approach, certainly in regard to the European Arrest Warrant, which you mentioned. The idea that, because we get 100 people back, many of whom will be criminals and, quite rightly, should face justice, we should sacrifice to the proverbial lambs innocent people is not something that chimes with my view of justice. It is not a view that I would sign up to. That is a Faustian bargain and I would not accept it. But, of course, we do not face such a zero sum game because we have this option of stepping out. In any event, there is quite a lot of appetite for renegotiation of the
European Arrest Warrant. A lot of people that I have talked to from the different embassies have accepted issues. They are not just about proportionality but about basic fairness.

**Lord Elystan-Morgan:** Do you not accept that it would be sensible to look at each of these measures individually in the round? That is the way the Law Society look at it; that is the way the Bar Council look at it; that is the way the police look at it. The police say, “Look, in so far as Europe is concerned, it is really valuable.” In so far as Eurojust is concerned, that is so. In so far as information concerning DNA and criminal records is concerned, and indeed the mutual swapping of evidence is concerned, there is a substantial net benefit. With very great respect—and this is not an exercise in name calling—is it not possible that you are looking at the situation in too mechanistic a way altogether and looking just at little bits of it rather than at the rounded whole and the effect that it has totally upon our situation in Europe?

**Dominic Raab:** Clearly, in your view, but I am looking at the practical choice that I face, which is a block opt-out with the possibility of opting back in, which is not a binary zero sum game; so, with respect, we may just have to agree to differ.

**The Chairman:** There is another option, which is to get agreement and renegotiate it round the table.

**Dominic Raab:** In practice, that is almost certainly what will happen.

**Q93 Lord Hannay of Chiswick:** This is a separate question. You have referred in your written material to the loss of democratic control were the opt-out not to be exercised and the Court of Justice of the European Union came to exercise jurisdiction. Can you explain what you mean by this phrase “the loss of democratic control”? After all, the UK agreed to all the measures we are talking about. They were adopted by unanimity. Was that not an exercise of UK sovereignty? Also, the UK, in all the post-Lisbon measures it has opted in to, has passed through a parliamentary procedure. You yourself probably voted against it in a rather small minority on one occasion.

**Dominic Raab:** Shall I assume again that that one is aimed for me? I am feeling that Stephen has been rather neglected.

**Stephen Booth:** I would be happy to have a go at answering it first. My concern, again, comes back to this role of the ECJ and the fact that, although the Government obviously agreed in a process of unanimity and that was a democratic decision, the issue was that they were agreed to in a context where the ECJ’s role was not foreseen. That is really the issue when it comes to these measures.

The democratic issue is one where we have seen the ECJ take decisions that national Ministers had no idea or anticipation of that have radically changed the nature of secondary legislation at the EU level, not necessarily in this field but in other fields as well.

The problem is that in such a sensitive area, where the Government have highlighted concerns that that is a very real issue, it would seem a real risk to me that, if you put this in the hands of the full jurisdiction of the ECJ, you could face cases like that. The problem is that, once that happens, we all know that to amend one of these laws you have to go through the whole process of QMV and getting the European Parliament’s approval. To me,
it would seem that you can be locked into a situation where one of these laws, which you 
have agreed to pre a role for the ECJ, becomes something rather different from what you 
anticipated it would be. The method of changing that is then very much out of the control of 
the British Government.

Lord Hannay of Chiswick: But, presumably, you would not support the idea of exercising 
democratic control over the Supreme Court of the United Kingdom.

Stephen Booth: No; well, the Supreme Court here interprets the laws made in Parliament.

Lord Hannay of Chiswick: But the European Court of Justice is subject to the laws made 
in the Council.

Stephen Booth: Sure, but the problem is that British power is diluted much further at the 
EU level than it is at the national level. That is the fundamental point.

The Chairman: Do you want to add to that, Mr Raab?

Dominic Raab: The key thing for me is that there is a distinction between formal 
sovereignty and democratic control. I agree with the points that Stephen has made. The 
President of the Commission has set out the direction of travel very clearly: that is having a 
European public prosecutor; having the ECJ exercising the final word over many of these 
issues; and the move from unanimity to QMV. These all involve a loss of democratic control 
or oversight, whatever you call it, at national level. That seems to me self-evidently true. I do 
not disagree with you that you can make the point that we have signed up to it as a matter 
of sovereignty. It is not quite the same thing, in my view.

Lord Hannay of Chiswick: I am sorry to have to come in on that point, but the President 
of the Commission does not dispose of the decision of whether or not there is a public 
prosecutor. It is decided by unanimity by the Member States. Britain has an absolutely cast-
iron opt-out from that particular decision in a separate part of the Treaty from the one we 
are discussing now. I honestly think that his views are not terribly relevant. He is not the 
person who decides.

To put out of concern something you said earlier, nobody in these two Committees doubts 
for one minute that the United Kingdom has the right to opt out. That is not in question. I 
have not heard anyone question that.

The Chairman: Can we move on to Lord Hodgson because I am conscious of time for our 
witnesses and time for the Committee?

Q94 Lord Hodgson of Astley Abbots: My question takes us on to the decisions of the 
Court of Justice and whether you consider there is any positive value in having a 
supranational jurisdiction dealing with the interpretation of EU-wide measures in the PCJ 
area. It would probably be helpful if you could provide some examples where you think they 
have had a negative effect, excluding the Pupino case, and whether you would accept that 
they could also make positive judgments that could respect the autonomy of national 
criminal justice systems and improve the operation of PCJ measures, including the Radu 
opinion?

Stephen Booth: First, there are not that many examples. That is partly because, obviously, 
some Member States have not given full jurisdiction to the ECJ and partly for a reason that 
was mentioned earlier. A lot of these measures have not necessarily been implemented yet
at the national level and therefore have not given rise to the types of preliminary rulings that you see in other areas of EU law that are of concern to us.

One example the Government raised in their evidence was the Metock case, in which the ECJ expanded the rights of non-EU nationals who marry EU nationals. The Government there express a clear concern that that has led to a direct increase in sham marriages. That is in their evidence. That is the one case that I am aware of as an example in this particular area.

I would say that there are other examples in other areas of EU law that would give me cause for concern. For example, the one case mentioned by Martin Howe QC in his evidence to you was the ruling on the gender directive relating to the opt-out for insurance. That was an area that Member States had negotiated and had explicitly written into the Directive. Insurance companies would be derogated from the gender discrimination aspects of the Directive. The ECJ took upon itself to strike that out from the law. That just illustrates the kind of power that the ECJ can have and the kind of unforeseen consequences that ECJ jurisdiction can have. In such a sensitive area, as I said before, the UK has potentially set itself up for unintended and unexpected consequences, which, as I said before, are very difficult to amend once they are in EU law because of the process that we talked about earlier.

Lord Hodgson of Astley Abbotts: On this, as on most of the other questions, I get the sense that you feel we are rattling along uncontrollably, with slightly unpredictable outcomes and results. We are going too fast and are possibly unstoppable, and this opt-out represents a way to put a spoke in the wheel to stop the machine so that we can stand back and see where we should and should not renegotiate to our advantage.

Stephen Booth: That is partly true, but there are also concrete particular issues. I would agree and say there is a wider issue which you mentioned. There are particular issues with the fact that the Government have raised concerns that particular measures are open to wide interpretation because they were drafted in such a way that the ECJ’s role was not foreseen at the time.

Q95 Lord Hodgson of Astley Abbotts: Obviously I have not read this as closely as Lord Richards has read it, but, of the 136 measures at this moment, give us an estimate of how many you think we might opt in to, or would we opt in to none?

Dominic Raab: I wonder whether I could take the opportunity, Lord Chairman, to touch on two of the questions so far. In relation to that one, I give 60 as candidates, but there is a broader issue about four. That is subject to negotiation.

In relation to whether this is the right time to start renegotiating, I do think that Britain should be respectful, moderate and find the right time to have a reasoned conversation with our colleagues and friends in Brussels, both with the Commission and wider Member States. This seems like the right juncture to do that. There is never a great time to put your hand up and say that you are not particularly happy, but this seems to be better than others.

In relation to the case law, the Radu case was cited. Obviously, that is an Advocate General opinion.

I want to talk about the substance of this and I raise three points very briefly. First, this was provided as an example of how ECJ jurisdiction can be quite helpful in rowing back on some of the problems or flaws in legislation. Of course I welcome the Advocate General highlighting a problem with the European Arrest Warrant. I am amazed it took eight years.
The second point is that he highlights the flaw in the European Arrest Warrant, which is that it is contingent upon mutual trust in the practical justice systems in all other 26 Member States. As we have seen from a litany of cases, from Andrew Symeou to Edmond Arapi to Colin Dines, this is a sham. There are corrupt Greek police, incompetent prosecutors in Hungary and appalling jail conditions in much of Europe. The assumption that justice systems are the same everywhere, which is the reason we have fast-track extradition without safeguards, is a sham. At least the Radu judgment highlights it.

Do I celebrate the fact that the ECJ might now correct some of the excesses with a test that at least, according to the Advocate General, would be marginally better but still very nebulous? Not much. As a matter of democratic accountability and separation of powers, legislation should be amended by elected representatives of Member States, not unaccountable judges. That is where I see Radu, and I hope that answers the earlier question as well as your current one.

Q96 Lord Rowlands: You touched on the case about the pre-Lisbon measures, but since Lisbon there have been a number of measures that this Government have accepted and indeed this Committee has in fact scrutinised in great detail. I cannot recall in any of the cases we are talking about that any Government Minister raised the problem or issue of the Court of Justice. It was about the substance or whether the thing was pragmatically of any value, like, for example, combating the sexual abuse and sexual exploitation of children. These were practical, pragmatic decisions taken. I cannot recall this horrifying feeling that the Court of Justice was going to somehow threaten us if we accepted these opt-ins. Do you think the Ministers were sleepwalking or that we all were?

Stephen Booth: I would not say that. Obviously, there are two issues. The first one is that the pre-Lisbon measures that we talked about were different because they were not drafted with the ECJ in mind. The post-Lisbon opt-ins, which were obviously with the ECJ's jurisdiction, were part of the opt-in decision, if you like. To be honest, there has been far too little scrutiny of the ECJ's potential role in this. The fact that a route of co-operation for us, as Dominic highlighted in his pamphlet, which would not involve the ECJ is not on offer—

The Chairman: Mr Booth, I am afraid I am going to have to interrupt you because there is now a Division in this House. The Committee is adjourned for 10 minutes.

Sitting suspended.

Q97 The Chairman: My Lords, we can recommence. I ask members to bear in mind that we have a long way to go. Our current witnesses are content, notwithstanding, to stay with us until about quarter past five. There is also the question of our other witnesses, whom we expect to be here at five o’clock. We have now lost 10 minutes. I do not want to restrict anybody but perhaps we can make some sort of progress, bearing in mind that a number of the points in the questions have already been dealt with in answers by the witnesses.

Does anybody want to say anything further in answer to this question of Lord Hodgson?

Stephen Booth: I was going to say that the issue at hand is that there is no non-ECJ option available. That is part of the reason why it has not been considered in such a way that we would like it to be.

Lord Rowlands: Do you think the measures post-Lisbon could be threatened by the same ECJ activism as the ones before?
Stephen Booth: Yes; in principle, the same dangers or the same risks apply.

Lord Rowlands: In the Bar Council’s evidence last week, I thought Helen Malcolm made a very interesting point in distinguishing what role the Court had played in the Single Market and in trade matters, and the very different role she thinks the Court will play in matters of criminal jurisdiction. She says that you must not judge the Court’s performance on Single Market and trade matters as applying exactly to criminal justice matters. I think that is a reasonable paraphrase of what she said. I thought that was a rather telling point—that there would be a distinction between the role of the Court in these two areas.

Stephen Booth: I did not see that particular piece of evidence, but it would be interesting to see why she makes that assertion. As I understand it, this area of law will now be treated as any other area of law by the provisions in the Treaty. I do not see why that would be the case.

Lord Rowlands: Perhaps you might like to read it because I found it rather convincing.

Stephen Booth: The problem is that that is open to question because it is generally going to be an area of EU law like any other, so why would that be the case without any future knowledge of what is going to happen?

Q98 Lord Dykes: Mr Raab, I will address this to you because it was your article in The Times. Halfway through paragraph 4 you say: “José Manuel Barroso, the EU Commission President, is forging”—rather an interesting verb too—“a new pan-European criminal code, enforced by the Commission and European Court, and calling for an EU Public Prosecutor.”

Coming to the restatement of that, perhaps you could explain exactly what you mean? It has already been stated quite correctly in this meeting that the Commission President may wish to recommend all sorts of things but does not dispose of the final decision. That is made by the sovereign Member Governments of the European Union. You could say that, if sovereignty is an important subject for you, sovereignty exercised by 27 sovereign states is presumably stronger than sovereignty exercised by just one. Why do you make that assertion, which appears to me to be prima facie incorrect?

Dominic Raab: First of all, the Commission has a track record of whittling away and getting what it wants in the end. In terms of harmonisation of laws, there are already examples of harmonisation and attempts to harmonise—for example, which drugs are banned and prohibited.

Lord Dykes: Can we come back to the specific Barroso statement on that? How can you justify and defend that? Is that correct?

Dominic Raab: I will come on to it. The point I wanted to make is that that is something the Member States, by definition, have acceded to. The other example I was going to give is the balance between xenophobia and free speech. That is something where the EU has legislated. It is a good example of harmonisation. Personally, I think that Britain would probably take a more pro-free speech approach in that particular area. There are other Commission working papers.

President Barroso has made clear his determination to set up an EU public prosecutor. You say that the Member States will not necessarily agree it. It will be very interesting to see what the regulation looks like that comes out on amending Europol and Eurojust and the powers of initiation of the investigations, the prosecutions and the like, or the extent to which that is touched upon. I have not seen the latest on that, but I am hearing through the
grapevine—and Lord Hannay will be better informed than I—that there are some interesting innovations in that area. All I would say is that that is an example of where we have the harmonisation and we have these bodies, which by the way I list as being valuable, but step by step we make the move towards supranationalism. The way I see it is that President Barroso puts the federalist flag in the ground and gradually over time we move towards it.

Lord Dykes: The Commission often grumbles that the sovereign Member Parliaments are asking them to do too much, so it works the other way as well. What I am concerned about is that you give the impression that that decision has already been made, admittedly in a Murdoch newspaper, which allows sloppy journalism. That is totally incorrect. No decision has been made on any of those matters.

Dominic Raab: You are entitled to your view.

Lord Dykes: You confirm that—

The Chairman: We will pass on from that.

Q99 Baroness O’Loan: EU-wide measures on policing are said to be necessary as a counterpart to free movement in the Single Market and the growth of cross-border crime. In the areas where you favour a permanent UK opt-out, do you think that considering co-operation with other Member States is necessary or desirable?

Dominic Raab: I do not think JHA is a condition or required for the Single Market. I do not think any other free trade area needs supranational moves towards JHA—Justice and Home Affairs—in order for the Single Market to work. Look, my position is that I favour widespread operational co-operation. I would prefer this was done through formal frameworks like an MoU or even on an ad hoc basis if it is things like database checks, which are a matter of administrative efficiency rather than supranationalism, and without the overarching jurisdiction of the ECJ.

Frontex is an interesting model. The head of Frontex says that, when it comes to risk analysis and joint operations, even though we are not a fully-fledged member, there is practically no difference or there is no difference between the UK and others. They benefit from our intelligence and expertise.

SOCA has an international strategic alliance with the US, Australia, New Zealand and Canada for cyber crime and various other things. That operates effectively under an MoU. The EU is the exception to the rule on insisting—

Baroness O’Loan: Can I ask you a supplementary question which follows this? Do you think that the Government should seek to rejoin those opt-outs?

Dominic Raab: Sorry; which opt-outs?

Baroness O’Loan: You have identified 60 measures that you think are of some value to the United Kingdom. Do you think we should seek to rejoin those 60?

Dominic Raab: I have already answered that question. I said I think they are candidates. There are areas where we should be co-operating, but I would like to look—

Baroness O’Loan: That is why I asked you again. Do you think we should seek to rejoin the 60 measures rather than look for agreements, MoUs or anything else?
Dominic Raab: No; I think we should not rule out opting back in. That is my point if it is unclear. I thought I had spelt it out at tedium in the report. We should not rule it out, but we should also look more broadly at broadening the range of formal mechanisms through which we conduct our co-operation.

Q100 Earl of Stair: How feasible would it be for the United Kingdom to rely on the Council of Europe Conventions in place of the police and criminal justice measures? Would the fact that many of these areas are not covered by these Conventions, while others have never been implemented or have been superseded in some Member States, pose any problems in this regard?

Dominic Raab: I do not think it is ideal by any stretch, but I do not think it is a disaster. The main problem would be that extradition would be much slower, as it was previously. I would accept that that is a drawback but it would only be in the interim. There is also an alternative model that you could approach. I am pretty open-minded about it. While we have the renegotiation on the EAW, let us say that for six months or a year we could temporarily extend its application. There are different ways you can skin a cat. Opting-out en bloc and then waiting before we opt back into the EAW until we have addressed those concerns—and perhaps also the ECJ point—is the sensible way to go. It maximises our leverage. After all, we get a third of all European Arrest Warrants. I have spoken to a range of embassies. They have contacted me and this is one area, for all the political furore, on which they were quite sympathetic.

Earl of Stair: So you only see it literally taking a longer time to act; otherwise you do not see any issue with it at all.

Dominic Raab: As I said, I do not think it is ideal. The major problem would be delay rather than criminals going free, but, of course, we would have to look at the precise application of the pre-existing conventions to the individual countries and try and plug any gaps if we needed to. There is this second alternative model, which is for a temporary period while we renegotiate extending the application of the EAW. My point is that I am relaxed about form, as ever.

Q101 Lord Hannay of Chiswick: Many of the EAW requests that come to us are preponderantly nationals of other EU countries, not British nationals. Are you suggesting that getting rid of these people who are being pursued for very serious crimes and sending them back to the country which is going to try them is a bad thing?

Dominic Raab: No; in fact, I think it is a very good point. Ironically, the Framework Decision on the European Arrest Warrant came into force at the same time as the EU Citizenship Directive. That has made it much harder to deport foreign criminals back to their home country within the EU. Therefore, there has been a dual development that has been going on. Personally, rather than dressing up the EAW as a cure for that problem, I think we should revert to making it easier to deport foreign nationals to their home countries in the EU because all the torture arguments and all the rest of it do not apply.

Lord Richard: On this point of the European Arrest Warrant, again looking at your documents produced by yourself and your collaborators, it is very interesting to look at the figures. The complaint is often made, and indeed is almost strident in some of the documents that you have produced, that somehow or other the UK is bearing an unfair share as far as the EAW is concerned. If you look at the figures, in 2010-11, 48 UK nationals were surrendered to other EU Member States. In other words, there were 48 Brits that would
have to go and be tried for offences in other EU states. On the other hand, 134 individuals of other nationalities came to the UK. We asked for and certainly got 134 criminals that we wanted—though we may have asked for more; I do not know—and we can try them here. In return for that, what did we have to do? We had to return a lot of non-Brits to their home countries so that they could be tried and we had to allow out 48 UK nationals. How is that unfair?

**Dominic Raab:** There are two points here. First of all, you are including in the data those surrendered as well as those where they are not surrendered. The fact is that, for 2011, we issued one European Arrest Warrant for every 33 received. That puts a huge pressure on operational policing, as Commander Gibson has made clear, even though it does not tend to get picked up in the evidence he has given.

**Lord Richard:** Are you saying the figure of 48 UK nationals is wrong?

**Dominic Raab:** I would have to look at your data—

**Lord Richard:** It is your data, not mine.

**Dominic Raab:** I am confident of my data becomes it comes from the Government. The other point I would just make—

**Lord Richard:** I am sorry; I just want to know whether you are challenging the figures. There were 48 UK nationals who were sent out from the UK and we got in 134 individuals.

**Dominic Raab:** I am not challenging the figures in my report. I think your portrayal of them is rather selective. The broader point I wanted to make, and I think I have made, is that it is an abuse of the EAW that we are using it effectively to deport foreign criminals or people wanted for serious crimes back to their home countries in the EU. We should be using deportation. If you look at the reliance on deportation as opposed to extradition with Jamaica, the US and Australia, that is borne out. Most of these cases, with no questions answered and no fuss unless there is a torture issue, would go to deportation. That is part of the problem here, which is why I think the Jeremy Forrest and Hussain Osman cases are a bit of a distraction from the crux of the issue at stake.

**Lord Richard:** I do not want to take up too much time and apologise for it, but, as far as torture is concerned, you are talking about the European Convention on Human Rights. You are talking about that Court, not the European Court. You are not talking about the ECJ.

**Dominic Raab:** It will be interesting to see how that develops. My apologies but that was not the point I was making. I was saying that there should not be an objection to deportation within the EU because there is not really a torture issue in the same way that there may be with Jordan or with other countries. That was the point I was making. Therefore, fast-track deportation for third-party nationals should be relied upon more than extradition. It is an abuse of process argument that I am making.
The Chairman: You have mentioned Memoranda of Understanding.

Q102 Baroness Liddell of Coatdyke: Can I move on to the practicalities? How practical do you think it would be for the UK to negotiate and agree multiple bilateral MoUs or other international agreements with all of the other Member States? Do you think they would all be willing to enter into such agreements? Has this ever been done before? Can you provide examples of where this has been done before and was it successful? Could you give an idea of the costs and any delays that might be involved in it?

Stephen Booth: The one example to look at, not in terms of MoUs necessarily but as a method of co-operation that does not involve the ECJ, which is where we are coming from, is the Danish example. They can apply to take part in EU measures and they are free from the jurisdiction of the ECJ.

Baroness Liddell of Coatdyke: I think you may be misunderstanding the question. You will have to enter into ad hoc agreements, as Mr Raab has already said. Presumably, you need to do that with all of the other individual Member States. How would you go about doing that, what would the mechanisms be and has it ever been done before?

Stephen Booth: That is the question I was answering. Denmark has done such a thing, but it has not done it with the individual Member States; it has done it with the EU.

Lord Hannay of Chiswick: But it is quite often rejected, is it not?

Stephen Booth: Sometimes it has been rejected, yes; that is true. The Danes have an option to conclude a bilateral agreement with the European Union institutions, which is then binding on all the other Member States. That is an option that the UK should explore. As I understand it, that is probably how it would have to work. You would have to do a bilateral agreement between the UK and the EU bloc rather than necessarily bilateral things with the individual Member States.

Baroness Liddell of Coatdyke: Can you give us an idea of time scale and cost?

Stephen Booth: That is all a matter of speculation. It is a negotiation with the others.

Baroness Liddell of Coatdyke: You cannot give us any suggestion of how long this might take and the kind of costs that might be incurred in doing it.

Stephen Booth: I do not think you can give a hard and fast figure on that, no.

The Chairman: With respect, is it not quite important? If, in fact, the opt-out takes place and you do not have those alternatives in place, some of the things that we might all agree are useful will disappear, and then where are we?

Dominic Raab: Lord Chairman, I will try and address that. They could be multilateral or bilateral. This is Foreign Office bread and butter. I used to be a legal adviser and negotiate these things all the time. But how can you possibly say how long it would take to negotiate things with a partner that is dependent upon their approach, how long they need and also to see the extent to which we actually need to do it—for example, with the European Arrest Warrant? It may be that we can reach agreement on that relatively soon, in which case we would not have to worry about it. Of course it would be speculation at this stage, before we have even exercised the block opt-out, to be able to say that. I think it is eminently doable. The answer to the last bit of the question is that Member States will do it if they think there are reciprocal, practical law enforcement benefits.
The Chairman: Let me be clear. You are saying to Lady Liddell that we need to do that before we actually exercise the opt-out, if we are going to do it.

Dominic Raab: There are different parts. We should certainly be in consultation now. I am pretty sure that those consultations have already taken place.

Baroness Liddell of Coatdyke: You said that you had had a number of discussions with embassies. Did you raise these matters, and, if so, what conclusions did you arrive at?

Dominic Raab: No. The embassies at the moment, quite understandably, are consulting Parliamentarians of all colour and hue about the state of the political context. One of the issues that I get asked about Justice and Home Affairs is, “What is your problem with it?” I spell out the main thrust of it in the way that I have explained to you; it is not an operational negotiation. All I am saying is that, on some of these issues, there is a huge amount of sympathy.

Q103 Baroness Liddell of Coatdyke: I would ask one other supplementary question. It relates to the UK/Ireland relationship in relation to police and judicial co-operation. How would that be affected if the opt-out were exercised?

Dominic Raab: This is a very specific issue. Extradition has always been a sensitive issue with Ireland because of the Troubles. We all know that. The EAW did have a beneficial effect because it effectively multilateralised what was otherwise a very sensitive bilateral issue. I do think there is an issue there but I do not think it is insurmountable.

Lord Hannay of Chiswick: Presumably that is not the view of the Irish Minister of Justice, who has very recently stated his great and deep concern about the use of the opt-out. When you made the various recommendations that you have made, did you really factor in the Irish dimension? If you did not, is that not a really rather serious lacuna?

Dominic Raab: I think we considered it, but there are bespoke issues with a range of countries. I do not see it as insurmountable. I have read the reports in the newspapers but I am not part of the Executive; I am part of Parliament. I can see why it would create domestic political difficulties for the Irish. We would want to be very sensitive about handling that, but I do not think it is insurmountable. We have come so far in relation to that conflict and, in any event, I do not think Britain’s approach to law enforcement co-operation with 26 Member States should be hamstrung just by that one issue. We would have to take it and deal with it sensitively and practically.

Q104 Lord Sharkey: What is your response to the support expressed by senior police and law enforcement representatives for many of the current PCJ measures and their doubts about the practicality of any alternative arrangements for cross-border co-operation? Perhaps you could also say how effective you think Europol and Eurojust actually are.

Stephen Booth: I will deal with the first part of the question. The ACPO evidence, which was very interesting, said that it was vital that the UK opts back into 13 measures and there were a further 16 where the UK should opt in. At the same time, it also said there were 12 measures where it was not in the interests of UK policing to opt back in. That illustrates that, even from a policing and law enforcement perspective, it is a mixed bag. It is not quite as it has been portrayed in certain parts of the media. It is clear that there are real concerns about keeping some aspects of it. The European Arrest Warrant is clearly of primary concern to the police. I think we should listen to their arguments.
Again, they are coming at it from a very specific perspective. For example, they do not really touch on the role of the ECJ. They are much more concerned about the co-operation aspect of it and being able to get the people through European Arrest Warrants and provide people for European Arrest Warrants. They are not so interested in the constitutional or ECJ element. We should, of course, bear that in mind, but we also need to look at the role of the ECJ in these areas. We should also be clear, as we have said earlier, that the opt-out decision does give us the opportunity to opt back in. Given that they have said there are 12 things we should not opt back in to, this block opt-out would provide us with a way of removing ourselves from the 12 elements they do not like. You can look at it that way as well.

**Lord Sharkey:** Could you briefly speak to their doubts about the practicality of any alternative arrangements for cross-border co-operation?

**Stephen Booth:** I am not sure exactly what their specific doubts are. In an earlier question Dominic explained how that might work. The police’s primary concern is about retaining the operational capabilities in the areas they are concerned with.

**Lord Hannay of Chiswick:** Are you not slightly misrepresenting what ACPO said? With regard to the ones you say they did not like, I do not think they said they did not like them. They said they were of no positive value to the United Kingdom. That is a completely different proposition.

**Stephen Booth:** One example I picked out of their evidence was the Framework Decision on combating terrorism. They say: “For this reason it was advised that adoption would bring no benefit as it may mean a potential weakening of UK legislation.” That would seem to me to be a concern.

**Lord Hannay of Chiswick:** That is one.

**Stephen Booth:** I do not want to go through all of them.

**Lord Hannay of Chiswick:** I think you will find, if you look at what they were saying, it was what I said they were saying, namely, that they did not see any positive value in certain of these measures to the United Kingdom, not that they saw any harm.

**Dominic Raab:** I got into trouble for using that paradigm earlier, but I am glad to see that Lord Hannay has adopted it. In terms of ACPO’s job and the police’s job, their job is to give evidence on the operational value. It is not their job to answer political questions about what we do about that situation. Secondly, in terms of law enforcement value, that is only one side of the coin here. It is also about standards of justice, which is why I quoted Lord Justice Thomas. In a democracy we do not just do what the police tell us to do. We take it very seriously but we look at the issue in the round. Criminal justice is not just about what the police and the prosecutors want; it is also about standards and safeguards of justice.

A question was asked about Eurojust and Europol. I have to say that I was posted to The Hague for three years and worked and liaised with them. These are important bodies, but, of
course, their development and evolution—and we await the new regulation—is something which under this and the previous Government we have always been quite nervous about.

In terms of efficiency, I want to make one other point because I do think it touches on democratic oversight. If we take Eurojust, its budget has practically doubled between 2007 and 2012, but the number of cases closed fell quite dramatically. That is one indicator. There are plenty of other issues in the round that people would want to put for and against Eurojust. That is one example but no one ever talks about that. We have so little evaluation, empirical or otherwise, assessment or appraisal of some of these institutions. That would never happen in this country in relation to the police or prosecutors. While I am generally in favour of that kind of co-operation, I do also just mark a caveat about waste and efficiency.

Lord Hannay of Chiswick: I think you might find it useful to read some of the reports that this Committee has written on Europol.

Q105 Lord Elystan-Morgan: Mr Raab, you expressed concerns about the ability of the CJEU to rule on the powers of foreign police operating in the United Kingdom—I am sure you will agree a not unemotive issue. We have heard evidence, I think more than once in this Committee, that Article 276 of the TFEU prevents the CJEU from making such a ruling. Would you accept that?

Dominic Raab: I have a general concern—you are right—about supranational control via the Commission or the ECJ. As I said, I do not know any country outside Europe that thinks it is necessary to have that kind of control as a condition of co-operation. Article 276 is very carefully drafted. Of course, we do not have a huge amount of acquis on the JHA area so it is not clear how it will be interpreted. That, of course, would itself be decided by the ECJ under the competence-competence rule. As a safeguard, if that is your question, I would put money on it leaking like a sieve.

Lord Elystan-Morgan: Is it not the case that the Government have accepted that Article 276 does exactly that?

Dominic Raab: It may be.

The Chairman: It is unfortunate that we are so short of time. I am just looking at Article 276. If you have time, Mr Raab, it would be very helpful if you could drop us a note as to why you think it leaks like a sieve. It looks quite a solid pan to me, but if it is a sieve I am sure we would find it helpful to know why. I will not detain you now because I think we should press on with the questions. If you have a moment to do that, that would be very helpful.

Lord Mackenzie of Framwellgate: I think you have probably answered this already, but Professor Spencer has suggested that, if many measures are indeed defunct, then they clearly present no threat to the UK were the European Court of Justice to acquire jurisdiction over them. What do you think of his view?

Stephen Booth: I think he is probably correct. If they are defunct they are not of use, but that is not the whole question we are addressing. We are addressing a much bigger question.

Dominic Raab: I would probably put it the other way. As a legislator, the question is not, “Shall we pass it because it does not do any harm?” It is, “Does it do any positive good?” I do not like cluttering up the statute book in this country, or anywhere else for that matter, with legislation that may be redundant, opaque or of no value because it creates legal
uncertainty and it is open to abuse. I would phrase the question, “Does it add value?”, not “Does it do no harm?”

Q106 Lord Stoneham of Droxford: Your support for the opt-out might be considered as displaying a lack of confidence in the UK’s ability to influence EU decision-making on PCJ issues, whereas other witnesses we have seen take the view that the UK has played a leading role in the development of EU policy in these areas. What is your response to that view?

Stephen Booth: I would agree. I think it is correct that the UK has often taken a lead in these areas. Again, it is a trade-off between influence and the democratic process or control by the UK Government. This is not an area like product standards in the Single Market; it is an area that is based, supposedly, on mutually beneficial co-operation, which is meant to be of benefit not just to the UK but the other Member States. It seems to me to be an area where keeping it on an inter-governmental basis would not necessarily dilute UK influence so much because it is meant to be mutually beneficial. It is in everyone’s interests, surely, to reach agreement.

Lord Stoneham of Droxford: But others would say that going for opt-out would undermine our influence and our negotiating power.

Stephen Booth: It depends what you want to influence. If you can continue to reach agreements with Member States on things that are beneficial to law enforcement in this country, that is something that the UK should continue to explore.

Lord Hannay of Chiswick: Even when those post-Lisbon measures would be subject to the European Court of Justice.

Stephen Booth: I do not understand the question.

Lord Hannay of Chiswick: You said that you thought the UK should continue to co-operate and to agree to EU measures where they were of benefit to the UK. I asked you the question, even though that would, since they are post-Lisbon measures, involve ECJ jurisdiction.

Stephen Booth: As we have both said, the UK should take this opportunity to enter into discussion about reverting back to a process where this is done at a much more inter-governmental level rather than through the supranational—

Lord Hannay of Chiswick: So, you are advocating Treaty change?

Stephen Booth: In the long term that should be an aim of the UK Government, yes.

Q107 Lord Judd: Can you be a bit more specific about this crucial question? It is really about woods and trees, is it not? If we are agreed—and I presume we are—that the reality of the world we are living in is that crime is increasingly internationalised and globalised, if we are agreed that terrorism is similarly internationalised, should not all our effort go into joining institutions where we can ensure that others are operating to the standards they should be operating to? Is it not weak to say, “They are not operating to standards we would like; therefore, we are going to withdraw and have a little island all on our own”? How does that help combat the terrorism or the crime from which we suffer?

Dominic Raab: I would make two comments, one in relation to the earlier question. If we followed the logic that we have to be at the heart of everything in order to influence, we
would sign up to the euro and we would sign up to Schengen. That is not the position that either this Government or previous Governments have taken.

In relation to the point that Lord Judd is making about global outlook, the perspective I take—and it is the only one I can talk to—is that we want to maximise the amount of co-operation we have with our EU partners. The reality is that no one outside Europe takes this Faustian approach of saying that you cannot co-operate. “We will throw our toys out of the pram unless you give up bit by bit supranational control.” That is the dilemma. At some point, if you take the wood-for-the-trees approach that you do, you have to look at this and say, “Hold on a minute here. Is there a wider democratic issue at stake?” That is the view that I take.

**Lord Judd:** I am very attracted by part of your argument this afternoon. It is the one in which you emphasise—and some of your past career suggests that you take this very seriously—how you need to take the issue of justice as seriously as the technical issue of fighting crime. You must fight crime in the context of your commitment to justice.

I am very taken by that particular argument, but, surely, if all the people in the front line of the operation such as the police, the security services and others are saying to us with a loud voice, “We will do nothing but lose by opting out because we are beginning to find that our work is more effective because we are in, whatever the frustrations”, we can work on those by demonstrating that we are second to none in our commitment to effectiveness.

**Dominic Raab:** Lord Judd, that is a total caricature of what the police have said. They say that 29 only of these measures are of practical benefit to the UK. There are others who raise concerns. I have already cited the most senior extradition judge. I do not believe the issue is the binary zero sum game you present.

**The Chairman:** We will have to make a judgment on the evidence in due course.

**Q108 Lord Rowlands:** I think in some way we have gone over this question, but I want to clarify your position, Mr Raab and Open Europe. First, there are some measures which you think we should opt in to after opting out; is that right?

**Stephen Booth:** As we have both tried to say, as a first position, the UK should investigate the means of doing so without ECJ jurisdiction, and in the longer term try and apply that principle to its co-operation in this area as a whole and not just the area of—

**Lord Rowlands:** But are you ruling out the option of opting in?

**Stephen Booth:** No; I do not think you can rule out opting back in to anything because, as you have said, these are very serious issues and the police are very concerned.

**Lord Rowlands:** So there is that group of potential. What is the alternative? Do you think you can negotiate a kind of Danish protocol? Would that be an ambition of yours if you were in charge?

**Stephen Booth:** Speaking personally, in my opinion, that is what is in the interests of the UK. If what you see as the issue is the ECJ—which is what I see as the issue—that is a model that would be one that you should pursue. As Lord Hannay mentioned, the Danish example does pose questions about sometimes being refused entry. This is something that we are told is a mutually beneficial process for the UK and the other Member States. We should enter into agreements where it makes sense to do so but not ceding powers to the ECJ.
Lord Rowlands: On your position on those post-Lisbon opt-ins that we have already endorsed—and this Committee has endorsed—you would want to find a means of opting out of them as well, would you?

Stephen Booth: Again, in the long term it is not necessarily about the underlying measure; it is about the means of co-operation. It is the form of co-operation under the ECJ, yes.

Lord Rowlands: But you would have to accept that, until some future time that maybe you can get the opt-out, these are binding and the Court of Justice will be binding as well?

Stephen Booth: Of course; the opt-out would not affect those measures.

Q109 The Chairman: Do any other members have questions? Mr Raab and Mr Booth, is there anything that you want to say to us that you have not said already, or any questions you think we should have asked and you have not had the opportunity to answer?

Dominic Raab: Not from my point of view.

The Chairman: If that be the case, thank you very much for giving us a lot of your time. I know we have had a lot of written evidence from you both, but I hope you will accept that the Committee finds it very useful to be able to have a face-to-face exchange with you about what you have written and your views. It is very helpful to us in the preparation in due course of our report and this inquiry. Thank you very much indeed.
Submission can be found under Dr Alicia Hinarejos, University of Cambridge
**Professor Steve Peers—Written evidence**

**Pre-Lisbon core - suggestion:**

1. 2. liaison magistrates
2. 14. Naples II
3. 19. Europol staff regs (connected to participation in Europol)
4. 26. data protection body (connected to participation in Europol)
5. 35. Eurojust
6. 41. EAW
7. 51. Eurojust
8. 57. financial penalties
9. 66. Cepol
10. 67. confiscation orders
11. 68. Swedish FD
12. 78. Eurojust
13. 80. Prum
14. 81. Prum
15. 83. prior convictions
16. 86. prisoner transfer
17. 89. EJN
18. 90. probation and parole
19. 91. personal data
20. 93. in absentia trials
21. 94. ECRIS
22. 95. ECRIS
23. 96. Europol
24. 98. pre-trial
25. 105. Europol
26. 106. Europol
27. 107. Europol
28. 109. Europol
29. 111. Schengen remnants
30-37. 112-19 Schengen
38-44. 128-34 Schengen - SIS II

1. 25. mutual assistance convention (EIO would replace)
2. 32. mutual assistance protocol (EIO would replace)

nb - 6 Europol measures also CEPOL - number drops to 37

*16 January 2013*
Jean-Claude Piris—Written evidence

This written evidence is submitted on a personal basis by Jean-Claude Piris, the former Legal Counsel of the European Council and of the EU Council and Director General of the Legal Service of the EU Council (1988-2010), at the request of the Special Committee on the European Union of the House of Lords.

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-1 This written submission does not deal with all questions raised by the Select Committee. It does not either describe the EU measures concerned, their content and effect, all issues on which existing documentation is abundant and sometimes of an excellent quality.

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QUESTIONS 1 AND 13

-2 It seems that the Government has already announced its intention to decide on the block opt-out, and then to try and «opt-back-in» some of the measures in question. In accordance with Protocol 36, the decision to opt out is entirely at the discretion of the British Government, without any need of consent or even of consultation of the other EU member states or of the Commission.

-3 However, there are two difficulties:

- the first one is that, when deciding in a discretionary manner to opt out or not, the Government will not be allowed to preserve those EU instruments which it might find useful for British interests and security. It will have to decide either an opt-out on all 136 measures on police and criminal law adopted by the EU before the entry into force of the Lisbon Treaty («pre-Lisbon PCJ») or no opt-out at all;

- the second one is that the «opt-back-in» is not a decision which can be taken by the British authorities. The UK can only express a «wish» (article 10, paragraph 5, Protocol 36). The decision(s) will belong, according to the cases, either to the EU Council, deciding unanimously, or to the Commission, which will probably wish to ask for the views of the European Parliament and of the Council. These decisions might be taken on a case-by-case basis, meaning that the British wishes could receive different answers and/or at different times.

1 See Alicia Hinarejos, J.R.Spencer and Steve Peers, CELS Working Paper:«Opting out of EU Criminal law: What is actually involved?», University of Cambridge, September 2012, 80 pages. I would, however, disagree with the legal interpretation given in § 163, page 50, of this Paper of the provisions of Protocol 36. I do not think that Protocol 36 «impose(s) an obligation upon the Commission to permit the UK to join any non-Schengen-related pre-Lisbon policing and criminal law measures it wishes to participate in, unless there is an inextricable link with another measure which the UK does not wish to participate in». I think there will be no such legal obligation for the Commission: the decision will legally remain at its discretion, while taking into account the elements referred to in Protocol 36 («shall seek to...»).
As everybody agrees that some of the measures in question would be helpful and even in some cases crucial to preserve, if possible without any time gap, in order to help better protecting the British interests, a decision to opt out would therefore unavoidably be based on a gamble, ie betting that the Commission and the other EU member states would accept quickly, and more or less entirely, the wish-list of the UK.

Would such a bet be reasonable?

Protocol 36 provides that both the UK and the EU institutions «shall seek to re-establish the widest possible measure of participation of the UK in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence». Moreover, in principle, it will be in the interest of the other EU member states that the UK opts back in to some of the measures in question. If the UK wish-list were to be generous, the chances of an affirmative answer will therefore be theoretically better than if the list were to be very selective, but it would depend on the concrete measures listed. For example, the Council might be reluctant to accept that the «Schengen package» (not concerning the control at borders of course) be open for the United Kingdom.

At the end of the day, the fact will remain that the decision will have to be taken either by other EU member states or by the Commission. Such a decision will be highly political and will depend on the general political climate of relations between the UK and other EU countries at the time when the decision will be made. Nobody can now predict what this climate will be at that time. It might be influenced by a number of other issues not linked with the matter, such as difficulties in adopting the EU multi-annual budget, disputes about the first legislation on establishing a Banking Union, or differences of view about envisaged solutions to solve durably the Eurozone’s problems.

If the political climate is bad, other member states might react negatively to British requests to opt-back-in, in a manner which they may perceive as «pick-and-choose», ie aiming mainly or only at the SIS II system, the European police databases and the European Arrest Warrant.

Therefore, I think that the decision to opt out would unavoidably be a bet. The risk would be that the UK’s internal security might be a little bit less protected, either for a long period of time in the case of a (complete or partial) negative answer to one or several of the UK’s important wishes, or for a shorter period in the case of a delay in obtaining a green light from the Council or the Commission, at least on some of these wishes.

QUESTION 3

If the Government decided to exercise its right of opting out, this would be adding an important chapter to the list of issues on which the UK has positions different from those of the vast majority of the other EU countries. Moreover, this decision would also have a

403 While the decision of the UK to opt out must be notified before a precise date, ie on 1st June 2014 at the latest, there is no time limit, either for the UK’s notification of its wish-list to opt back in, or for the decisions of the Council and the Commission on the answers to be given to this list after the 1st December 2014. Also, both the wish-list and the answers given to it might be taken and notified, either in one single decision, or through a series of successive separate decisions. Given the procedure to be followed, a time gap between the opt-out and the opt-back-in (which aims at measures «which have ceased to apply» to the UK) would, in any case, be difficult to avoid.

481
potential impact on the internal security of those countries. I think that this will certainly have negative effects on the general political climate mentioned above. Moreover, it might have an accelerating effect on the speed of the eurozone on its way towards closer integration.

QUESTIONS 4 AND 12

-11 All pre-Lisbon PCJ measures were adopted with the positive vote of the British Minister in the EU Council. Therefore, these measures must have been considered, at least at the time of their adoption, as beneficial for the UK and its internal security.

-12 Among others, one of these measures which is important is the 2002 framework-decision on the European Arrest Warrant, the positive effects of which for the UK are undisputed. Other measures which are of a similar importance and which help preserving UK’s internal security are those which permit a better cooperation between the police services of the EU member states, including the so-called «Prüm system» which provide an access to centralised databases of finger-prints, DNA and vehicle registration, as well as the measures on mutual assistance and recognition and the police aspects of the future SIS II.

-13 Another important consequence of a possible opt-out would be that the UK’s representatives, experts and services would not be admitted anymore to participate in such agencies as Europol, Eurojust, Cepol (the European Police Academy, which has presently its seat in the UK) and to benefit from their databases, as well as those of the Customs Information System, the FADO system, ECRIS, etc...

-14 It is a matter of fact that these measures have proven to be helpful and efficient in fighting cross-border criminality and terrorism and in improving law enforcement. I personally think that it would be a loss for the UK not to be able to benefit from them anymore.

QUESTION 9

-15 If the Government decided not to exercise its right of opting out, the UK will have to check if all necessary domestic measures have been taken in order to respect the commitments it has taken in the past by approving some of the measures in question. In principle, the UK implements reasonably well its legal obligations; therefore, it should not be a great problem. In case of non or incorrect compliance, the UK might be subject to the enforcement powers conferred in the EU Treaties upon the Court of Justice of the EU.

-16 On the other hand, the same obligations and enforcement powers will be imposed on all other EU countries. Thus, I would expect that all pre-Lisbon PCJ measures will be better respected and implemented in the future, as compared with the past and present situation. As these measures are aimed at combating international criminality and terrorism, this should be a win-win effect for all.

404 However, it is probable that some of these measures will be amended before 1st December 2014. In the case where the UK would opt in the revised new texts at the time of their adoption, these measures will be outside the possible scope of the British opt out and the UK will continue to benefit from them.

405 About a third of the 136 measures in question do not require any national measure of implementation, given their aim of establishing a new European structure or procedure, or being of a practical or administrative nature.
Jean-Claude Piris—Written evidence

-17 This being said, I also think that some minor pre-Lisbon PCJ measures are either obsolete, not well legally drafted, or disregarded by a number of EU countries for different reasons. The Commission should urgently be tasked to review these texts and propose either their abrogation or their revision.

QUESTION 10

-18 The implementation of the 2002 European Arrest Warrant is relatively satisfactorily and brings positive effects for the countries involved. Undisputed figures\textsuperscript{406} show that the system is much quicker, simpler and cheaper than the previous systems of extradition between EU member states. It is my opinion that for the UK to leave this system would be costly and significantly detrimental to its interests, as the existing Council of Europe’s instrument is much less effective.

-19 This does not mean that some amendments should not be requested, as I think that the texts which have established the European Arrest Warrant could certainly be improved.

QUESTION 11

-20 If the Government decided to exercise its right of opting out, the British law enforcement authorities would loose access to the EU databases centralising data coming from the police services of other European countries, including to the future SIS II (the UK has and is still contributing financially to this important project). This decision would also cut these authorities from the exchange of information with these services, in particular through Europol, Eurojust and the Prüm system.

-21 I do not see any advantage to be expected for the efficiency of the fight against cross-border criminality and terrorism, neither for the UK, nor for the other EU member states.

11 December 2012

\textsuperscript{406} See the 2011 «Scott Baker Report», quoted in the CELS paper referred to above, at paragraph 97.
The Police Foundation—Written evidence

About the Police Foundation
The Police Foundation is the only independent charity focused entirely on developing people’s knowledge and understanding of policing and challenging the police service and the government to improve policing for the benefit of the public. The Police Foundation acts as a bridge between the public, the police and the government, while being owned by none of them. Founded in 1979 by the late Lord Harris of Greenwich, the Police Foundation has been highly successful in influencing policing policy and practice, through research, policy analysis, training and consultancy.

Introduction
1. Under Protocol 36 to the EU Treaties, as amended by the Lisbon Treaty, the UK is entitled to withdraw from approximately 130 EU policing and criminal justice measures. The Government has until 31 May 2014 to decide whether to continue to be bound by the measures, or whether to use its right to opt out. The right to opt out is exercised en bloc, i.e. all pre-Lisbon measures must be opted out of in one go. Application could then be made to opt back into specific measures.

2. The Home Secretary has announced that the government is currently minded to use its right to opt out of all the pre-Lisbon police and criminal justice measures and then negotiate with the European Commission and other member states to opt back into those individual measures which are judged to be in the national interest. At this stage it is not clear which measures the Home Office would plan to opt back in to, which it would like to opt out of completely, and the reasons for this approach. We can only therefore set out below a brief general response. We hope to be given additional opportunities to present our concerns in response to further consultations on this topic.

Participation in pre-Lisbon policing and criminal justice measures
3. The measures in question include those which have significantly benefitted cross-border policing, including the European Arrest Warrant (EAW), the European Supervision Order, the European Criminal Records Information System, and those laws establishing the EU’s judicial and policing agencies Eurojust and Europol. There is no doubt that there are flaws with some aspects of these measures and the EAW has, in particular, attracted criticism. However the measures represent a package of mutual legal assistance and mutual recognition which together greatly aid policing across Europe, enabling the British police to find and extradite serious criminals hiding in the UK as well as to demand the return of those criminals who have committed offences here and subsequently fled abroad. Indeed, the benefits of the current system are so clear that many of its previous critics are in firm agreement that, despite its problems, opting out could place the British public at serious risk of harm.

4. Much of modern crime is organised, international and cross-border and constitutes a serious threat to the UK, both in terms of financial cost and public safety. According to SOCA’s 2009/10 UK Threat Assessment:

‘…towns and cities all over the UK are affected by organised crime, with areas plagued by drug abuse and associated volume crime; by organised immigration crime, including the

exploitation of illegal immigrants in the sex trade and as cheap labour; by violent crime, particularly the availability and use of firearms; by fraud, including the corruption of public officials’.

5. ‘Local to Global’, the Government’s strategy for tackling the cross-border threat of organised crime, consists of three elements:
   • Stemming the opportunities for organised crime to take root;
   • Strengthening enforcement action against organised criminals, including a commitment to tackling criminal finances; and
   • Safeguarding communities and businesses by reducing their vulnerability to victimisation.

We believe that exercising the opt-out, and in particular opting out of measures that relate to cross-border policing, would seriously undermine all three of these aims. Victims, criminals, evidence, and data for investigation and for prevention are located across different European countries as well as more widely. A system of mutual assistance, recognition and support across the EU is therefore vital to ensure that the British police have access to the information and cooperation they need to fight organised crime in the UK efficiently and effectively.

6. In part because of the threat to the UK, Britain has been at the forefront of policing and crime cooperation in Europe, including the creation and part-funding of the ECRIS database and the hosting of the EU Police Training Centre at Bramshill. The Director of Europol is British, as is the former President of Eurojust. The standard of cross-border policing in Europe has improved because of the UK’s efforts and expertise, as well as through British funding. Indeed, ‘Local to Global’ states:

   ‘Internationally, we will seek to enhance cooperation at all levels. This includes the Justice and Home Affairs Committee on internal security that ensures operational cooperation on internal security within the European Union’.

7. The system that the UK has championed, supported and part-funded is a package based on diplomacy and reciprocity; it requires parity to function effectively. There is a real danger that by opting out the UK will be unable to make use of this package and, without the help it provides in identifying and extraditing serious criminals, there is a risk that the UK could potentially become what amounts to a safe haven for cross-border organised crime groups. We therefore have grave misgivings about plans to opt out of the valuable package of mutual assistance currently in place.

8. Our principle concerns arise in relation to the following policing and criminal justice measures:
   • The European Arrest Warrant
   • The European Supervision Order
   • The European Criminal Records Information System
   • Laws establishing the EU’s judicial and policing agencies Eurojust and Europol

The European Arrest Warrant

9. The EAW came into force on 1 January 2004 under the Extradition Act. Prior to the EAW, the UK police had to use a range of complicated bilateral agreements contained in
the 1957 European Convention on Extradition. Under this system it would take months or even years to extradite a foreign suspect. The EAW enables the police to cut across bilateral agreements resulting in a system which is simpler, more efficient, more effective and significantly cheaper. Under the EAW it takes on average approximately 47 days to extradite a foreign suspect. As Commander Allan Gibson, representing the Association of Chief Police Officers (ACPO), noted in March 2011 in evidence to the parliamentary Joint Committee on Human Rights:

‘When you need to have someone arrested abroad, it is a simpler, faster and more certain process of getting a person before your courts. The police service benefits from that. It is much easier than what went before.’

10. When introducing the Extradition Bill the then Home Office Minister Bob Ainsworth stated:

‘British victims of crime, where the suspect has fled overseas, currently have to wait up to a year for that person to be extradited back to the UK to face British justice – causing untold upset and frustration to victims and their families. And it can take anything up to six years to extradite someone back to an EU member state. The Extradition Bill will deliver swifter justice by removing the unnecessary delays and duplication that afflict our archaic and costly extradition laws – contested extradition cases cost the British taxpayer an average of £125,000.’

Since 2002, when Mr Ainsworth made this statement, movement across the EU has greatly increased, indicating that a return to the former system could result in far greater cost to the taxpayer. The UK itself has a high number of foreign criminals within its borders and the EAW is used regularly to extradite them. In 2011, for example, 93% of the individuals surrendered by the UK under the EAW were foreign fugitives hiding in UK. Without an efficient and effective system of extradition, Britain could potentially become a safe haven for these people.

11. There is no doubt that there are problems with the EAW, and its supporters are not blind to these, backing the measure in spite of its flaws. The principal difficulty is that the warrant does not include a test of proportionality. This means that countries can make use of British police resources to track down criminals who have committed even small crimes. Poland, in particular, has attracted criticism for using the EAW in a disproportionate manner and critics have pointed to the resources the police can be obliged to put into finding and extraditing low level criminals. However, as identified by the Metropolitan Police, opting out of the EAW would be a false economy as every extradition (whether proportionate or not) would cost significantly more under the 1957 system – the Metropolitan Police estimates up to ten times the current amount. The amount of time that everyone involved in each extradition would spend on the case - including the police and the Crown Prosecution Service - would increase, resulting in a slower, more cumbersome and more expensive system. As a study by the Cambridge Centre for European Legal Studies identifies:

409 Commander Allan Gibson, Metropolitan Police in interview with the Police Foundation, 21 November 2012
‘The EAW was introduced for reasons of practical necessity: the existing system of extradition had become unacceptably cumbersome, expensive and uncertain for modern conditions.’

In addition, steps have been taken to deal with the problem of disproportionate use. In May 2012 the European Commission stated:

‘Rather than re-opening the successful EAW Framework Decision, the Commission is committed to improving the EAW system through other measures such as procedural rights legislation and guidelines to practitioners. To this end, in relation to minor offences the Commission has stressed that a proportionality test should be applied when an EAW is issued and Member States therefore have been urged by the Commission to take positive steps to ensure that practitioners use the recently-amended EAW handbook as the guideline for the manner in which a proportionality test should be applied.’ Efforts are also being made to provide training for European police, with police exchanges taking place between the UK and other European countries. In oral evidence to the Joint Committee on Human Rights, Detective Superintendent Murray Duffin, representing the Metropolitan Police Service, stated:

‘An awful lot of work has been carried out with the Home Office and the CPS and with ourselves, with various meetings and bilateral arrangements with the Poles to try to introduce some sort of proportionality test. Anecdotally, I would say that those types of requests are reducing.’

12. Despite its flaws, the case for the EAW seems clear. The EAW is viewed as time efficient, effective and simple and the Ministry of Justice has stated that the EAW plays a vital role in the UK’s fight against international and transnational criminality, enabling the UK to extradite over 1,000 fugitives to other EU member states between 2004 and 2009. A number of senior figures in policing and criminal justice have come out in support of the measure, recognising that the loss of the EAW would be a serious blow to European police co-operation and that withdrawing from the EAW would have serious implications for public safety. The recent Scott Baker Review of Britain’s extradition arrangements, requested by the Home Office, found that although the EAW had its flaws (which the review recognised the EU was attempting to remedy):

‘We have concluded that the European arrest warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily.’

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European Supervision Order (ESO)

13. The ESO establishes a system where a person can be released on bail, back to their own place of residence, while awaiting criminal proceedings in another Member State. It was set up following problems identified where suspects were waiting for their trial to begin for a considerable time in a foreign country, spending sometimes months or years pre-trial in prison abroad. The ESO is due to come into force in December 2012 and is one of the measures affected by the opt-out. Britain would therefore no longer be a party to this mutual agreement if the right to opt out under Protocol 36 were exercised.

14. It is widely recognised, even by those who support opting out, that the ESO could solve some of the identified problems in the EAW by allowing a British citizen to be supervised in Britain until a trial is ready to begin abroad. A paper for Open Europe, which supports the opt-out states:

‘The possibility of domestically-supervised bail procedures could help address some of the flaws in the practical operation of the EAW.’

The European Criminal Records Information System (ECRIS)

15. ECRIS is a relatively recent system, having only become operational in April 2012. The UK is currently trialling a pilot of the system, which enables member states to access information from the criminal records database of each individual state.

16. Prior to this system being in place a previous conviction obtained in another country would not be visible to the UK police. As a result, the criminal records of people who had lived in other European countries could not be checked effectively. Thus, for example, someone with a criminal record could move to the UK and take up a position at a school without previous offences showing up on a Criminal Records Bureau check. Furthermore, if a criminal went on to commit an offence in the UK, the UK courts (as they had no access to prior conviction data) treated the person as a first time, rather than repeat, offender. With an increasingly mobile population, this created a significant gap in the criminal records checking system. As Sir Hugh Orde, President of ACPO, has stated:

‘The ability to obtain and coordinate criminal information from across Europe is vital in dealing with modern criminality which increasingly crosses borders and jurisdictions.’

17. The UK was at the forefront of the creation of ECRIS and its supporting systems. The government invested in ECRIS itself and in the UK Central Authority for the Exchange of Criminal Records, as well as part funding a system in ACRO (the criminal records section of ACPO) to improve the electronic exchange of convictions across the EU. The UK has also, with funding assistance from the EU, begun an EU fingerprint exchange system. The technology Britain helped to establish is now in place; however the UK would lose access to the system if it chose to opt out.

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Eurojust and Europol
18. Eurojust is the EU’s judicial cooperation body. Its role is to coordinate national investigations and prosecutions. The number of cases that Eurojust has dealt with has been increasing steadily, from 202 cases referred in 2002 to 1,441 cases in 2011. The UK is a major participant in Eurojust, with the highest number of cases (205) referred in 2009-2010. In a report in 2004, the House of Lords EU Select Committee referred to Eurojust as meeting a ‘real and increasing need for assistance in facilitating the investigation and prosecution of complex cross-border criminal cases’.

19. Europol is the EU’s law enforcement agency. Its role is to help prevent and combat international crime and it works with EU members to improve cooperation and tackle cross-border cases of human trafficking, smuggling and tax fraud. Britain is plays a leading role in the work of Europol. The agency is currently run by Rob Wainwright, who is British, and the UK Liaison Bureau has the largest proportion of officers of any country represented at Europol headquarters.

Opting in again
20. As stated above, the Home Secretary has suggested that the UK could opt out of all pre-Lisbon measures and then negotiate with the Commission and member states to opt back into selected individual measures. The Home Office has not yet set out which measures it would like to opt out of completely, and which it would want to opt back in to. In theory opting in again could be possible, as long as the European Commission agrees. However, there are risks involved with this approach.

21. There is firstly the danger that the Commission may refuse permission to opt in (although this is unlikely). As the process is one of diplomacy, there is also the possibility that the Commission might attach conditions to the opt-in, such as requiring the UK to join packages of measures. Further, other member states might not be willing to accept any amendments that the UK requests, or might make those amendments conditional upon the acceptance of other Treaty amendments (this could include economic measures). As the Centre for European Reform points out;

‘UK officials imagine that Britain’s size and importance mean that it can automatically opt back in to around 50 EU anti-crime measures, including the arrest warrant, once the block opt-out is triggered…this is wrongheaded. The European Commission is likely to attach tough conditions to an attempted partial re-entry, and Britain’s negotiating stock in Brussels is low due to its perceived unhelpfulness during the Eurozone crisis. Countries in the EU’s Schengen area of passport-free travel have previously blocked Britain from joining Frontex, the EU’s border agency, and the so-called VIS, a common database of visa records. Why should they now acquiesce to British cherry-picking in policing and justice?’

22. Given the importance of the EU measures outlined above, it seems almost foolhardy to risk being excluded. Therefore, if the option to opt-out and then opt back into certain measures were to be taken up, diplomatic assurances would need to be sought, prior to opting out, that an opt-in to certain measures would be acceptable.

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The European Investigation Order (EIO)

23. This is a post-Lisbon measure and thus will not be caught by the opt-out. As the UK has already opted into this order, Britain will be bound to it even if it chooses to opt out of other measures. The EIO was designed to fit within the broader package of policing and crime measures and gives the police power to order police in other member states to gather and share evidence with them. It is a mutual recognition measure and will be significantly less effective without the EAW, the ESO, ECRIS, Europol and Eurojust.

Conclusion

24. We recognise there are problems with the current package of mutual assistance and mutual recognition measures, and in particular with the EAW. However we believe that, with proper guidance and training, issues such as disproportionality in the use of the EAW could be addressed. Indeed, there is anecdotal evidence that improvement in this area has already begun. In our view the current package of measures is an important component of the work of the police in tackling cross-border crime and we would therefore strongly favour the route of remaining within the current system and working to remedy any current problems. If the Government were instead to decide to opt out, we would strongly advise that negotiations be undertaken to obtain assurances in advance that the UK will be able to opt back in to those measures which are essential, including those that we have identified above.

14 December 2012
At the outset, it is important to point out that the ACPO position regarding the ‘2014 Decision’ has been set out in a detailed draft paper entitled ‘ACPO Cabinet – Assessing the Impact of a UK Opt-out of EU Third Pillar Criminal Law and Police Measures under the Lisbon Treaty.’ (Dated 18th October).

Whilst we do not see the content of the ACPO Cabinet paper changing in detail from its current form, we remain conscious that it is a draft document and therefore have drawn out the relevant sections to include below rather than attach the paper in its totality.

Having considered this paper in detail, we fully concur with the findings and views expressed by Commander Gibson, MPS in terms of the impact envisaged on policing nationally. It is clear from the paper that key areas of Service Improvement Department business, i.e. The European Arrest Warrant (EAW), Europol, Eurojust, ECRIS (European Criminal Record Information System), Schengen (SISII), are considered as ‘vital’ to policing. (See point 3.2 below). This paper addresses most, if not all the questions posed in the House of Lords document.

3.2 Prioritising the TPMs

3.2.1 Each of the 109 TPMs that relate to law enforcement have been considered in depth and the assessment of relevance to UK policing for each of them is shown at Appendix B.

3.2.2 It is recommended that this assessment be used as a shorthand reference document by ACPO. From a law enforcement perspective, the assessment has categorised the 109 into five different categories as follows:

- TPMs that it is vital that we opt back into – there are 16 of these plus a further 23 that relate to the Schengen Information System (SIS)
- TPMs that we should opt back into - there are 16 of these
- TPMs that we need not opt back into but if we did they would have no practical effect on UK LE - there are 38 of these
- TPMs that are not in the interest of UK law enforcement to opt back into – there are 7 of these
- TPMs that have been replaced by post Lisbon measures or are likely to be before December 2014 - there are 9 of these.

3.2.3 The 16 TPMs identified as vital by the assessment are:

- 1996/610/JHA (Terrorism and related matters)
- 2002/475/JHA (Terrorism and related matters)
- 2002/996/JHA (Terrorism and related matters)
- 2005/671/JHA (Terrorism and related matters)
- 2008/615/JHA (Terrorism and related matters)
- 2008/616/JHA (Terrorism and related matters)
- 2008/919/JHA (Terrorism and related matters)
- 2008/675/JHA (Exchange of criminal records)
- 2009/315/JHA (Exchange of criminal records)
3.2.4 The addition 23 TPMs that all relate to SIS that we consider vital as well. These are:

- 2000/586/JHA
- 2003/725/JHA
- 2004/849/EC
- 2004/919/EC
- 2005/211/JHA
- 2006/228/JHA
- 2006/229/JHA
- 2006/631/JHA
- 2007/171/EC
- 2007/533/JHA
- 2008/149/JHA
- 2008/173/EC
- 2008/328/EC
- 2008/334/JHA
- 2009/724/JHA
- Convention implementing the Schengen Agreement of 1985
- SCH/Com-ex (96) declaration 6 - Declaration on Extradition and MLA
- SCH/Com-ex (98) 26 def
- SCH/Com-ex (98) 52
- SCH/Com-ex (99) 11
- SCH/Com-ex (99) 6
- SCH/Com-ex (99) 7
- SCH/Com-ex (99) 8.

The Third Pillar Measures (TPM) fall into three broad categories. Firstly, what can mostly appropriately be described as ‘best practice’ leaving the implementation of the practice to individual states. Secondly, TPMs, which create an obligation on each state to enact domestic laws to create certain offences and penalty types. Thirdly, and most importantly, are the TPMs which confer new powers on states that may only be fully exercisable as long as the state is party to structure and agreements forming part of the measure. e.g. EAWs, mutual assistance measures or Europol. It is this last group that is the most vital as if the UK leaves it we would lose the operational effects and legal powers that go with it.

Ref Question 6, 10 of the House of Lords document re EAWs.

This is dealt with in detail at Point 4.2 of the ACPO paper as set out below.

4.2 European Arrest Warrant
4.2.1 The assessment process has confirmed that EAW is the most important of all the TPMs. Unfortunately it is also the one that attracts the most opprobrium.

4.2.2 Most of the stakeholders consulted believe that opting out of this and relying on alternative arrangements would result in fewer extraditions, longer delays, higher costs, more offenders evading justice and increased risk to public safety. That said, extradition did exist before 2004 and so it could operate without it – as it does with non-EU states.

4.2.3 The EAW has been in operation for eight years and has now become a mainstream tool. In the last year prior to the introduction of the EAW (2003), the UK received a total of 114 extradition requests worldwide and surrendered 55 individuals; in the same year the UK made 87 extradition requests to other countries across the globe and 64 people were returned. In 2010/11 the UK received 5,382 EAW requests and made 221 EAW requests to other EU states. The UK surrendered 1,149 individuals (approximately 7% of which were UK nationals, the other 93% being fugitives to the UK). The UK had 93 people surrendered to it.

4.2.4 These trends in extradition reflect the increasing international patterns of crime and offending. Open borders across Europe, free movement of EU citizens, low cost air travel, cheap telecommunications, the internet and the expansion of criminal networks across national boundaries are all contributory factors to the growth in extradition requests. These are irreversible changes which need to be matched by increasing flexibility on the part of European law enforcement and criminal justice agencies.

4.2.5 Further evidence of these changes is to be found in data concerning arrests. Recent data gathered by the MPS in the first quarter of 2012 showed that of 61,939 people arrested in London, 8,089 were nationals from EU countries (13%) and 9,358 were foreign nationals from outside the EU (15%). The presence of fugitives from justice fleeing to the UK is a significant public safety issue. In 2011/12 the MPS received 50 EAWs for homicide, 20 for rape, and 90 for robbery. Each of these cases represents a person who is wanted for a serious crime who fled to the UK. There is strong evidence to show that foreign criminals who come to UK continue to offend when in the UK. There is a real risk that opting out of the EAW and relying on less effective extradition arrangements could have the effect of turning the UK into a ‘safe haven’ for Europe’s criminals.

4.2.6 The EAW is an efficient system, built upon mutual recognition of criminal justice systems between member states and an obligation to comply with a properly constructed warrant. Barriers which previously existed have been removed. The nationality of the person sought can no longer be a barrier to affecting an extradition request. Under the previous arrangements many European states, such as Germany, France and Poland, did not allow their nationals to be extradited to stand trial and required them to be tried in their home state. On this point, it should be noted that some non-EU states still have this rule.

4.2.7 Prior to the introduction of the EAW, extradition between European states where it did occur could, and often would, take many months in uncontested cases and many years in contested cases. EAW data from the Commission to the European Parliament show that across the EU it takes an average of 17 days to surrender a wanted person in cases with consent and 48 days in non-consensual cases.
Pre-EAW Example

On 4 November 1995 Rachid Ramda, an Algerian national, was arrested in the UK in connection with a terrorist attack on the Paris transport system. France sought extradition from the UK. The legal process was protracted and it was not until 2005 that his extradition was finally completed. Throughout this time he was detained in British prisons. He was convicted and sentenced in March 2006 to ten years imprisonment.

Post-EAW Example

Hussein Osman, a naturalised British citizen born in Ethiopia, was identified as a suspect for the failed bomb attack at Shepherd Bush Tube Station on 21 July 2005. The UK sought his extradition under the relatively new EAW arrangements. His extradition was completed in September 2005. On 9 July 2007 Hussain Osman was found guilty at Woolwich Crown Court of conspiracy to murder and sentenced to a minimum of 40 years imprisonment.

Part 2 Example

Contrast these with Abu Hamza. Fourteen years after his arrest on behalf of the USA (under legal conditions largely identical to the 1957 Treaty) he was finally extradited to the USA to face terrorism charges there.

4.2.8 These are not isolated examples – similar ones are legion. See Appendix C for further examples of non-terrorism cases.

4.2.9 The EAW is not a perfect system and ACPO’s position has been to support proposals for change in relation to a proportionality clause to prevent member states seeking the extradition of individuals in relatively trivial cases. On the question of a British nationals being detained for long periods in European prisons (e.g. the Andrew Symeou case, detained in Greece for 2 years in connection with a manslaughter allegation and ultimately acquitted), ACPO has supported proposals to affect change such as the introduction of the European Supervision Order, which itself is one of the TPMs covered by the 2014 decision. This TPM requires member states to create a mechanism by which their criminal justice systems can supervise each other’s suspects in their home countries whilst released on bail. Member states are required to implement this TPM by 1st December 2012. The UK is not on course to do so. ACPO’s position has been that it would like to see improvements to the EAW system but these can be best achieved by remaining part of it and lobbying for change. Overall the benefits of the EAW to the UK greatly exceed the problems that are experienced in a small number of cases.

4.2.10 The EAW is a cost-efficient system for a number of reasons. Firstly, it is a standardised system that is relatively simple and easy to operate. It has removed the previous complexity that arose from having to understand different bilateral arrangements. This has led to EAW work becoming mainstream, capable of being dealt with by non-specialist police officers and lawyers. Processes are quicker and move through the courts with less difficulty. This reduces the cost of having to detain suspects for extended periods in UK prisons at British taxpayers expense. In contrast, extradition to Part II countries under the Extradition Act
2003 continues to be complex, expensive and slow as was evident in the recent Abu Hamza extradition to the United States.

4.2.11 Added to all of this is the cost to the public purse. If we relied upon a 1957-type mechanism (see paragraph 4.2.15 post) then we would be committing ourselves to footing the legal bill for extradition processes that go on for years and cost hundreds of thousands of pounds. The public and the judiciary are frustrated that the extradition of terrorists is often delayed for years. A return to the 1957 process could make this long drawn out process the norm. That may not have been such a problem twenty or thirty years ago when criminals rarely crossed borders. Nowadays it is routine.

4.2.12 It is not just foreign criminals who would sit for years in UK jails. UK court cases would stall for many years as we waited to get our fugitives back, robbing their victims of the chance for justice to be served. To expect witnesses to wait many years before a suspect could be returned to the UK to face trial would be a gigantic step backwards.

4.2.13 Lastly, but by no means least there is the benefit to public safety in the UK. Where there are foreign criminals in the UK who are wanted abroad, we want to extradite them as soon as possible; a burglar in France is a burglar in England: the EAW allows us to do this. Without it, we would not only have them on our soil for longer but the UK is likely to be seen as a safe haven for EU criminals, much as Spain used to be for British fugitives.

4.2.14 The view therefore of LE is simple. The EAW works very effectively and increases the safety of the UK public. It is for this reason that UK LE strongly supports the EAW.

**Alternatives to the EAW?**

4.2.15 Prior to the implementation of the EAW in 2004, extradition across Europe was built upon the 1957 Council of Europe Extradition Convention and bilaterally negotiated arrangements between individual states. Following the Framework Decision that gave birth to the EAW (FD 2002//584/JHA) it was implemented in UK law through Part I of the Extradition Act 2003. That act would remain on the statute books. Some commentators have argued the UK could continue to deal with extradition requests from EU states (‘Part I countries’) on the same basis as before if the UK opted out.

4.2.16 The assessment team have concluded that it is not certain that the 1957 Convention and the Extradition Act 2003 can be relied upon to give a workable system. They observe that Article 31 of the EAW measure (2002//584/JHA) states the following:

> “Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States [which includes the Extradition Treaty of 1957].”

4.2.17 The 1957 Treaty ultimately brought into force the Extradition Act 1989 – an act that was repealed by the 2003 Act. The reasons for these two Acts were that international treaties have no force in domestic law unless they are enacted domestically. For example the Human Rights Act came into force in 1998. It brought into UK law the European Convention on Human Rights that was signed by the UK in 1950. However until 2000
(when the 1998 Act came into being) it did not have legal force in the UK. In the same way, although the 1957 Treaty may still exist as a treaty, its presence in UK law was only brought in by the Extradition Act 1989. As soon as the Extradition Act 2003 repealed the 1989 Act, the 1957 Treaty ceased to have a presence in UK domestic law. It may well still exist as an entity, but may require a new act of Parliament to bring it back into domestic law.

4.2.18 Whether any system after a UK opt out of the EAW could work would also depend on how the EAW was incorporated into domestic law in the member states. Unlike the UK, some states explicitly refer to the EAW Framework Decision (2002/584/JHA) in their domestic legislation. In consequence, it is likely that those countries would not be able to send EAWs to the UK or execute UK EAWs. Solutions to this could be found, for example by treating them as ‘Part II’ countries under the Extradition Act 2003 like non-EAW countries. However, such a course of action is likely to have unintended consequences, i.e. those countries no longer being willing to extradite their nationals to stand trial in the UK (as was the case before the EAW).

4.2.19 The conclusion of the assessment team is that extradition to and from EU states could continue to work should the UK opt out and not back into the EAW TPM. However, it is judged that from a law enforcement perspective and public safety perspective this would create a fallback system that was substantially less effective and efficient than the current EAW system.

4.2.20 Finally the entire legal basis behind such a fallback position is at best questionable; any alternative system would be more complex, less effective, more expensive, slower and may require extensive treaty negotiations with every other EU state.

Correcting Erroneous Understandings

4.2.21 One of the arguments being put forward for the UK opting out of the EAW is that to do so would mean that in future EU states that wanted the UK to extradite a suspect to them would have to produce a prima facie case to our courts. This is simply untrue.

4.2.22 This requirement was abolished by the 1957 Council of Europe Convention on Extradition. Article 12 of the 1957 Treaty requires that when extradition is sought, the requesting state only provides:

“A statement of the offences for which extradition is requested, the time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible”

4.2.23 Any remnants of the requirement for a prima facie case to be shown were removed by section 9(4) of the Extradition Act 1989. Opting out of the EAW would therefore have no effect in this regard unless the UK also withdrew from the 1957 Convention.

4.2.24 Misunderstanding about what having to present a prima facie case means also exists. A prima facie request (i.e. those provided by Part II (non-EAW) evidence countries) does not require the case to be proven in a court in the UK. The term means that the requesting state provides evidence, which if believed, may lead to a conviction. It does not in itself test
the evidence. Such a condition has never existed because if it did, every request would be a trial in the UK.

We would wish to add the following comment to the above from a Northern Ireland perspective.

Since 2004, the Police Service of Northern Ireland (PSNI) has received around 265 European Arrest Warrant (EAWs) for action in Northern Ireland and transmitted around 50 EAW’s for action outside the UK Jurisdiction, around 30 of which have been transmitted to the Republic of Ireland.

In general terms, the EAW process has proven to be an effective mechanism for ensuring the administration of justice across EU jurisdiction. For PSNI, there are considerable cost implications in terms of arrests, case management at court and the transfer of subjects to London following an extradition ruling for hand over to the requesting county. That said any similar action required outside the current EAW arrangements to secure extradition would attract comparative costs.

Should the Government opt out of EAW arrangements then the UK would move from the status of a ‘Category 1’ country to become a ‘Category 2’ country and all requests to the UK will become ‘Part 2’ requests.

In practical terms, we envisage that for police services it will mean that extradition process time will increase as each case will be bound by existing treaty requirements as country to country requests and would lose the streamline effect of the European Framework - EAW process. Under any new arrangements we are assuming that the Home Office would remain as the lead agency on ‘Part 2’ requests whereas SOCA is the current lead on ‘Part 1’ EAW requests. We envisage the Home Office would pass case papers seeking the extradition of a subject from Northern Ireland to the Northern Ireland Courts & Tribunal Service (NICTS). Following review of the papers, an appropriate judge in Northern Ireland would decide if a warrant of arrest should be issued. This warrant would be passed to PSNI for subsequent action. During the extradition process the requested person would have an opportunity to challenge all evidence against them, so in theory, foreign officers/officials could be called to Belfast to give evidence in the hearing process, this may well prove to be an additional burden to PSNI to manage witnesses in such a process.

Requests out seeking extradition will be governed by existing treaty legislation on a country by country basis, as we understand it there are long existing treaties with all European countries. Requests for extradition from the UK post the Opt out would place us in the same position as that currently operated by Norway or Switzerland.

The process out will mean that evidence will be taken by way of deposition. A file of evidence will be forwarded with an extradition request to the Home Office and if the request is acceded to the Secretary of State will make a country to country request for extradition as permitted under existing treaty arrangements between the UK and the requested country.

As evidence may be challenged under this type of extradition process, it is possible that PSNI officers could be called to the requested country to give evidence in the extradition process; this would be an additional burden of cost above the current process.
Where circumstances dictate, the EAW process currently operated in Northern Ireland allows for the streamline issue of an EAW within a short period in order to have a person returned to this jurisdiction to stand trial or serve a sentence. There are excellent examples of this in practice between the UK and the Republic of Ireland, for example to secure the arrest of a person unlawfully at large who is considered to pose a risk of serious harm to the public or in child protection cases. The recent return of a male teacher from France following the alleged abduction of a 15 year old girl in England is a further example of the effective operation of the EAW process. Under ‘Category 2’ arrangements, I fear the flexibility to respond quickly to emerging circumstances would be lost by the UK.

We agree with the views of the Home Secretary that the current EAW process is in need of some reform. The disproportionate use of the EAW for trivial offences by some Member States is an issue, however in our experience the scale of this particular problem has reduced in recent years with the vast majority of warrants being received relating to more serious criminality.

In conclusion, extradition could continue to work between EU states in the absence of the EAW arrangements should an opt-out occur. In addition to what has been stated above, ACPO raise a further important issue at point 4.2.17 above, regarding the repeal of the Extradition Act 1989 and possible requirement a new act of parliament should an opt out of the EAW process occur.

The PSNI view is keeping with that of ACPO, that such an arrangement would create a system that was substantially less effective and efficient than the current EAW system and would not best serve public protection arrangements in the UK.

Re Question 16 of House of Lords document re implications for the Republic of Ireland

The PSNI is unique in a UK context as it is the only UK police service bordering another EU member state. On that basis alone, one must fully consider the potential impact of an opt out on operational policing practices and mutual cooperation developed over years with the Republic of Ireland, in particular EAWs, Mutual Assistance and counter-terrorism arrangements. Given our shared history, and the persistence of terrorist activity on both sides of the border, TPMs relating to ‘terrorism and related matters’ are considered vital and particularly relevant to Northern Ireland. See ‘Counter-Terrorism’ Section below.

We understand that at a recent cross-border meeting of senior police and government colleagues from both jurisdictions, there was concern raised by colleagues from the Republic of Ireland regarding the proposed opt-out and the potential impact on UK / ROI cooperation arrangements.

EU Exchange of Criminal Records

At point 4.7 of the ACPO paper below – the benefits are very clearly outlined. This is a powerful public protection tool and without it, PSNI would be relying on formal Mutual Legal Assistance arrangements to obtain similar information. Outside the Metropolitan Police, PSNI are one of the highest users of this Service, averaging around 700 requests per year in the last three years.
In financial terms there has been considerable investment by government in developing the ECRIS application.

4.7 The Exchange of Criminal Records

4.7.1 Two TPMs deal with the exchange and use of criminal records within criminal justice systems of member states – 2008/675/JHA and

4.7.2 2009/315/JHA. These measures seek to ensure that a conviction in one state is given the same weight in all. So for instance if a person from Poland is convicted of burglary in the UK and it is discovered that he has 12 convictions across the EU for burglary, the UK courts must treat these 12 convictions as they would for UK matters when it comes to bad character and sentencing.

4.7.3 In addition, they provide a mechanism by which these convictions can be quickly obtained. Since this came into force in the UK as a result of the Coroners and Justice Act 2009, progress has been swift. At the inception, the International Assistance Unit (IAU) of the MPS conducted three pilots into the effectiveness of this new measure.

4.7.4 The result of these pilots have been widely circulated in both the UK and the EU and generally show that in London, around 35% of foreign nationals have convictions abroad and around 8% are wanted in their home countries. These wanted suspects are not on EAWs simply because the state that wants them did not know that they were in England. It is solely by confirming their identification, through a criminal records request, that their offending history is established. It therefore allows the removal of dangerous criminals from the UK who were otherwise free to remain at large.

4.7.5 This has huge ramifications for policing in the UK in terms of bail, charging decisions, public safety, extradition, the trial, sentencing and deportation. The importance cannot be overstated. The MPS have championed this process for over two years now and the ACPO Criminal Records Office (ACRO) has made great progress.

4.7.6 Two years ago when these measures came into force, the results took around a week to obtain. Although not ideal this was a vast improvement over the many, many months it used to take. However, with more and more countries now coming on-line with this system, the results – while not yet instant – can certainly be obtained from some countries within a few hours. Easily quick enough to greatly assist while the suspect is under arrest for other matters.

4.7.7 Under the Framework Decision, member states that convict non-nationals must send information of the conviction to the home member state of the convicted person. This process is known as ‘notification’. All notified convictions of UK nationals are recorded on the Police National Computer (PNC).

4.7.8 In addition, member states must, upon request from another member state, provide up-to-date information on the convictions of one of its nationals. This process is known as ‘request’ and it is the means by which the UK obtains antecedent information about foreign
nationals being investigated or prosecuted on these shores. Any offences that present a serious risk to the UK public will be recorded on the PNC.

4.7.9 The exchange of criminal antecedent information is a critical part of ensuring justice is done and that the public are protected from harmful people. Prior to this TPM, EU nationals were treated as if they were of good character by our courts absent information to the contrary. Such information is used in determining whether to grant court bail, for determining mode of trial, for bad character evidence during trial and for sentencing. Exchanging information in this way also stops criminals moving from one jurisdiction to another simply to prevent their pasts catching up with them. The information is also made available to multi-agency public protection panels, charged with the responsibility of managing the risks to communities presented by sexual and dangerous offenders. The information is also used for child protection, firearms licensing and employment vetting. Lastly, the information is made available to the UK Border Agency to facilitate decision making as to whether a person should remain in the UK or be allowed to re-enter.

4.7.10 Given the very clear benefits to the UK, the assessment team could identify no reasons why it would be in the interests of the UK to opt out of this TPM and in fact it was deemed a vital measure to opt back into given the huge benefit to public protection.

4.7.11 Some case studies of the benefits of being part of the measure are given below:

**Romanian predatory rapist convicted using foreign convictions as bad character evidence**

A Romanian national ‘A’, was arrested in the UK on suspicion of raping a prostitute and a vulnerable female adult in London. A request for conviction data identified that he had a previous conviction for rape of a vulnerable adult in Romania.

Application to use the previous conviction as bad character evidence was made by the prosecuting counsel and was granted by the judge. ‘A’ was convicted of 4 counts of rape, 1 count of false imprisonment, 2 counts of assault by penetration and 1 count of actual bodily harm. An indeterminate prison sentence was imposed with a recommendation that he serve at least 11 years.

The prosecuting counsel was firmly of the view that ‘A’ would have been acquitted but for bad character evidence given the extreme vulnerability of the victims as witnesses.

**The Jasionis Brothers**

In 2010, two brothers were circulated on PNC as being wasted for a gang rape. They were eventually located and arrested. As part of the case, their fingerprints and DNA were sent to Lithuania so that their identities could be checked under the provisions of the relevant TPM. Prior to the trial, Lithuania confirmed that brother one had a conviction for murder. Brother two was wanted in Lithuania for another rape but not on an EAW as they did not know that he was in the UK. As a result of this, an urgent EAW was generated. The previous conviction for murder (due to the MO) was instrumental in convicting brother one of the gang rape. Brother two was acquitted but immediately arrested on the EAW. He was...
swiftly extradited to Lithuania (within a matter of weeks) and has since been convicted and sentenced to rape in Lithuania, thus removing a dangerous offender from the UK. Although it was the EAW that removed him, it was another TPM that allowed the identification to take place in the first instance.

**UKBA deport EU nationals with serious offending history**

Since April 2010 the UK Central Authority for the Exchange of Criminal Records (UKCA-ECR) has been sharing serious foreign conviction information with UKBA of EU nationals subject to criminal proceedings in the UK for minor offences. The UKBA are deporting EU nationals who are identified as posing the highest risk to the UK and putting in place measures to refuse them re-entry.

**UK national ViSOR subjects identified following conviction information exchange**

Since 2006 the UKCA-ECR has received in excess of 500 notifications of UK nationals convicted in other EU states of sexual offences, many of which fulfil the requirements of sex offender registration under the Sexual Offences Act 2003. These persons are now being managed within the sex offender management system to protect the British public.

**Counter-Terrorism**

This remains a vital area of business with particular resonance for the Police Service of Northern Ireland. Whilst terrorism is a global issue, there remains a severe threat posed by republican dissident groups in Northern Ireland. This was recently highlighted by the murder of David Black on his way to work at Maghaberry Prison and numerous attacks on security forces.

Point 4.8 below outlines the ACPO position on the subject of Counter-terrorism which is supported by PSNI colleagues.

### 4.8 Counter-Terrorism


4.8.2 2008/615/JHA and 2008/616/JHA are known as the Prüm decisions and specifically deal with the fast track exchange of DNA, fingerprint and vehicle data with a view to combating terrorism and serious organised crime. It sits side by side with SIS.

4.8.3 The rest of these can be handled as one issue. Despite the best intentions of every western government, the abatement of European terrorism has unfortunately coincided with the rise of Islamist terrorism.

This is not likely to disappear any time soon and with countries in the Middle East and Africa suffering unrest, the threat continues to be very real and changing in the methods, bases of operations and entities involved,
Police Service of Northern Ireland—Written evidence

4.8.4 Any failure by one state to co-operate fully with the EU and the rest of the world could hinder the joint response to such investigations. Measures that foster greater co-operation between EU states is vital – especially given the juxtaposition of some EU states (Turkey for instance) with countries of particular concern.

4.8.5 For these (brief) reasons, it is the view of LE that the seven TPMs that seek to foster greater co-operation between member states on CT matters must be maintained.

Joint Investigation Teams

Although not used extensively, PSNI has, and continues to utilise these legal arrangements to good affect in order to enhance cross border investigation of serious and organised crime. Point 4.9 of the ACPO paper addresses this issue and is in keeping with the PSNI position regarding the vital nature of this cooperation.

4.9 Joint Investigation Teams (JIT)

4.9.1 JITs are covered by Council Decision 2002/465/JHA. Historically these have not been extensively used by UK law enforcement. The reason for this seems to be nothing more than a lack of knowledge around their use. This is changing though as more and more police units discover the benefits of them.

4.9.2 JITs are legal agreements between two or more states whereby a cross border crime is investigated. They are designed to speed up the investigation and reduce bureaucracy and they are very successful at doing this.

4.9.3 What the JIT does is set up an agreement between the states whereby each country investigates the crime in their own country by using their own domestic powers without having to resort to letters of request. For example, consider a murder investigation JIT between England, Germany and France. If the SIO in England decides that he needs some banking evidence from France and a search to be conducted in Germany, he simply picks up the phone to his counterparts in those countries who have signed the JIT and they go and do it: no letters of requests, no unnecessary delays. The benefits for speedy investigations are immediately obvious to anyone who has had to deal with letters of requests. Decisions around prosecution can easily be made so that suspects can be indicted in the most suitable jurisdiction to ensure that court time is most effectively utilised and uses a single court process instead of many.

4.9.4 JITs can be used for just about any crime. Currently these enquiries are used mostly by murder teams and police units dealing with human smuggling although they can be used to great effect on lesser crimes such as internet frauds.

Operation Veerde

Operation Veerde was a JIT with the Czech Republic and Eurojust. It was an investigation into human trafficking, prostitution and rape of females brought to the UK by an OCN. 33 victims were located in the Czech Republic. A JIT was agreed so that the UK and Czech police could gather evidence using domestic laws quickly. 9 suspects were indicted in England on behalf of both states. All nine were convicted.
of trafficking offences and sent to prison.

**Operation Romabank**

Current ongoing operation with Poland. 485 victims have been located in Poland and the UK with 47 suspects located across Europe. As a result of the bilateral, although the cases could be prosecuted all over the EU, Poland have taken primacy and charged and prosecuted all 47 suspects saving a huge cost all over the EU.

**Operation Golf**

This is a long term JIT between the Metropolitan Police, the Romanian National Police and Europol. One part of the operation was to tackle a Romanian gang that was trafficking children into the UK and it has so far resulted in the arrest of 126 suspects for a wide range of offences. These offences have included human trafficking, benefit fraud, theft, money laundering and child neglect offences.

**Schengen SISII**

There are clear benefits to policing and public protection here. As outlined at point 4.3.5 of the ACPO paper, ‘...for the first time it will provide UK law enforcement agencies with real time access to information (via SISII alerts). The UK will also have the ability to place alerts on the system, extending the reach of UK law enforcement into Europe in a far more practical and immediate way that has ever been possible before.’

Key strategic benefits include:

- reduced criminality, particularly as a result of the ability to screen for wanted criminals at borders
- greater identity assurance,
- enhanced public and officer protection
- improved judicial and police cooperation across the Schengen area

There has been an enormous investment by government in preparing for Schengen, an investment which would be wasted if a decision is make to opt out of this measure.

**Europol / Eurojust**

We concur with the ACPO paper as set out at point 4.10/4.11/4.12 below. We would agree that these bodies are under utilised by UK Policing however this is changing in our experience and providing strong benefit to cross jurisdictional serious and organised crime investigations.

4.10  **Eurojust and Europol**

4.10.1 In total, there are five TPMs (2009/968/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/948/JHA) that are concerned with membership of Eurojust or Europol. Considerations of these TPMs are not straightforward, but fortunately we do not need to consider them in too much detail.
4.11 **Eurojust**

4.11.1 Membership of these organisations is a pre-requisite for certain other measures. One of these is the JIT. JITs were designed by Eurojust (and Europol) pursuant to Article 13 of the 2000 EU Convention on Mutual Legal Assistance; it is a measure that we consider it vital we opt back into. In theory, we do not have to be a member of Eurojust to form a JIT but Eurojust control the funding for JITs. One of the many benefits of the JIT system is that Eurojust can (and normally do) provide significant funds to run the JIT. This money includes equipment, travel, outside resources and the like.

4.11.2 As such, although membership of Eurojust is not necessary to use the JIT process, without it the process would move from being free to UK law enforcement to becoming expensive and unworkable.

4.11.3 For these reasons it is considered that we remain within Eurojust.

4.12 **Europol**

4.12.1 Europol performs many functions such as the exchange of intelligence between police, customs and security services. From 2013, they will also host the European Cybercrime Centre – EC3. This will lead on cybercrime co-operation and will be the first attempt at a joined up approach in this difficult area. The remit is to provide a response not only against criminal cybercrimes but also cyber-attacks by terrorists and foreign intelligence agencies.

4.12.2 In addition, Europol are integral parts of SIS (see para 5.3 post). This is a measure that the UK (and the rest of the EU) have invested considerable time and money in and to fully utilise it, we need to be a member of Europol.

4.12.3 Although other parts of Europol are underused by the UK (Europol analyst files for instance), these are growing and provide a strong benefit to international criminal investigations.

4.12.4 As a final point, both of these organisations are generally a force for good in terms of public safety and for combating crime. Crime gets more and more international with each passing year, making it harder and harder for countries to act in isolation. In the rest of the world, such matters are dealt with under a raft of bilateral and multilateral treaties that are more complicated than the EU agreements. Most of our international crime and transient criminals come from Europe and membership of these organisations makes it far easier to target them. Removing ourselves from these measures and putting ourselves in the position of having to re-negotiate 26 treaties on each and every topic, would be a massive step back for law enforcement that would benefit no one. The Heads of Europol and Eurojust are provided by the UK.

In conclusion and as a very useful reference on the ACPO position as included in the draft paper, I have included ‘Appendix B’ with this paper.

11 December 2012
Appendix B

TPMs that UK LE consider it vital to opt back into

1. **1996/610/JHA - Creation and maintenance of a Directory of specialized counter-terrorist competences.** This measure was proposed by the UK and we started it. It creates what is termed the directory which is a central repository of specialist knowledge that each member state has in any given area of terrorism. The ratio for the directory is that if a member state needs assistance in a particular area of counter terrorism then they may seek the assistance of the member state with the requisite knowledge. Governance of the Directory rotates around the members states on a year by year basis.

2. **2002/465/JHA - Joint investigation teams (JITs).** This provision is extremely useful for large scale multinational investigations in terms of exchanging evidence and using domestic powers to gather evidence as opposed to MLATs. The use of JITs is growing and it is unusual in that it actually works well and reduces red tape to almost zero. This is one of the measures (along with the EAW) that we would seek to retain above all others.

3. **2002/475/JHA - Combating terrorism.** This Decision creates standardisation across the EU in a number of CT areas. The first is that it creates certain offences of terrorism in each and every EU state. This is important when states wish to apply emergency measures seeking the assistance of other states or where the EAW or EIO is used. It also sets up the concept of proscribing terrorist organisations. Again, a vital standard when it comes to dealing with groups existing in one jurisdiction while operating in another. The Decision then makes further agreements around sentencing, jurisdiction and the standing of victims. All of these areas should be standard across the entire EU to ensure the smooth application of other measures. Given the global nature of CT matters, it would be a mistake to remove ourselves from any function that assists in this area.

4. **2002/584/JHA - European arrest warrant and the surrender procedures between Member States.** This is an extremely effective LE measure and to remove it would represent a huge step backwards. Further, if the UK sought to remove itself from the TPMs en masse to reclaim powers back from Brussels, the real effect would be that we would in all likelihood lose the special considerations that we have with the UK EAW now and so the act of leaving the TPMs would be to introduce more EU control on us, not less. See the main report for much more detail on the EAW

5. **2002/996/JHA - Establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism.** This establishes a working group EU wide for the oversight of the way that CT matters are developed and to monitor expertise in various areas. Given the global nature of CT matters, it would be a mistake to remove ourselves from this group.

6. **2005/671/JHA - The exchange of information and cooperation concerning terrorist offences.** This Decision concerns with further terrorism definitions, matters around jurisdiction, MLA requests and the use of JITs in CT matters. Given
the global nature of CT matters, it would be a mistake to remove ourselves from any function that assists in this area.

7. **2008/615/JHA - Stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.** Decision is to do with the exchange of information, most notably DNA data. Given the global nature of CT matters, it would be a mistake to remove ourselves from any function that assists in this area.

8. **2008/616/JHA - The implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.** This Decision set up the mechanisms by which Decision 2008/615/JHA would operate. Given the global nature of CT matters, it would be a mistake to remove ourselves from any function that assists in this area.

9. **2008/675/JHA - Taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.** Even though this it is already part of UK law it completely relies upon other states being able to pass this information to us outside of the MLA process. If we were no longer part of it, it may make the obtaining of conviction data very long winded taking the CJ system back many years and running the risk of serial offenders not being identified. See the main report for more details on this measure.

10. **2009/315/JHA - The organisation and content of the exchange of information extracted from the criminal record between Member States.** This is an extremely important provision. Without it we would rely on MLATs (EIOs when they come in) to obtain criminal conviction records. See the main report for more detail on this subject.

11. **2009/919/JHA - Amending Framework Decision 2002/475/JHA on combating terrorism.** This Decision only amends small parts of 2002/475/JHA so see above for details on the Decision. Given the global nature of CT matters, it would be a mistake to remove ourselves from any function that assists in this area.

12. **2009/968/JHA - Adopting the rules on the confidentiality of Europol information.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.

13. **2009/934/JHA - Adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.

14. **2009/935/JHA - Determining the list of third countries with which Europol shall conclude agreements.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.
15. **2009/936/JHA - Adopting the implementing rules for Europol analysis work files.** Irrespective of this measure, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.

16. **2009/948/JHA - Prevention and settlement of conflicts of exercise of jurisdiction in criminal matters.** This role is filled by Eurojust which the UK uses sparingly. That said, membership of Europol is needed for a number of areas such as JITs, SIS and E3C. See the main report for more information.

The additional SIS TPMs that UK LE consider it vital to opt back into

1. **2000/586/JHA - Establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65((2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.** There is a large volume of ongoing work in this area that is being dealt with a multi-agency SIS2 unit within the Home Office (which includes police officer experts). Although the UK is not as signed up to this measure as the rest of mainland Europe are, membership of SIS2 is deemed vital to the national interest and so LE would seek to retain this measure.

2. **2003/725/JHA - Amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.** See 2000/586/JHA ante.

3. **2004/849/EC - On the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation’s association with the implementation, application and development of the Schengen Acquis.** See 2000/586/JHA ante.

4. **2004/919/EC - Tackling vehicle crime with cross-border implications.** This is integral to SIS2 and is a growing problem across the EU from which the UK is by no means immune. It is important that we are a part of this measure.

5. **2005/211/JHA - Concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism.** See 2000/586/JHA ante.

6. **2006/228/JHA - Fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism.** See 2000/586/JHA ante.

7. **2006/229/JHA - Fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism.** See 2000/586/JHA ante.
8. 2006/631/JHA - Fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism. See 2000/586/JHA ante.


11. 2008/149/JHA - The conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen Acquis. See 2000/586/JHA ante.


15. 2009/724/JHA - Laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II). See 2000/586/JHA ante.


17. SCH/Com-ex (96) declaration 6 - Declaration on Extradition and MLA. See 1999/615/JHA, ante.

18. SCH/Com-ex (98) 26 def - Setting up a Standing Committee on the evaluation and implementation of Schengen. See 1999/615/JHA, ante.


20. SCH/Com-ex (99)11 - Agreement on cooperation in proceedings for road traffic offences. See 1999/615/JHA, ante.

21. SCH/Com-ex (99)6 - Schengen Acquis relating to telecommunications. See 1999/615/JHA, ante.
22. **SCH/Com-ex (99)7 - Rev 2 on liaison officers.** See 1999/615/JHA, ante.

23. **SCH/Com-ex (99)8 - Rev 2 on general principles governing the payment of informers.** See 1999/615/JHA, ante.

**TPMs that UK LE consider that we should opt back into**

1. **2000/375/JHA - Combat child pornography on the internet.** The order is merely a best practice document which the UK already exceeds. There are pluses and minuses in this TPM. On the plus side it requires member states to share information on CP matters quickly and for LE in each state to process requests for information as a matter of urgency. This does not adversely affect the UK as we do this anyway, but it is useful to have as it ensures that other states do the same with our requests. If we left this then the rest of the EU would be under no obligation to treat UK requests as urgent. They may do, but the point is that they are not obliged to and where resources are scarce, if any country is going to be put to the bottom of the pile it will be the countries where there are not mandatory obligations in force. The other side is the requirement to inform Eurojust of all CP matters which is a little cumbersome but in reality it is not done in every case anyway. Another plus is that it requires close coordination of states when it comes to the removal of CP material from internet. Again, a most useful provision given the international nature of on-line CP. Finally it makes requirements for the retention and interception of communications data for the prosecution of CP matters. This ensures a common standard that is continually updated as technology evolves. Although there are some minuses, on the whole this is a positive TPM and we should opt back into it.

2. **2000/641/JHA - Secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders.** This actual Decision has little effect on the UK either way. However, this measure forms a number of bodies which have far reaching powers into other TPMs - some of which we would seek to retain, most notable the SIS2 system, the EAW and the EIO which the UK are already committed to.

3. **2001/419/JHA - The transmission of samples of controlled substances.** Without it, case by case agreements would have to be in place to permit the transfer between labs and LE entities to avoid LE breaking various national laws around the import/export of controlled substances. This would create unnecessary additional bureaucracy.

4. **2002/187/JHA - Setting up Eurojust with a view to reinforcing the fight against serious crime.** The UK is a major user of Eurojust. Membership of Eurojust is necessary for JITs and the EIO (which the UK is committed to). Given that, the question of opting back in may be irrelevant as due to our membership of the EIO we have to be a member of Eurojust.
5. **2002/348/JHA - Concerning security in connection with football matches with an international dimension.** This decision not only sets up SPOCs for football intelligence, it also mandates the exchange of information to other members. If the UK moved out of this measure then although we could choose to pass information to other EU states, there is no obligation on the other EU states to do the same for the UK. Although part of the Swedish Framework Decision, those charged with this area of work within the MPS are keen on it and to remove it would be a retrograde step.

6. **2003/170/JHA - Common use of liaison officers posted abroad by the law enforcement agencies of the Member States.** This is concerned with LE officers being posted to other countries or to the EU. In the main, this role is taken up by SOCA (and then the NCA when it comes into being) as they are the closest that the UK has to a national police force. The system is heavily underused when compared to other countries. If the UK left this Decision, then there is nothing to stop us continuing to send LE officers to other states, although we would not be able to have any at the EU (Eurojust or Europol) which would have a knock on effect on our ability to operate in other areas. As such it should be retained.

7. **2005/222/JHA - Attacks against information systems.** Cybercrime is a growing threat to the economic wellbeing of all states and also to critical infrastructures. The rapid exchange of information and intelligence should be made available outside of other criminal matters due to the time dependant nature of such matters.

8. **2005/681/JHA - Establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA.** The college at Bramshill deals with the exchange training of EU senior police officers. The actual value to UK policing is a matter for ACPO but the exchange of learning between police officers across the EU (and the world as a whole) is intrinsically a good thing and it would make no sense to remove ourselves from it. In addition, a proposed post-Lisbon decision is likely to remove this from the TPM list before December 2014.

9. **2006/560/JHA - Amending Decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States.** An update in reality of 2003/170/JHA that strengthens the role of Europol liaison officers. If we left this Decision, then we would not be able to post such officers. These posts are filled by SOCA/NCA but have an impact on the MPS more than any other force.

10. **2006/960/JHA - Simplifying the exchange of information and intelligence between law enforcement authorities of the Member States.** The UK would still be able to pass information to other EU states and we do not use Europol to transmit intelligence or evidence as a rule. This may change though when the EIO comes in and so it would be wise to retain this measure.

11. **2007/412/JHA - Amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension.** Only amends 2002/348/JHA ante which we wish to remain a part of anyway.
12. **2007/845/JHA - Concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime.** The UK has met its obligations by enacting the Proceeds of Crime Act 2002. The information sharing network though is useful and there is no reason to cease being a member as further intelligence sharing would require state by state agreements.

13. **2008/617/JHA - The improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations.** This allows for the deployment of rapid reaction forces to other countries. Where country A seeks the assistance of country B in a crisis, this sets up the legal framework for this to operate. It covers serious physical threats (terrorism, hostage taking etc) and not natural disasters. It would make little sense to remove this sensible provision - especially given the ongoing threat of organised crime, cybercrime, terrorism and civil unrest due to economic issues. It may never be used but it is designed to protect the citizens of the EU from the gravest threats and as such it would be unwise to remove it.

14. **2009/371/JHA - Establishing the European Police Office (Europol).** Membership of Europol is required and demanded by a number of other measures - not least the EIO which the UK has already signed up to. As such, the UK is obliged to remain a member of Europol so we need to opt back in.

15. **2009/426/JHA - The strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.** Eurojust is integral to the JIT process and will be at the centre of the EIO (which we have signed up to post-Lisbon) and so in all likelihood we cannot opt out of this measure anyway.

16. **Council Act of 17 June 1998 - Convention on Driving Disqualifications.** This was designed to ensure that disqualified drivers are shown disqualified in each member state. However, only the UK and Ireland have agreed it so it only acts as a bilateral. That said, there is no reason not to keep it as it would only have to be replicated in a bi-lateral with Ireland anyway which would be a waste of time and effort.

**TPMs that have no impact whether we opt back in or not**

1. **1996/698/JHA - Cooperation between customs authorities and business organizations in combating drug trafficking.** Is merely a central database of drugs related matters. No evidence could be found of this being used by the MPS and loss or retention would have no impact either way on UK LE.

2. **1996/699/JHA - Exchange of information on the chemical profiling of drugs to combat illegal trafficking.** Information can still be exchanged. Along with other measures, it is one of the Swedish Framework Decisions and could be replicated with ease if need be. That said, there is nothing prejudicial in the Decision so while there is no reason to re-join it, there is also no reason to leave it.

3. **1996/747/JHA - Creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international**
organized crime. This is merely a central database of drugs related matters. No evidence could be found of this being used by the MPS and so the loss would not be a significant one.

4. 1996/750/JHA - Approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking. The UK could maintain this position outside of this measure if it wished to and met the criteria prior to its adoption anyway.

5. 1997/339/JHA - Cooperation on law and order and security. This function is a duplication of the Interpol Green and Orange notices. Part of the Swedish Framework Decision

6. 1997/372/JHA - Refining of targeting criteria, selection methods, et. and collection of customs and police information. The UK could maintain this position outside of this measure if it wished to. Part of the Swedish Framework Decision.

7. 1997/827/JHA - Establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime. The UK could maintain this position outside of this measure if it wished to and it is a mechanism that sounds good but in reality has little practical effect.

8. 1998/699/JHA - Money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime. This TPM concerns the informal exchanging of information on financial crime and is part of the Swedish Framework Decision. If the UK opted out there would be no realistic difficulty in continuing to share information. That said, membership of this TPM does not saddle the UK with any problematic measures and so while membership is not necessary, there is no reason to actively seek the UK’s removal from it.

9. 1998/700/JHA - Concerning the setting up of a European Image Archiving System (FADO). This has been overtaken by technology. High speed internet connections and the routine use of email by LE across the EU have reduced the need for this measure. It is not clear whether it is used by the UK (it is possible that UKBA may) but it is not used by UK police.

10. 2000/261/JHA - Improved exchange of information to combat counterfeit travel documents. It is likely that this could be maintained on a police to police basis and a similar system exists within Interpol. Forms part of the Swedish Framework Decision.

11. 2000/642/JHA - Arrangements between financial intelligence units of the Member States in respect of exchanging information. It is likely that this could be maintained on a police to police basis or via the Swedish Framework Decision. After all, we share this kind of information with many other non-EU states without any problem.
12. 2001/413/JHA - Combating fraud and counterfeiting of non-cash means of payment. This Decision places a number of legal obligations on the members in terms of creating criminal offences and suitable penalties for a range of conducts and also to permit extradition for such matters (although the EAW provisions supersede these). Although it imposes legal obligations on the UK, these are already in force. It does not apply supra-jurisdictional powers that require membership of the TPM.

13. 2001/500/JHA - Money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. Given the international nature of nearly all financial crime now, the ability to identify, track and seize assets (where required) is vital to effectively investigate such crimes. It may be that this eventually falls under the EIO but this is not certain at this time. In addition there is a post Lisbon measure being discussed that would take this out of the TPM area (although the UK has not made a decision on that new measure). As a result of this Decision, the UK brought in the Proceeds of Crime Act 2002. As such the UK had more than fulfilled its obligations around it and is hardly likely to repeal it. As such this is largely an irrelevant measure for the UK now.

14. 2002/494/JHA - European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. Such contacts are police to police matters and could be maintained outside of this decision.

15. 2002/946/JHA - The strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. This decision required that states create a large number of offences. As these are part of UK law now, if we left this measure it would have no impact on the UK as these offences would remain. There is an additional obligation in respect of refugees but this is largely redundant as the UK is a signatory to articles 31 and 33 of the 1951 Refugee Convention.

16. 2003/335/JHA - The investigation and prosecution of genocide, crimes against humanity and war crimes. Although a serious matter, the jurisdiction for these crimes is a matter for the UK. Agreements to determine primacy are helpful but not vital.

17. 2003/568/JHA - Combating corruption in the private sector. This decision required that states create a large number of offences. As these are part of UK law now (see for example the Bribery Act), if we left this measure it would have no impact on the UK as these offences would remain.

18. 2003/642/JHA - Concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States. An odd one really. Although this does not directly affect the UK, the UK administers Gibraltar. If the UK opted out of this then we would not be obliged to deal with corruption there under EU law but the EU states that opted in would. However, as Gibraltar is governed by the UK, we would always treat corruption there as a criminal matter and as such this Decision (even at its inception) only really applied to the rest of the EU.
19. **2004/731/EC - Concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information** Agreement between Bosnia and Herzegovina and the European Union on security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

20. **2004/843/CFSP - Concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information.** The UK does not use this. Exchange is done directly.

21. **2005/069/JHA - Exchanging certain data with Interpol.** Membership of this TPM is not necessary here as the UK is a member of Interpol in its own right.

22. **2005/212/JHA - Confiscation of Crime-related Proceeds, Instrumentalities and Property.** The UK has already fulfilled its obligations here by enacting the Proceeds of Crime Act 2002. It is inconceivable that the Act would be repealed if we left this measure and as such it is largely irrelevant now.

23. **2005/296/CFSP - Concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information** Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

24. **2005/387/JHA - The information exchange, risk-assessment and control of new psychoactive substances.** If the UK left this provision, we would still exchange intelligence with other countries (EU or otherwise) and so this is largely a pointless measure.

25. **2005/481/CFSP - Concerning the conclusion of the Agreement between the European Union and Ukraine on the security procedures for the exchange of classified information.** The UK does not use this. Exchange is done directly.

26. **2005/511/JHA - Protecting the Euro against counterfeiting, by designating Europol as the Central Office for combating Euro-counterfeiting.** By not being part of this agreement will not affect the UK as the Euro is not our national currency. Arguably we would be better off out of this. Currently we have let Europol to deal with counterfeiting of the Euro. This is a little odd as we would not cede an investigation into counterfeiting the US Dollar to the US Secret Service. Leaving it though (if deemed desirable) is by no means a reason to leave the rest of the TPMs as it does not place that much of a burden on the UK but if opted out of, there would appear no obvious reason to opt back into it.

27. **2006/317/CFSP - Concerning the conclusion of the Agreement between the European Union and the Republic of Croatia on security procedures**
for the exchange of classified information. The UK does not use this. Exchange is done directly.

28. 2006/467/CFSP - Concerning the conclusion of the Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

29. 2006/783/JHA - The application of the principle of mutual recognitions to confiscation orders. The UK has met its obligations by enacting the Proceeds of Crime Act 2002. It is possible that this may fall under a post Lisbon measure pre-2014 anyway.

30. 2007/274/JHA - Concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information. The UK does not use this. Exchange is done directly.

31. 2008/568/CFSP - Concerning the conclusion of the Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information. The UK does not use this. Exchange is done directly.

32. 2008/841/JHA - The fight against organised crime. Although this decision largely is a legislative one, it requires the proscription of matters (conspiracy) that has long been an offence in the UK anyway. There is nothing to be gained by opting back into it.

33. 2008/977/JHA - The protection of personal data processed in the framework of police and judicial cooperation in criminal matters. This sets up rules for the transfer of information about persons concerned in criminal investigations. All areas are met already under domestic legislation and the provisions here are also covered in other EU directives.

34. 2009/820/CFSP - Agreement on Extradition and MLA between the European Union and the United States of America. The US signed this treaty with the EU in 2003 and as a result the UK signed its treaty with the USA in December 2004. The EU treaty required each member state to negotiate a treaty with the USA and so the 2003 treaty led to the 2004. However, the 2004 one does not rely on the 2003 one as it stands alone. This decision merely confirms the exchange of such treaties making this a measure that does not affect the UK.

35. 2009/902/JHA - Setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA. This is in effect an EU crime prevention body. It brings together subject matter experts in the field and encourages ongoing good practice. Information from the ACPO lead confirms that this is not used by UK LE and is a measure that is not needed.

36. 2009/905/JHA - On accreditation of forensic service providers carrying out laboratory activities. This ensures that labs in member states conform to ISO
17025. The UK is one of the leaders in the forensic world and it is inconceivable that if we left this Decision that the UK would suddenly cast aside all their minimum standards. All police computer and phone forensic labs need to meet this by 2015 and so the UK is clearly committed to this in any case. As such this ruling has little effect on the UK and arguably the UK should be free to set its own standards in line with the rest of the world and not just the EU.

37. **2009/933/CFSP** - The extension, on behalf of the European Union, of the territorial scope of the Agreement on Extradition and MLA between the European Union and the United States of America. The UK has its own extradition treaty with the USA and does not rely upon the EU-US one. As such, this measure (which concerns the inclusion of Dutch overseas territories) is an irrelevance.

38. **2003 Agreement on mutual legal assistance between the European Union and the United States of America.** The 2003 treaty was signed between the EU and the USA which required individual states to negotiate an MLA treaty with the USA. As such the UK signed its own treaty with the USA in December 2004 and so leaving this measure would be of little consequence.

**TPMs that UK LE does not wish to opt back into**

1. **1999/615/JHA** - Defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties. The UK can proscribe whatever drugs it wishes and is free to follow or ignore other states. Any suggestion that the UK leaving it would lead it us legalising it is nonsense. As with the other drugs prohibition measures, it is not in the interests of the UK to be beholden to by the EU as to what should be proscribed. Although this has not caused any harm to the UK so far, in the interests of transparency it would be better for the UK to rely on the Drug Advisory Board and the emergency proscription measures that Parliament currently has in respect of drugs rather than be dictated to by a supra-national organisation.

2. **2000/383/JHA** - Increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro. In the UK, the Euro is treated the same as any other currency that is counterfeited and does not consider it a special case. The UK already provides a greater penalty for counterfeiting that is prescribed in this Decision (and did before its inception) so it is a meaningless measure. The UK did not require a treaty to make counterfeiting the US Dollar a crime after all. That said there is no reason to leave or (or remain within it). Although the measure appears unnecessary it does seek to elevate the Euro to a higher status than other currencies. While the UK already exceeds it, this measure could be amended in the future to provide an even greater emphasis on Euro currency offences, elevating them above others. This is undesirable and so membership of this is not in the best interests of the UK.


5. 2004/757/JHA - Laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking. UK legislation already exceeds the issues raised in this TPM which makes it largely irrelevant. However, we should not seek to opt back into it. It is not in the interests of UK policing to sign into a measure that is designed to determine the minimum penalties and offence types for drug trafficking. Opting out of this (and those like it) would be of benefit to the UK and permit Parliament to determine what is illegal in the UK and the sentence that should be imposed.

6. 2008/206/JHA - Defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions. See 1999/615/JHA, ante.

7. 2010/348/EC - Concerning the conclusion of the Agreement between the Government of the Russian Federation and the European Union on the protection of classified information. The UK does not use this. Exchange is done directly. In addition, the UK has its own rules on the exchange of information with Russia due to the large number of politically motivated requests that Russia sends out. Even though we do not use this, we would not want to be bound by it in any case, as it is in the interest of national security that the UK decide both the general and precise ways that information is shared with Russia.

TPMs that have been replaced by post Lisbon measures or are likely to be before December 2014

1. 1998/427/JHA - Good practice in mutual legal assistance in criminal matters. This measure basically required the member states to provide a statement of intent on how MLA matters would be dealt with. It places no onerous obligations on the UK whatsoever and is a fairly irrelevant entity as the UK goes further in the 2003 Act. When the EIO comes into force at the end of 2014 (likely to be the same time as the TPMs move across) it will repeal all of the MLA TPMs. As the UK is signed up to the EIO, it makes these TPMs largely academic.

2. 2001/220/JHA - The standing of victims in criminal proceedings. This Decision has been superseded by PE-CO S 37/12 and so no longer resides within the TPM. It is only included here because it was mentioned in older briefing papers.

3. 2003/577/JHA - Execution in the European Union of orders freezing property or evidence. It is important to be able to quickly seize physical evidence and evidence held by CSPs and ISPs although the current rather ad hoc measures will be superseded once the EIO come into force, removing this measure from the TPM list. As such, the issue of opting in/out is not a live one.

4. 2004/68/JHA - Combating the sexual exploitation of children and child pornography. This Decision has been replaced by the post Lisbon measure.
Directive 2011/92/EU. As such it is no longer a TPM and only included here for continuity as it was mentioned on previous briefing papers.

5. **2008/651/CFSP/JHA** - The signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service. No longer relevant. Replaced by the post-Lisbon decision on the 29th September 2011. It is only included here for completeness as it featured on a previous briefing sheet.

6. **2008/978/JHA** - The European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Was never in force and will be replaced by the EIO.

7. **Council Act of 16 October 2001** - Establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union. This ultimately led to the Crime (International Co-Operation) Act 2003. However, when the EIO comes into force at the end of 2014 (likely to be the same time as the TPMs move across) it will repeal all of the MLA TPMs. As the UK is signed up to the EIO, it makes these TPMs largely academic.

8. **Council Act of 29 May 2000** - Convention on mutual assistance in criminal matters between the Member States of the European Union. When the EIO comes into force at the end of 2014 (likely to be the same time as the TPMs move across) it will repeal all of the MLA TPMs. As the UK is signed up to the EIO, it makes these TPMs largely academic.

9. **Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security.** Without this provision, the UK would be free to continue to exchange with the US if it wished to do so. It would also be a waste of time and resources to re-sign a bilateral treaty when the one that exists works fine. Finally, the post-Lisbon decision OJ 2012/472/EU supersedes this and the UK has signed it. This new decision will soon come into play, removing this TPM from the list.
Scottish Government—Written evidence

Scottish Government—Written evidence

I am grateful for the opportunity to submit written evidence to the sub-committees for their inquiry into the UK’s 2014 decision (Protocol 36). While we are not required to do so, I believe it would be helpful for me to set out the potential implications of the UK Government’s decision for justice matters that fall within the devolved competence of the Scottish Parliament.

Committee Members will be aware that, within the UK, Scotland has its own separate legal system and justice institutions. The Scottish Parliament and Scottish Ministers have devolved responsibilities for the vast majority of justice matters in Scotland. Scottish justice authorities engage directly with their counterparts in other EU countries in investigating and prosecuting crime.

Given the potential implications for the efficient operation of justice in Scotland, I wrote to UK Ministers in April 2012 and again in August 2012, emphasising the need for effective dialogue and consultation before any decision on the opt-out was taken. I was disappointed, therefore, that no prior notification was received by Scottish Ministers ahead of the Home Secretary’s statement on 15 October confirming the UK Government’s preferred position. Both the Home Secretary and the Secretary of State for Justice have written subsequently, acknowledging the need for dialogue at ministerial level between the UK and Scottish Governments and with operational organisations, such as the police and Crown Office, in Scotland. Our most immediate priority is to seek a clear understanding from UK Ministers of the timescales and arrangements for this dialogue ahead of any formal decision.

Scottish Ministers’ starting position on this matter has been and remains, that no decision to opt-out should be taken by the UK Government without a clear and compelling case, which would justify the potential disruption to existing cross-border co-operation and practical measures that assist authorities in tackling serious and organised crimes. The decision must be informed by the views and experiences of those agencies involved directly in applying these measures within each of the UK’s distinct justice systems. UK Ministers must also be able to demonstrate that any alternative arrangements would be more effective in combating cross-border crime.

This issue has been given added urgency by the Home Secretary’s announcement on 15 October of the UK Government’s preferred position.

I hope this written submission is of assistance to the Committee in its consideration of the UK Government’s handling of this important decision. I am copying this letter to the Scottish Parliament Justice Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice

18 December 2012
WEDNESDAY 6 FEBRUARY 2013

Members present

Lord Hannay of Chiswick (Chairman)
Lord Anderson of Swansea
Lord Avebury
Lord Blencathra
Lord Bowness
Viscount Bridgeman
Lord Dykes
Viscount Eccles
Lord Elystan-Morgan
Lord Hodgson of Astley Abbots
Lord Judd
Baroness Liddell of Coatdyke
Lord Mackenzie of Framwellgate
Baroness O’Loan
Baroness Prashar
Lord Richard
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Lord Stoneham of Droxford

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Lord Boswell of Aynho

Examination of Witness

Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service.

Q209 The Chairman: Good morning, Director. Thank you very much indeed for coming to give evidence to our inquiry into the UK’s 2014 opt-out decision. The Committee is an enlarged Committee because it is made up of the Sub-Committee for Justice and the Sub-Committee for Home Affairs, to give them their shorter titles, who are
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral evidence (QQ 209-228)

conducting this inquiry together. All our meetings and evidence sessions are held together and our report will be a joint committee report to the EU Select Committee, whose Chairman I see has joined us.

This is an important matter, as no one needs to emphasise, which could have far-ranging implications for both the UK and the European Union and I would like to begin by just briefly explaining the background. The Government’s “current thinking” is in favour of exercising the opt-out, but they have promised to consult Parliament before making a final decision. In order to inform the House of Lords’s deliberations—and I emphasise that it is the House of Lords that we are addressing ourselves to—we launched an inquiry on 1 November last year, which is being conducted as a joint inquiry in the way I mentioned. We received a lot of written evidence at the end of last year and we are now receiving oral evidence from lawyers, academics, think tanks and NGOs, as well as serving and former police practitioners and prosecutors—yourself, of course—which will further inform our deliberations. We had a lengthy session in Brussels last week, in which we saw Europol, Eurojust, the Commission Director Generals who are concerned with this, the Council Secretariat, the European Parliament committees that cover this, and so on. After the oral evidence sessions conclude on the 13 February—which is the day we are seeing the Home Secretary and the Lord Chancellor, who will appear before the Committee—we will get to work on our report. We hope to publish it just before the end of the current Parliamentary session—that is to say somewhere around the end of April. The report will cover both the merits of the opt-out decision and which measures the UK should seek to rejoin, were it to be exercised. It is intended that the report will inform the House’s debate and the vote on the matter could take place before the summer although its timing is not in our hands.

As you know, the session is open to the public and a webcast of the session goes out live as an audio transmission and is subsequently accessible via the Parliamentary website. A verbatim transcript will be taken of your evidence and this will be put on the Parliamentary website. In a few days after this evidence session, you will be sent a copy of the transcript to check it for accuracy. We should be grateful if you could advise us then of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence, or have any additional points to make, you are welcome to submit supplementary evidence to us.

Perhaps if you would like to begin by introducing yourself and if you wish to make some opening remarks that would be entirely welcome to the Committee. However, if you would prefer to move straight into questions that would be equally satisfactory.

Keir Starmer: Thank you very much. My name is Keir Starmer, Director of Public Prosecutions. If I may, I will just take a couple of minutes to give an overview of our main areas of concern. So far as the overview is concerned, there are about 730,000 defendants in the Magistrates’ Court and about 100,000 defendants in the Crown Court year-on-year. In the more serious cases, cross-border issues are raised. The more serious cases, so far as the CPS is concerned, are usually found in our Complex Casework Units, which handle about 5,000 cases a year, or our Special Casework Divisions, such as Counter-Terrorism, Fraud and Organised Crime. They handle about 1,500 cases a year. They are the more serious cases. We also handle about 1,800 extradition cases year-on-year, so these measures are of real importance to us.

We have made increasing use of EU measures concerning police and criminal justice in recent years, either directly, as prosecutors, or indirectly relying on the access and exchange
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral evidence (QQ 209-228)

of information that the police have. The most important, so far as the CPS is concerned, are Eurojust, the Joint Investigation teams and the use in this jurisdiction of EU convictions and European Arrest Warrants. As a general statement, in relation to some of the opt-out measures, the CPS could probably cope with the effect of not opting back in, either because further provision is soon expected or because we can rely on workable bilateral arrangements—for example, in some aspects of mutual legal assistance. In relation to others, failure to opt back in could result in an uncertain, cumbersome and fragmented approach, which is likely to have a damaging impact on the prosecution of crime in England and Wales, unless equally effective measures replace them.

Q210 The Chairman: Thank you for that opening statement; perhaps I can just pick up on that. You have addressed the question of what would be the effect for the UK prosecution and law enforcement agencies if the UK ceased to participate in the EU’s pre-Lisbon police and criminal justice measures. Perhaps you could just go a little bit more into what would be the operational and financial consequences of that.

Keir Starmer: If it is convenient for the Committee, I will give a little bit more detail on Eurojust, Joint Investigation Teams, convictions and European Arrest Warrants. If it is helpful to the Committee, I can explain what the numbers are and how often we rely on them, what we see as the benefits and what we are concerned about it if there were no opt back in, or equivalent measure.

Starting if I may with Eurojust, this, as the Committee will know, is essentially a coordination hub, which deals with quite a number of cases. The number of cases going through Eurojust has increased from about 200 in 2002 to about 1,400 in 2011, of which the coordination meetings are the most important; there are currently about 200 a year. The UK participation in coordination meetings is high. We participate in about 45 or 55 coordination meetings a year at Eurojust and, in nearly all of those meetings, the Crown Prosecution Services is represented, so there is quite heavy usage from our point of view. The benefits for us are: access in one place at one time to 26 national desks, rather than a whole series of bilateral arrangements; the facilities, language skills and legal expertise; the multi-jurisdictional meetings; the coordination of arrests and searches that can be done through Eurojust; that it works well for the interface between a common law jurisdiction and a civil code jurisdiction; and of course there is a linkage to Joint Investigations Teams. I do have a number of examples of very positive outcomes where we have been able to progress serious cases in this country using Eurojust, ranging from rape trials, drug importation and animal rights extremists. I do not know if it is helpful to the Committee, but I could quickly put them in a letter.

The Chairman: Perhaps if you could give us a note on that that would be very helpful to us.

Keir Starmer: I can write a note of the examples in due course.

The Chairman: It would be really valuable to have that.

Keir Starmer: The cost of Eurojust is, in our view, relatively modest. Over and above the infrastructure costs, which the EU covers, they run at about £360,000 per annum to the UK for the staff, etc. That has to be set aside the cost if we were not participating in Eurojust. From our point of view, we think we would probably have to deploy a larger number of liaison magistrates across Europe to further the bilateral work, which it probably would be across Europe. The cost is about £150,000 per liaison magistrate, per year. Our view is that Eurojust is a very good coordinating body. It comes at relatively low cost. There
would almost certainly be greater cost if Eurojust went. If Eurojust was not available we
would end up with bilateral arrangements, which would probably depend on haphazard lines
of communication that can break down when individuals move on from country to country.

That is Eurojust; perhaps I can take Joint Investigation Teams next, because they very often
go hand in hand with Eurojust. Again, some numbers for the Committee: the UK makes
quite heavy use of Joint Investigation Teams. In the last year there were 78 Joint
Investigation Teams across the EU: the UK was involved in 25 of those. That is a relatively
high use of Joint Investigation Teams. The benefits, as we see them, are speed of
coordination and an agreed and accepted way of putting a Joint Investigation Teams
together, which otherwise would have to be done through the countries involved. Secondly,
and not to be underestimated, all of the countries participating in the Team, have access to
all the evidence that is made available as a result of the investigation. For us as prosecutors,
that is a very big advantage because, instead of sending letters of request to use evidence in
this jurisdiction, we have direct access to it through the Joint Investigation Teams if it
emanated from abroad. That reduces the scope for admissibility arguments or difficulties in
presenting that evidence to the court.

The Joint Investigation Team also allows for the deployment of UK law enforcement into
other countries, without the usual bilateral arrangements that have to be made and which
can then be challenged if a case comes to court. There is, of course, EU funding for Joint
Investigation Teams at the moment. Again, I have some very good examples, we would say,
of Joint Investigation Teams leading to very successful prosecutions in this country, saving
considerable amounts of money. I am in the Committee’s hands, but I am very happy, again,
if it is helpful to the Committee to simply schedule them.

The Chairman: If you could do us a note on that too, that would be very helpful.

Keir Starmer: Yes. In which case, if I may, I will move on to the third of my four areas of
concern: EU convictions. The Framework Decision requires Member States to give weight
and effect to previous convictions imposed in other Member States, and we do make use of
this, particularly in serious cases. The usual way we deploy previous convictions in cases
these days is at an early stage at bail, when the court has to decide whether or not someone
should be released on bail—a previous conviction for murder, rape or sexual assault is likely
to be extremely relevant at the bail stage. We also make use of EU convictions when we
are putting bad character evidence before the court, on a number of occasions. But for the
EU conviction, we would first have had to live with the fact that the defendant would
present as a person of good character. Secondly, we would not have been able to deploy
bad character evidence. Where we can pick up similar conduct in an EU conviction, it is
particularly powerful in the cases that we are running. We use it also in sentence, in
particular when dangerousness is being assessed.

Q211 The Chairman: Is this the ECRIS system?

Keir Starmer: We adduce the conviction itself in evidence but the police use ECRIS to get
the information in the first place. The advantage of that is it comes in an understandable
format in an agreed way, which can be readily used by us with details to put before the
court. As the Committee will appreciate, having accurate details of the actual offence is
critical when you are running bad character. An example we have is someone who had been
charged and was being tried in this jurisdiction for sexual assaults; we were able to
demonstrate not only did he have previous sexual assault convictions in another country, but
there were real similarities in the way the offences had been carried out. That is very
powerful. ECRIS gives us the information we need in the form we need it, but the measure
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral
evidence (QQ 209-228)

is in actually putting it before the court. The CPS guidance that we have issued guides our
prosecutors to focus on EU previous convictions, particularly in cases involving
dangerousness, homicide and rape and where there are mandatory sentences such as drug
trafficking, because the conviction can be taken into evidence in that regard.

I have some figures for the Committee but I am not able, at the moment, to say in how
many cases we have ever relied on an EU conviction. I have the statistics for the number of
requests that have been made from the UK to other Member States for the last three years:
in 2010, 8,500 requests; in 2011, 9,500 requests; and then in 2012, 20,000 requests. There
are a significant number of requests going out. I hasten to add that some of those will come
back—many of them may come back—with no previous convictions. However, if they do
come back with previous convictions, then that is very useful. What the current measure
gives us is a mutual recognition approach, which means we get the answers we need in the
form we need in a speedy way. That is very important for bail. It is not so important for
bad character and sentence because there is a longer lead-in, but bail will often come up in
days or weeks of an arrest. The speedy turnaround is very important in that respect.

Regarding the risks of not having this available to us, the obvious risk in relation to bail is
that someone who would otherwise have been denied bail, because they might commit a
serious offence, may be given bail. As the Committee may well be aware, there have been
tragic examples where that individual has then gone on and committed another serious
offence. Operationally, we see that as one of the biggest risks.

I will now move to European Arrest Warrants, if I may. By way of context—and this is
important when one considers what the fallback position may be if European Arrest
Warrants are not opted back into—our figures show that in the year before the EAWs
came into force, there were very few requests from the UK for extradition and very many
fewer requests to the UK. The figures of extradition requests to the UK were 114 across
the world and the requests by the UK, in the year before EAWs came in, was 87.

The Chairman: What year was that?

Keir Starmer: That was the year immediately before EAWs came into force, so I think that
is the year 2002. I can get the precise dates.

The Chairman: Could you just make it clear which year that was when you let us have a
note of those figures?

Keir Starmer: The reason I just note that at the commencement of this part of my evidence
is because the question will arise: if EAWs are not opted back into, we will probably fall back
on the pre-EAW arrangements. The evidence is that they were very slow and cumbersome
before 2003 and that was dealing with a relatively low number of cases. I do not think
anybody has road-tested the old arrangements for the very much greater number of cases
that we are now dealing with. When the Extradition Bill was introduced in Parliament it was
said that, at that stage, it was taking about a year for the UK to get somebody that we were
seeking back to the UK, and it was taking anything up to six years to extradite someone
from this country to a Member State. There are some celebrated examples: with the person
wanted for the Paris Metro bombing, it took 10 years, as the Committee knows, before he
was extradited. Does the Committee have the figures for the current number of requests
and surrenders under EAWs?

Q212 The Chairman: We have some figures given to us by the Council Secretariat in
Brussels, but they are not absolutely up to date. However, they are the latest collective set

525
of figures, in which all Member States’ requests of each other have been tabulated. If you were to give us a set of your own and trust us to make sure that the presentation in the report is properly done, that would be a great help.

**Keir Starmer**: I will do that and I will indicate how we put our figures together.

**The Chairman**: Also, the clerk could give you the document we received from the Council Secretariat, just so you can see what it is you are comparing with.

**Keir Starmer**: In the year 2010/2011, there were nearly 1,400 arrests under European Arrest Warrants and about 1,170 surrenders. I simply use that figure to highlight the significant difference between that and the pre-2003 figure that the old system was tested under. The benefits for the CPS of European Arrest Warrants are, first, it is an obligation and not a request. There is no executive discretion: it is an order with a fixed timetable. Second, speed: we sampled our own EAWs last year and that shows an average of 63 days from first hearing to final order, including appeals. Again, I will provide the Committee with written examples, but we have got many examples where we have requested from Member States somebody back to face a rape or murder trial and we have got them back with a number of months—usually about two months. That is significantly different to the position we found ourselves in before, and it is a huge benefit from a prosecutorial point of view.

Third, nationals: under the EAWs, as the Committee knows, Member States cannot refuse to extradite their own nationals, whereas previously they could. On our research, nine countries refused to extradite their nationals, and four would only do it on condition. The practical effect of that is obvious. It is hard to put a figure on what that means operationally, but what I have for the Committee, if it is helpful, is since we have been in the EAW scheme, the UK have had to give undertakings in relation to returnees about where they serve their sentence back in their country of origin on 97 occasions. I think I am on fairly firm ground saying that that probably indicates about 100 cases where a nationality issue would probably have arisen under the previous regime. It is a significant issue. Fourth, the dual-criminality provision was changed with EAWs. Again, I have very good examples. Everybody, I think, is familiar with the 21/7 bomber example where the man was extradited back from Italy in very short order. I have others, because there has been a heavy reliance on one example and the Committee may want others. Again, rather than take time now, I will provide them to the Committee if that is adequate.

**Q213 The Chairman**: Thank you very much, Director, for that. Have you reached the end of your introduction?

**Keir Starmer**: I have a comment on the concerns I would have if EAWs were not available after the opt-out process. The speed point is obvious if we moved to a situation where it would take years and not months to get people back to this jurisdiction. I am sure there will then be concern about why prosecutions for serious cases, where there is an extradition issue, are taking so long, because it will delay our serious cases by however long that process takes. We would not be able to get back non-nationals. To give an example, in 2007 the CPS decided that there was enough evidence to bring charges against a man called Lugovoy, from Russia, where there was enough evidence of murder in London in the Litvinenko case. He is not being returned because of the nationality rule. I am not sure anybody has done the research on this yet, but the other concern is that most Member States amended their own domestic legislation to provide for EAWs at the beginning of the scheme. Some, if not all, of them will probably have repealed, expressly or impliedly, their existing provision. My concern is to fall back on the old arrangements may require—and I accept we have not bottomed out research on this—other Member States to change their legislation. That
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral evidence (Q209-228)

creates significant risk that either it will not happen or there will be a gap. If there is a gap, where we have a serious case in this jurisdiction and we simply cannot get the return of someone from another jurisdiction to stand trial in this country, that is a real concern to me. I accept straight away that further research is needed on that as to exactly what we need in each Member State.

The Chairman: Do you happen to know whether Ireland was one of the countries that removed the underpinning?

Keir Starmer: It did remove the underpinning on our researches. Ireland would therefore have to revive the provision. I do not have a full answer on that but I can certainly provide the Committee.

The Chairman: That would be very helpful. We are taking some evidence from an Irish academic, who I think will know, but that would be very helpful indeed if you could give us a note on what you know about the Irish situations.

Keir Starmer: Those are the reasons I have real concerns about the EAW scheme, should that not be available to us post-2014. Thank you, those are the four areas.

The Chairman: Thank you, Director, for that very full run through the main areas of your interest and concern—that is extremely valuable.

Q214 Lord Anderson of Swansea: Your concerns are powerful; the statistics speak for themselves. To what extent were you consulted by the Government before they said they were inclined to opt out?

Keir Starmer: I do not think I was consulted before but I have been consulted since, and I have been given a proper opportunity to make my concerns known to the Government. I do not have any complaints.

Lord Anderson of Swansea: There was no consultation before?

Keir Starmer: Something might have been passed between our offices, but there was nothing formal. As I say, I have been—and am being—given proper opportunity to make my points during this period between now and the decision date.

Baroness O’Loan: In addition to the problem of those Member States that have repealed their legislation on the European Convention on Extradition, are there Member States who were never party to that treaty and who therefore have no legislation to repeal, but have no arrangements?

Keir Starmer: I do not know, but I will find out. In the research I have done I have not picked any up. I could not say without checking.

Baroness O’Loan: I just wondered in respect of the more recent members of the European Union.

Keir Starmer: Yes; I do not know. What I do know is that I have tried to test the proposition that it is much quicker now than it was under the old regime. To be fair, the old regime was different and I do not think you can necessarily compare pre-2003 with now. What I have done is compared how it works with Norway and Switzerland, who are non-Member States but cooperate well with us—they are not particularly difficult states. Broadly speaking, it takes twice as long to run through the extradition arrangements with those countries as it does under the EAW, and that is with countries that cooperate well with us.
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral evidence (QQ 209-228)

If we are going to double the time it takes for all of these proceedings, given the volume, then that is going to significantly increase cost to the CPS and the criminal justice system. Equally of concern is that it will lead to delays.

Q215 Lord Mackenzie of Framwellgate: One of the criticisms of the European Arrest Warrant is that some countries tend to use it for relatively trivial matters. Does the British side of it—and do you, in fact—apply a proportionality test before making a request for a European Arrest Warrant? On top of that, how could the problem of disproportionate use and other problem areas relating to Arrest Warrants best be tackled at European level?

Keir Starmer: First, I acknowledge that problem. I would only add this: on the problem of trivial or stale cases being requested of us, the proportionality issue does not go away by getting out of the EU. Under the 1957 arrangement, there was no proportionality clause. Whatever that problem is, going back to the old arrangements does not solve it. The same is true for no prima facie case: that was not the rule before and was not introduced by EAWs. They are problems and as far as the proportionality is concerned and as the Committee will know—I have figures that I will provide if they are of any use—we get a large number of requests from Poland and we deal with a large number of Polish cases, some of them for stale and trivial cases. We are concerned about that. On our side, we deal with proportionality by applying the Code for Crown Prosecutors and we have specific guidance on EAWs that I have issued to my prosecutors. That makes clear, if I may just read one sentence, “It is important that applications for EAWs should only be made in cases where this is clearly appropriate and proportionate to the seriousness of the alleged offending, the likely penalty if the requested person is eventually convicted and the interests of any victim.”

Lord Mackenzie of Framwellgate: Is that just your personal guidance?

Keir Starmer: That is our Code, so when we are making the request we go through that exercise. That is one of the reasons why there are fewer requests from us going out than, for example, Poland, coming in.

Lord Mackenzie of Framwellgate: Could the rules relating to a Warrant be improved under the present setup?

Keir Starmer: We would certainly want to join with any efforts to deal with this difficulty. I know that the EAW handbook has been amended to give guidance on proportionality. The problem is that it is not legally binding. We would acknowledge that it is a problem that needs to be dealt with and would happily join with any efforts to deal with that.

The Chairman: When we were in Brussels, we were told that there had been a 25% reduction in Polish requests for EAWs following the issue of that guidance. They were not related to requests from the UK. This was Polish requests of all other Member States.

Keir Starmer: I can make the figures available to the Committee. The surrenders for Poland in 2009/10 were 425, 2010/11 was 761 and then the rolling year to date, 2011/12, is 514. What I have done, if it is helpful to the Committee, is I have a schedule that runs through from the highest number of requests to the lowest year-on-year, country-by-country, so you can see not only where Poland is but also where the other Member States are in the batting order, if you like. Again, when I submit my written supplementary, I will happily—

The Chairman: That would be very valuable.

Q216 Lord Bowness: The question of proportionality is a problem, but is part of the problem that not all prosecutors have the same discretion as you have?
Keir Starmer: Yes. We have had discussions with our colleagues in Poland because before this debate opened in the way it did with the statement in October, I was concerned as to the use of lawyers and resources in conducting this many cases. I understand from them that part of the problem is that their prosecutors do not have discretion; they must have put the case before the court and the court then has the discretion of what to do with it. Therefore, unlike the ability of my prosecutors to apply the Code for Crown Prosecutors and decide, as a matter of discretion, that the case need not be taken, my Polish counterparts do not have that luxury. I should also add—because it is important and the Committee is probably well aware—that the proportion of Polish citizens in the UK is higher than any other Member State and therefore you would, on one level, expect more Polish requests, in any event. That is not the full account.

Lord Avebury: Do you think that the question of proportionality really needs to be resolved by amendments to the Framework Decision, or whether there are any other lesser methods by which there could be a universal solution?

Keir Starmer: When we looked at it we concluded that it probably did require an amendment to the Framework Decision. If there is some other practical way we would happily work with that. I was concerned to know whether I could exercise discretion in relation to the requests that are sent in, equivalent to the ones that we make. I thought there might be a possibility there but we could not come up with a workable solution ourselves. If there is one there we would happily operate it.

The Chairman: Yes, imagine the solution you were not able to use would have been a unilateral one, rather than a collective one?

Keir Starmer: I think from memory we concluded that even if we tried to reach some agreement with Poland between the two prosecuting authorities, that would not be consistent with the nature of the scheme, which requires all of the Member States to operate in the same way. We had explored with them whether there was some way we could deal with this issue in a practical way and, in the end, we concluded we could not. If we are wrong about that then I would be rather happy.

Q217 Lord Elystan-Morgan: I think the Director has to a large extent answered the question already, but it was along this line. So many opponents of the European Arrest Warrant use the question of proportionality as a cudgel to beat the system. The Scott Baker report finds the system is a useful one and should be retained but highlights that as the main weakness. Is there any prospect that by some informal, self-denying ordinance, all of the countries concerned—and each one can benefit from this—could agree to reduce the bar a little in regard to such matters, so that the worst cases of triviality are not dealt with?

Keir Starmer: Yes, if there is enough will among the Member States then they could make that amendment. It may well be that they did not anticipate this when it was first drafted. It is one of the unintended consequences that anybody presented with the evidence would say, “That would be a sensible amendment.” In our work on this I have not met anyone who has said that, as a matter of principle, we would not go along with a proportionality clause. Most people accept that if it is possible to achieve it that would be a good thing.

The Chairman: Could I just ask you a question on costs? In the evidence that we have been given by Dominic Raab MP and by Open Europe, on whose behalf he wrote a paper, they stated that, “The high volume of European Arrest Warrants received by the UK means
that the UK police forces bear a disproportionate cost and logistical burden relative to other Member States.” Would you have a view on that?

Keir Starmer: I do not know the figures for the police. So far as the CPS is concerned, we bear the costs of processing the cases that we deal with; that is why we had a discussion with our Polish counterpart. What I am not able to do is compare the total number of EAW cases that the UK prosecutors deal with compared with prosecutors in every other jurisdiction. Those statistics may be there; I just have not seen those statistics.

Q218 Baroness Prashar: You have already talked about Eurojust and the benefits of it. Do you think that the UK could make more use of Eurojust than it does at present?

Keir Starmer: Possibly, but we do use it pretty heavily. We probably have more coordination meetings than any other country and we involve ourselves in Joint Investigation Teams more than any other country, as far as I know. It is relatively heavy usage. It is a very good facility, to have in one place a hub where information can be exchanged swiftly, quickly and accurately, where you find the person who understands how the legal system works in their country or can get to the person who does. In a sense, everybody should be making greater use of it year on year. If you are trying to run an effective criminal justice system, why would you not want an effective hub through which information can pass very quickly and where things can be coordinated? Simple things like coordinating where, in three countries, an arrest is going to take place and at what time has such obvious benefits that I would encourage greater use of it. If one of those arrests goes ahead half an hour before the other two, you may as well not bother with the other two.

Baroness Prashar: Some of the evidence we have received questions the effectiveness of Eurojust and its value for money. What is your view?

Keir Starmer: Well, £360,000 a year is money well spent, so far as I am concerned, for the amount of use we can make of Eurojust. It is relatively modest in terms of criminal justice figures.

Baroness Prashar: What about its effectiveness? Do you think it is effective?

Keir Starmer: Yes. We have our staff seconded there. We use it on a daily basis. If ever we need speedy information about a Member State for a real case going on in real time, we can usually get it turned around in less than 24 hours. That is highly efficient and saves a lot of time. For example, in a rape case an issue arose as to the equivalent provision in another country. We were able to provide the information quickly and get on with the case. But for that, the case may have to have been adjourned and everybody knows the cost of adjourning a case in our criminal justice system. Also, £360,000 is simply not a lot of money in the scheme of things and the benefit that can be taken from Eurojust.

The Chairman: Thank you. Your evidence on that point is very helpful because I am afraid to say that when we were in Brussels we were denied the opportunity to put questions to the British representative on the Eurojust governing council. This was because the Home Office instructed her not to speak to us, though she was present on the occasion.

Keir Starmer: I did not know that.

The Chairman: I hope it has no implications for your evidence today; I am sure it does not.
Q219 Lord Rowlands: Briefly returning to the European Arrest Warrant, in the Scott Baker inquiry, Lord Justice Thomas expressed very serious concerns, when giving his evidence, about the variable quality of judiciary right across the 27. He said at one point, “One of the problems with the way in which a lot of European criminal justice legislation has emerged is that it presupposes the kind of mutual confidence and common standards that actually don’t exist.” If he is concerned about the variable quality of the judiciary, have you got similar concerns regarding the criminal justice process?

Keir Starmer: It does vary and one keeps a careful eye on that. It is important to look at what the practical alternatives are. In a Europe where people move around much more than they did, we need a system for moving someone who has offended in one country back to that country to face charges if they are serious. Whatever arrangements you have, unless you have a full trial here or something close to it before the person goes back—an examination of every issue—there is a reliance on the arrangements back in that country. It is difficult to see how one lives in a world where that can be otherwise. You could have a system where all of the evidence was tested in our courts before someone was returned, but one, you would get very close to a finding on their guilt, which would not be helpful, and two, it would take a very long time. There has to be this reliance. I am not dodging the question in the sense that of course there are issues that arise and it is a variable quality across Europe. To some extent, there has to be reliance on the schemes. It is important to appreciate that most of the time we are returning to the country of origin somebody who offended in that country. All that has happened is that they have got over the Channel in the vast majority of cases, and they are going back to the system where they offended and where they would be had they been caught before they left.

Lord Rowlands: Sometimes speed can lead to an injustice as much as justice.

Keir Starmer: I am not sure that necessarily follows. The speed goes with the fact that, for example, there is no need for prima facie evidence through agreed timetables. To some extent I accept that means you are relying on the other country. It does not need to operate an injustice. You have to remember, if we come out of the EAWs we lose our ability to get people back for our trials in the timetables in which we normally get them back now. In the end, I would have to explain to families here, who may have lost someone through a murder, why their case was still being held up for a year or two years before we could start a murder trial. I do not look forward to a conversation like that.

Lord Rowlands: On the other hand, with the way things have gone have defendants’ rights taken a lesser role in recent years?

Keir Starmer: I do not think so. Certainly, when people have been returned here, I do not think there is anything to suggest there is a higher acquittal rate or perhaps they were wrongly charged. That may be because we are applying proportionality before we ask in the first place; I would like to think so. Certainly, for returnees here, I do not think that is the case. The bigger concern I am sure in your mind would be people going to other countries.

The Chairman: Some of the problems, presumably, could be mitigated by things like the European Supervision Order, which is sometimes known as “Euro bail”. This would mean that people who were asked to send back would be bailed in this country until the case against them was ready to proceed. I imagine you would welcome an early implementation of those provisions, which at the moment as you know, the Government has not implemented.
**Keir Starmer**: Yes, it seems to me that that is one way of dealing with that issue: the flanking devices or measures that would allow people to not necessarily be kept in the way that they are kept at the moment before they go. I would not stand in the way of that at all.

**Q220 Lord Mackenzie of Framwellgate**: Presumably there was a joint investigation into the recent announcement by Europol of the match fixing fiasco. Can you tell me if the UK was involved in that exercise, bearing in mind that there was a British club involved?

**Keir Starmer**: If I may, may I give a note to the Committee on that because I just need to check what is in the public domain and what is not.

**The Chairman**: Yes, that would be very helpful if you could, because this case has roused a great deal of public interest and we would like to be able to situate it accurately when we are looking at this matter. A note from you would be really helpful.

**Q221 Lord Avebury**: Could we turn to the question of asset recovery measures and could I ask you two questions? First of all, what impact has there been at a practitioner level as a result of the UK not fully implementing the pre-Lisbon measures? Secondly, if these measures are not among the list of those that the UK seeks to rejoin—that is to say if the opt-out is exercised—how would this affect the practitioners’ attempts to recover the proceeds of crime in other Member States?

**Keir Starmer**: As everybody in this Committee will know, the asset recovery measures are not fully implemented. Therefore, on that analysis, the detriment of not opting back in is less than it might be for other measures. The practical result of that is that we still rely on bilateral arrangements to freeze assets and to enforce confiscation orders. That means it is slower and less reliable. It also means that a prosecutor carries much more risk because we essentially have to re-litigate in this jurisdiction an order from another jurisdiction. Should there be any gap in the information or evidence that we are provided by the Member State and the case in this jurisdiction fails, the prosecutor here runs that risk. It has happened on a number of occasions where we failed to enforce an order because of some error or oversight by a Member State in providing information to us. As prosecutors, we then carried the risk of that. If it were implemented, that would be helpful from our point of view. I do not think I can properly make the argument that simply failing to opt back in to the unimplemented measures is particularly detrimental to the CPS and with the arrangements we have we are doing our best to make them workable, and have been doing for some years.

**The Chairman**: Do you mean, in what you are saying about them not being implemented, that not all Member States have given effect to the European decisions on this yet?

**Keir Starmer**: Yes. So far as the freezing orders are concerned they are implemented in part, but mainly in relation to evidence rather than property. The only property parts that are implemented relate to terrorist forfeiture. So far as confiscation is concerned, it is not implemented yet. We are using the same arrangements as we pretty well always use.

**The Chairman**: Is this a case of trying to impress the Commission to use their enforcement powers more rigorously on the Member States who are not yet fully in line with European legislation?

**Keir Starmer**: Yes. If the measures were fully implemented and there was mutual recognition of confiscation orders across Member States, then that would undoubtedly make it easier for us to deal with either enforcing confiscation orders in this jurisdiction from
other countries, or getting our orders enforced abroad. At the moment, what happens is that each country has to start the process afresh in their own country to get a fresh order. That runs the risk that that will not succeed. This is with the caveat that we are making it work to best of our ability now.

The Chairman: So it would not be unreasonable to say that if the UK opts out of this area, our ability to press the Commission in the direction we wish to go would be rather sharply diminished.

Keir Starmer: Yes, I would accept that.

Q222 Lord Avebury: Could I ask whether you think that there could be value in the UK opting in to the proceeds of crime directive after it has been adopted?

Keir Starmer: Yes, there would be benefits, certainly from a prosecutorial point of view.

The Chairman: That means that you share the view of this Committee because we, Committee F, the one I chair, did in fact press the Government to opt in at the negotiating stage. When they declined to do so, we reiterated our view that they should seriously consider opting in at the final stage and your view on that is very helpful.

Lord Hodgson of Astley Abbotts: The concept of a universal asset recovery system is attractive but the practical difficulties of asset recovery are very great indeed. If you look at the SOCA annual report in terms of asset recovery in this country, the figures are, essentially, trivial.

Keir Starmer: I would readily accept the proposition that having mutual recognition is only the first step on the journey that is asset recovery and the follow-through and enforcement afterwards is very often the really difficult bit. That requires a great deal of coordination if it is to be successful. I certainly accept the proposition that the measure in and of itself only goes so far and there are a lot of other things that have to fall into place if it is to be successful.

Q223 Lord Dykes: You mentioned, Director, the ECRIS situation in your opening remarks and thank you very much for that. What would the impact on practitioners and prosecutors be if the UK no longer participated in ECRIS?

Keir Starmer: The old international arrangements required a signature of a judge from the court in question in order to adduce the conviction. Legislation changed that and so I could foresee a situation where the legislation in this country remains in force. I do not see why any Government would want to repeal that. The pure admissibility question we could make progress on. The difficulty would be access to, in reliable form, the underlying detail in the way that it comes through ECRIS. It is one thing to have the fact of a conviction, but it is another to have the details of the conviction in a reliable form. It is not enough for a prosecutor to simply get up and say, “As I understand it, this person was convicted in Italy and these are the details,” because any court is going to say, “We are going to need this in a proper form,” particularly if you are relying on it for bad character.

Lord Judd: Are there any other significant pre-Lisbon PCJ measures that have been beneficial to prosecutors and that you think you might bring to the attention of the Committee?
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Oral evidence (QQ 209-228)

Keir Starmer: Broadly speaking, on the substantive criminal law measures—i.e. what the content of the criminal law should be—I am pretty confident, and I think most people who have looked at it are, that our law fully corresponds with the requirements in any event and always has done. There is a discussion about bribery, but even that has gone now. I therefore have no concern there. Where access to an exchange of information has worked, we would be concerned about any diminution. Mutual cooperation has worked well. There is a new measure of mutual cooperation that I think the UK is opting into. In a sense, any concerns I would otherwise have are allayed by the fact that, as I understand it, the UK is opting in and that will cover all the areas that were previously covered. I suppose the only concern would be timetabling, as long as the new measure was in before the old measures—

The Chairman: Is the one you are referring to the European investigation—

Keir Starmer: The EIO.

Q224 The Chairman: Perhaps you could just comment also on the Schengen Information System II, which the UK has opted into and which, presumably, also will provide valuable information.

Keir Starmer: Access to information and mutual cooperation measures are welcomed and used by us. I would be concerned if there was any diminution in the availability of information, access to that information or any drop-off in the cooperation we get across Europe. I have not listed it as one of my four major concerns because, on analysing the EIO, it seems that so long as that is implemented and we are in it—which is, as I understand it, the current thinking—then all of that will be covered off. The only residual concern is if there is a gap between December 2014 and the EIO. My evidence would be that I hope the CPS would be able to cope if it were simply a gap for a short period.

The Chairman: Of course, if the Government decided not to exercise the block opt out there would not need to be a gap at all.

Keir Starmer: Then I would welcome the opportunity to give further evidence.

Lord Sharkey: Are those EU PCJ measures that set down common definitions for criminal offences and that provide for maximum penalties helpful to prosecutors and, if they are, how are they helpful?

Keir Starmer: The short answer is “not particularly”, because our criminal provisions were the equivalent of, if not more comprehensive than, the EU measures and therefore first resources to our own legislation. I am happy that we have sufficiently robust criminal laws in place to comply with the measures. Do we make use of the measures? Not really in substantive criminal law matters.

Q225 Lord Rowlands: The opponents of the opt-out rest their case very heavily on the issue of the expansionist tendencies of the Court of Justice. Under the arrangements, if we opt in, the Court of Justice will be able to deliver preliminary rulings in relation to all the measures. How would that affect the work of UK prosecutors? Do you see any danger?

Keir Starmer: The true answer is that I do not know the extent to which it would affect prosecutions. The powers of the Court are more limited than other courts, in the sense that you cannot make individual applications and there are limits on what the Court can look at. It does raise the possibility that there will be a referral on an issue in a criminal case in some way or other. The concern then, from a prosecutorial point of view, would be delay and staying any case if that was necessary whilst that matter was resolved. It is hard to
predict what that might look like because we have not got any experience of criminal law cases from this jurisdiction. To some extent, we are going to have to deal with it in any event because the post-Lisbon measures will all be subject to the Court's jurisdiction and therefore we will come to know what the impact is. It is quite difficult to predict it, other than the obvious, which is if there is a referral that holds up a case then that is delay that would be unhelpful from a prosecutorial point of view.

**The Chairman:** It has been suggested in some evidence to us that there could be benefits from such preliminary rulings in the longer term. The point you make must be valid in any particular case imposing delay. Over time, would you agree that it is possible, though not certain, that preliminary rulings could be useful?

**Keir Starmer:** Yes, I would accept that proposition.

**Q226 Lord Blencathra:** In an earlier answer to Lord Rowlands, you indicated you had some concerns about the injustices caused by the European Arrest Warrant and you would like to see some changes, which I think most of the Committee would. If the British Government is unable to make those changes to the European Arrest Warrant on, say, proportionality or whatever, would it still be your view that the injustices of British citizens wrongly extradited to some foreign country are still outweighed by the benefits we get by getting other criminals back?

**Keir Starmer:** My position is that those problems are not problems caused by the EAW itself. Those problems were there under the old regime. Therefore, opting out and falling back on the old arrangements will do nothing to solve those problems, but it will bring with it the risks that I have identified. If anything can be done to deal with those shortcomings, either before December 2014 or afterwards, then I am all in favour.

**Lord Blencathra:** If nothing can be done, would you still be in favour of continuing with European Arrest Warrant and to blazes with the injustices?

**Keir Starmer:** I would not put it in that way. I would be in favour of continuing. It is very important to get this into perspective. There is an injustice in somebody being returned for a trivial or stale offence to another country and I can readily see that. There is also an injustice to a family of someone who has been murdered in this country if the person is not returned for trial in this country in a few months, as they currently are. I do not think it is fair or right to balance those injustices, but they are perfectly valid considerations. I would have the job of speaking to the families of those whose trials were delayed if the system changed. For obvious reasons, most families do not want delay in a serious case where a member of their family has suffered a serious offence. These are not black and white issues, that there is one injustice and no other. These are very difficult to balance, but I would be concerned about anything that slowed down the process.

**Lord Elystan-Morgan:** I will gladly be corrected if I am wrong, but did the Scott Baker inquiry not approach that problem in exactly that way and come to the conclusion that if nothing can be successfully ironed out—and there are many matters that should be ironed out—it would still be a greater evil to leave the European Arrest Warrant system than to cling to it?

**Keir Starmer:** That was the conclusion, yes.
Q227 Earl of Sandwich: In summary, you have implied that the UK is punching above its weight, which is something you mentioned in the European Arrest Warrant figures and so forth. Do you think that is a good thing?

Keir Starmer: I am not sure about “punching above its weight”. It is certainly making full use of the measures available to it and that is a good thing. In fact, it is probably making more use than other Member States. From a prosecutorial point of view that is a good thing. If we are getting convictions we can use swiftly, more than other states, then that is good.

Earl of Sandwich: Some of our witnesses have implied that it is not a good thing and that is expensive and so forth.

Keir Starmer: It is a very good thing if you are trying a man for rape if you can adduce a previous conviction in another country where he has previously raped someone else.

Q228 Lord Richard: It just occurred to me that looking at the totality of the evidence we have had and the evidence that you have given on the European Arrest Warrant, what really seems to be being said is that in one particular case, namely Poland, there are extreme difficulties. In relation to almost all of the other countries in the EU there are not great difficulties, except, as I think some of the evidence we have had suggests, possibly Sweden and the Netherlands, but they seem to be resolvable. If it really is only a question of Poland, that is a matter to be resolved a political level with the Poles, is it not?

Keir Starmer: We have tried to resolve it prosecuting authority to prosecuting authority. The difficulty is that there has to be overall agreement that governs it.

Lord Richard: If you look at what Lord Justice Thomas said to the Scott Baker inquiry, “Poland is a major problem. Some of the judges there hold the view that you have had expressed to you here, which is the fact that we have the common area for justice that was put in place with mutual confidence but we know that there are countries where what is on paper is not the actuality. My concern is that you might be perceived as looking at this through Anglo-Saxon eyes. Our views on the problems of EAW … arise largely because procedural standards are not common across Europe”. Do you think that is right? I do.

Keir Starmer: I am not sure. I did read that at the time; I have not re-read Lord Justice Thomas’s full remarks again recently. The procedural standards do vary—I do not quarrel with that—but they do for any country, whether it is Europe or otherwise. We have arrangements with very many countries across the world for extradition and the procedural arrangements are different in almost all countries. Therefore, one either has to have a workable system that allows exchange and extradition to take place, or one has a position where they say that nothing can happen until everyone is at the common standard. There are problems with that.

The Chairman: Thank you very much indeed for sparing us your time this morning and giving us so much valuable testimony, which we will undoubtedly make good use of in our report. Thank you also for your offer of some additional written material. The sooner you can produce that the better, because we are going to get on with the drafting of the report from the middle of February onwards. Therefore, it would be enormously valuable to us if you could produce that quickly.

Keir Starmer: I will send it as soon as possible.

The Chairman: That would be very good and thank you very much indeed.
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—Supplementary written evidence

When I gave evidence to the Select Committee on the European Union’s Inquiry on 6 February 2013, I undertook to provide the Committee with supplementary evidence in respect of particular case examples, figures about the use of European Arrest Warrants (EAWs) and points raised by the Committee during my evidence session.

You will therefore be interested to see the attached document at Annex A that sets out examples of where Eurojust, Joint Investigation Teams (JITs) and the European Arrest Warrant (EAW) process have been of practical benefit to prosecutors in the Crown Prosecution Service (CPS).

I also quoted figures to the Committee to demonstrate the levels of extradition requests that the UK received and made prior to the Framework Decision on the EAW coming into force here. I can confirm that the figures were for the year, 2003. As I promised, I have enclosed a copy of the set of information on EAWs that sets out the levels of EAW requests received from each Member State in order of volumes of requests (attached as Annex B).

The Committee also asked me to provide additional information of our understanding of the Irish position in relation to the EAW and what would happen if the UK Government did not seek to rejoin this measure. The extradition arrangements that the UK had in place with the Republic of Ireland prior to the EAW coming into force fell under the Backing of Warrants (Republic of Ireland) Act 1965, which was repealed by the UK. Ireland had reciprocal legislation which we understand has also been repealed. Ireland is a signatory to the 1957 Council of Europe Convention on Extradition and, unless the UK Government decides to negotiate separate bilateral arrangements with the Irish Government, I assume that we will revert back to extradition under the 1957 Convention. To do this would require amendment of UK legislation and would also require Ireland to make any necessary changes to their domestic legislation to allow them to transmit and receive extradition requests between the Republic of Ireland and the UK.

When I gave evidence, the Committee asked me to comment further on the media reports of a major cross European football match-fixing case. This has not yet been referred to the CPS for any prosecution decision about any allegations of illegal activities in England and Wales. However, on 4 February, Europol announced it had uncovered the largest ever football match-fixing operation in Europe. I understand that this involved police from over 13 European countries and that a multi-partnership approach with the international law enforcement community was taken including liaison with bodies such as Eurojust and Interpol. I have been advised that UK law enforcement has received a report through Europol on this issue, and as such I am unable to provide further comments pending further investigation.

27 February 2013
Examples of Eurojust assistance

1. Although Eurojust plays a key role in facilitating and co-ordinating cross-border investigations through JITs it also has much wider benefits to CPS prosecutors. Eurojust hosts case specific co-ordination meetings. Eurojust assistance to CPS prosecutors has included:

   - CPS request to obtain crucial evidence of a foreign conviction for a rape trial the next working day. The UK Desk was able to obtain the information via the Lithuanian Desk at Eurojust, which allowed the case to continue and meant a serious offender was convicted who otherwise would have been released and may have posed a threat to the public.

   - Eurojust facilitated meetings between prosecutors and investigators with Spain and The Netherlands to exchange information and evidence following a seizure of 1.6 metric tonnes of cocaine imported from South America.

   - In Operation Poppinjay, Eurojust facilitated a meeting between Sweden and the UK to exchange evidence in relation to the importation of Opium from Turkey to the UK and Sweden.

   - The prosecution of animal rights extremists: Eurojust hosted liaison meetings between the relevant European jurisdictions. This allowed evidence to be obtained that demonstrated the existence of an international conspiracy to blackmail the suppliers and customers of an animal research company, Huntingdon Life Sciences, which could be used in the trial here. Eurojust also hosted a meeting in relation to witness care for the witnesses in other jurisdictions who, at that stage, we anticipated might have to travel to Winchester to give evidence or appear by live video link.

   - After the conclusion of the prosecution on animal rights extremism and the imprisonment of the leadership, the criminal activity moved to Europe and the same conspiracy was continued by others both in the UK and in The Netherlands. Eurojust hosted a coordination meeting involving the Member States concerned resulting in the identification of prosecutors in each jurisdiction who would work with their counterpart investigators to ensure that intelligence and evidence was shared and the criminal activities coordinated. This meant that events occurring on the same night but either side of a border would now be investigated and dealt with in a coordinated way rather than in total isolation.

Joint Investigation Teams (JITs)
2. The following are examples of JITs that the CPS has been involved in:

- **Operation Golf** - this was the first JIT that the UK was involved in with Romania. It was set up to investigate and prosecute the trafficking of Romanian children to the UK to commit crime. Eurojust identified suitable participants for the JIT, drafted and negotiated the JIT agreement and played a key diplomatic role in maintaining good relations between the Romanian prosecutor and the other parties to the JIT. Three coordination meetings were facilitated by Eurojust in The Hague which the CPS prosecutor received funding to attend.

- **Operation Fry/Geldermaesen** - this was a UK/Netherlands JIT set up to investigate and prosecute the facilitation of illegal immigration by means of sham marriages to Dutch nationals. The challenges faced by investigators/prosecutors in these cases were in respect of coordinating the intelligence and evidence exchange between the Dutch and the UK, a greater need for clarity regarding the phases of the investigation/prosecution and considerations in relation to jurisdiction and deportation. Eurojust provided assistance to overcome these challenges by hosting coordination meetings, facilitating the creation of the JIT, and providing access to funding.

- **Operation Copius** - a JIT with The Netherlands in relation to fraudulently obtained genuine UK passports being used by serious criminals in the UK and The Netherlands. In this case there was a need to coordinate separate investigations and share biometric data. The JIT resulted in several high profile arrests, access to EU funding for investigation/prosecution, establishment of a SOCA operational base in The Netherlands and security improvements at the UK Passport Office

**European Arrest Warrants**

3. The Greek authorities provisionally arrested a man wanted for attempted murder when information was received that he was about to flee the jurisdiction. An EAW was issued on the 2 September 2011 and he was arrested within 2 weeks. His first appearance in a court here was on 14 October 2011 where he pleaded guilty. He was subsequently sentenced to 7 ½ years imprisonment.

4. An EAW request was sent to Sweden for a man wanted for rape and attempted rape. The EAW was issued on 2 September 2011. He did not contest his extradition and made his first court appearance on 23 September 2011. He pleaded not guilty but was convicted after trial and sentenced to 17 years of imprisonment.

5. The Italian authorities arrested an individual at Rome Airport on 14 May 2012 pursuant to a UK EAW. He was wanted for murder. He consented to his extradition and was surrendered back to the UK by 24 May 2012.

6. A man wanted for murder, was located in Estonia and the UK issued an EAW on the 8 March 2011. He was extradited back to the UK on 6 May 2011 and had been tried, convicted and sentenced by 19 October 2011.
ANNEX B

All data in the following tables has been provided by the Serious Organised Crime Agency, who are the Central Authority for EAWs.

**EAWs to the UK from other EU Member States (Part 1 extradition requests): Requests received, arrests and surrenders 2004-2011/12**

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<td>546</td>
<td>683</td>
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<td>178</td>
<td>415</td>
<td>516</td>
<td>699</td>
<td>1173</td>
<td>922</td>
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Source: Serious Organised Crime Agency

N.b All figures are per person rather than per EAW. Multiple EAWs are often issued for the same person therefore the actual number of EAWs issued will be much higher. For example, whilst 1,149 people were arrested on one or more EAWs in 2011/12, CPS case management data shows that this related to over 1,600 individual EAWs, each of which is dealt with separately in extradition proceedings.

Data is shown by calendar year for 2004 and 2005 and for fiscal year thereafter.
### Part 1 extradition requests received, arrests and surrenders by country

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<td><strong>699</strong></td>
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<td><strong>1,359</strong></td>
<td><strong>1,173</strong></td>
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<td><strong>1149</strong></td>
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*Source: Serious Organised Crime Agency*
**Part 1 extradition requests received, arrests and surrenders by offence type, 2011/12**

*Source: Serious Organised Crime Agency*

<table>
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<tr>
<th>Offence type</th>
<th>Requests</th>
<th>Arrests</th>
<th>Surrenders</th>
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<td>Racism &amp; Xenophobia</td>
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<td><strong>Total</strong></td>
<td><strong>5,832</strong></td>
<td><strong>1,149</strong></td>
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**EAWs sent by the UK to other Member States (part 3 extradition requests): EAW requests issued and surrenders to the UK 2004-2011/12**

<table>
<thead>
<tr>
<th></th>
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<td>146</td>
<td>182</td>
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<tr>
<td>Surrenders</td>
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<td>84</td>
<td>107</td>
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<td>86</td>
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</table>

Source: Serious Organised Crime Agency
Keir Starmer QC, Director of Public Prosecutions, Crown Prosecution Service—
Supplementary written evidence

**Part 3 EAW surrenders to the UK, 2009/10, 2010/11 and 2011/12**

N.B. These statistics are for surrenders to the UK and not requests made by country as that information is not available to us. In any event, these figures would be misleading because, where the location of a wanted person is unknown, we will send a request to several countries simultaneously.

<table>
<thead>
<tr>
<th>Country</th>
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<th>2010/11</th>
<th>2011/12</th>
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<td>Malta</td>
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**TOTAL** 71 134 86

*Source: Serious Organised Crime Agency*
The 2014 Opt-Out Decision

1. Should the Government exercise its block opt-out?

The Home Secretary announced on 15 October that the Government’s current thinking is to opt out of the measures included in the 2014 decision, and to consider which measures it is in our national interest to apply to rejoin.

The Treaty only allows for the UK to opt out of these measures en masse; we cannot simply opt out of those measures by which we no longer wish to be bound. The Government’s current thinking is based on the evidence currently before us, which indicates that these measures vary greatly in operational utility and that a number are effectively defunct. It is also the case that the vast majority of these Third Pillar measures were not drafted with the jurisdiction of the Court of Justice of the European Union (ECJ) in mind; as the EU Justice Commissioner Viviane Reding has made clear, the old ‘third pillar’ often led to outcomes at the ‘lowest common denominator’. This was mostly in order to secure unanimity. Much of the drafting is not of a high standard and may be open to expansive interpretation by the ECJ.

At this stage our analysis is not complete, and of course it cannot be until we have had more detailed discussions with the European Commission and the Council, and can take their views into account. Although we have considered the individual merits of each measure, we cannot do this in isolation and as such are continuing to work with law enforcement and criminal justice partners. There are around 130 measures to consider and the decision must be made with regard to all of them, not just one or two.

We recognise that there are a number of other interested groups and organisations and we are, of course, interested to hear their views on this issue. We also very much welcome this Inquiry and intend to look closely at its conclusions when making our final decision on whether to opt out, which, as per the Government’s commitment on the matter, will also be put to a vote in both Houses.

2. What are the likely financial consequences of exercising the opt-out?

Article 10(4) of Protocol 36 to the Treaties provides that ‘The Council, acting by a qualified majority on a proposal from the Commission, may also propose that the Council could adopt a Decision determining that the UK shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts’. It is important to note that the UK would participate in this Decision and would therefore have a voice in these discussions. As James Brokenshire said on 26 October in response to a Parliamentary Question, ‘until we hold discussions with the EU institutions and other Member States it is impossible to say with any certainty whether the UK will be held liable for any costs. However, the Government considers this to be a high threshold to meet’.

424 http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121029/text/121029w0003.htm#12102942000603
At his appearance before the European Scrutiny Committee on 28 November, James Brokenshire gave an undertaking that the Government will provide an Impact Assessment on the final package of measures that the Government wishes to rejoin, should the Government decide to exercise the opt-out.

3. What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

The Government has been working hard to make it clear to other Member States and EU partners that this is a one-off decision granted by the Treaty of Lisbon and as such can be considered separate from other areas of EU cooperation. We have been clear that this decision is not about the UK disengaging from Europe and that the Government remains committed to playing a leading role in the EU. We continue to engage with Member States and the EU institutions to make these points clear and ensure that our wider relations with our EU partners are not affected.

Following the Home Secretary’s announcement on 15 October, the Home and Justice Secretaries wrote to all Member States’ Interior and Justice Ministers to outline the Government’s current thinking and to invite their views. Ministers from across Government have also spoken to ministers from a number of Member States and will continue to engage constructively with our EU partners on this issue. We have also spoken to Home Affairs Commissioner Malmström and Justice Commissioner Reding, as well as engaging with MEPs, following the Home Secretary’s announcement.

As per the Coalition agreement the Government will continue to approach Justice and Home Affairs on a case by case basis. Where there is a case for cooperation at the EU level – not just in the field of justice and home affairs – the Government will support it. The UK will continue to play an active part in developing EU legislation in the Justice and Home Affairs area where it adds value for our citizens. For example, we have opted in to a range of measures since the Lisbon Treaty, including Directives on human trafficking, child sexual exploitation and on rights and support for victims of crime, amongst others.

The UK’s current participation in PCJ measures

4. Which of the pre-Lisbon PCJ measures benefit the United Kingdom the most? What are the benefits? What disadvantages result from the United Kingdom’s participation in any of the measures?

As was made clear in the Home Secretary’s announcement of 15 October, we are currently undertaking work to identify measures it would be in the national interest for us to consider applying to rejoin if the Government does exercise the opt-out. Parliament’s view on this is of course important and we welcome this Inquiry, which will be useful in informing the Government’s position. We will also be listening very carefully to the views and experiences of law enforcement and other criminal justice and operational agencies and other interested parties, who know first-hand how the measures are working in practice. The final list will also be informed by the outcome of the discussions that we will have with the European Commission and the Council.
We know that the European Criminal Records Information System (ECRIS) allows our police and prosecutors to obtain information regarding the previous convictions of an EU national being prosecuted in the UK. When judges know about the defendant’s previous criminality, it can result in longer prison sentences. Information on previous convictions can also be used by prosecutors to resist bail applications, thus improving the security of UK citizens. By ensuring that the courts take account of convictions in EU Member States, as well as those in UK courts, this information sharing creates more equal treatment between EU nationals and UK nationals. The Government wants to ensure that fairness is at the heart of our criminal justice system. Nonetheless, we will need to fully consider the impact of ECJ jurisdiction on this instrument before coming to a final view.

On the other hand, we also know that some of the measures are now effectively defunct. For example, the Agreement on Cooperation in Proceedings for Road Traffic Offences (SCH/Com-ex (99) 11 rev 2 - number 119 on the list) provides for Member States to provide contact details of drivers associated with a licence plate on request, and service overseas of penalty notices. It also provides for Member States to subsequently be able to transfer enforcement of any fine to the authorities where the offender resides. This does not appear to be in force, nor is it likely that it will ever be, given it has been largely superseded by measures on the mutual recognition of financial penalties.

5. In her 15 October statement the Home Secretary stated that “... some of the pre-Lisbon measures are useful, some less so; and some are now, in fact, entirely defunct”. Which category do you believe each measure falls within?

As set out above, our analysis of these measures has not yet been completed. However, in addition to SCH/Com-ex (99) 11 rev 2 (agreement on cooperation in proceedings for road traffic offences), at this stage it is clear that Joint Action 96/747/JHA (number 6 on the list), which concerns the creation and maintenance of a directory in order to facilitate law enforcement cooperation between Member States in the fight against international organised crime, is now defunct, as online thematic expert platforms have emerged in recent years and have now superseded the directory, which closed on 16 February 2012. In addition, in our view the declaration on extradition (number 112 on the list) has been superseded by the European Arrest Warrant.

Other measures have been amended or repealed and replaced by new legislation, which will enter into force before 2014. The UK has opted in to measures which have already entered into force, or are likely to enter into force before 2014, which replace the following measures:

1. Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security

2. Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service

3. SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen


6. Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union


11. Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters


We also expect the Commission to bring forward proposals which will repeal and replace or amend some further measures on the list. At present we expect measures on Europol, Eurojust, CEPOL, information exchange on psychoactive substances, minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, and counterfeiting of the Euro. We will approach our participation in those new measures on a case by case basis.

6. How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?

The extent to which the UK has made use of the measures subject to the 2014 decision varies widely. Some measures have been used a great deal; whereas others, such as the Agreement on Cooperation in Proceedings for Road Traffic Offences (SCH/III (96)25rev18), have not been used at all and are effectively defunct.

Further detailed information on the use of some individual measures is provided below:

**European Arrest Warrant** (Council Framework Decision 2002/584/JHA)
The number of people extradited from the UK between 2009 and 2011 is as follows:
The number of surrenders to the UK between 2009 and 2011 is as follows:

2009 – 80
2010 – 116
2011 - 99

Schengen Convention - Article 40

Since 2008, the UK has made 154 requests for authority to continue surveillance into foreign jurisdictions under article 40 of the Schengen Convention and has received five such requests from other Member States.

The figures do not represent the number of occasions that UK law enforcement actually conducted surveillance on foreign soil because such requests for continued surveillance are often facilitated by the receiving country, eliminating the need for UK law enforcement to travel. Of the five requests the UK has received from other Member States, all were conducted by UK authorities rather than the requesting Member State.

Mutual Legal Assistance (Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union and Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union)

In 2009, the Home Office accepted 1,999 Mutual legal Assistance (MLA) requests for evidence, of which 1,539 (77%) were from EU Member States. In 2010 this figure was 2,119, of which 1,620 (76%) were from EU Member States; in 2011 the Home Office accepted 2,728 MLA requests for evidence, of which 2,084 (76%) were from EU Member States. In terms of service of process (service of court documents, e.g. a summons), the Home Office received 726 requests in 2011, of which 626 (86%) were from EU Member States. It is not possible to say how many of these requests were made pursuant to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union and its Protocol.

Freezing Orders (Council Framework Decision 2003/577/JHA)

To date we have received 6 incoming requests pursuant to the Freezing Orders Framework Decision. We have not made any outgoing requests pursuant to this measure.


Requests from UK Law Enforcement to Europol are sent on the SIENA (Secure Information Exchange Network Application) secure system. The total number of SIENA messages sent
and received therefore provides a broad indication of levels of UK information exchange with, and therefore requests to, Europol. However, it is important to note that this is only indicative as there is great disparity in the volume and types of information exchanged in this way; an individual SIENA message may contain a single piece of information or a request for a simple check or, at the other end of the scale, may contain multiple attachments with, for example, intelligence logs, papers on often complex investigations and significant amounts of data.

The total numbers of SIENA information exchanges by the UK Liaison Bureau since 2009 are as follows:

- 2009: 4,234
- 2010: 13,215
- 2011: 16,875

More widely UK consultation with Europol is on a daily basis in that Europol data systems including SIENA are consulted by UK liaison bureau officials who are based at Europol in The Hague. UK liaison officers come from various UK law enforcement agencies such as the Serious Organised Crime Agency, the Metropolitan Police Service, Her Majesty’s Revenue and Customs, the UK Border Agency and the Scottish Crime and Drugs Enforcement Agency, and they have daily interaction with liaison officers from other Member States.

**Joint Investigation Teams (JITs) (Council Framework Decision 2002/465/JHA)**

During 2011 and 2012 the UK was involved in approximately 21 JITs with a number of EU Member States, some of which also had analytical support from Europol.


1,441 cases were registered by the Eurojust College in 2011. Of these:
- 71 were opened by the UK National desk; and
- other Member States collectively sought UK assistance in 197 cases.

204 cases across all Member States involved co-ordination meetings in 2011. Of these:
- 19 were opened by the UK; and
- the UK was involved with 39 cases opened by other Member States.


The UK made 7,872 notifications (convictions and updates) from August to October 2012. It received 2,070 notifications in the same period. In August to October 2012 the UK made 5,492 outgoing requests and received 1,165 incoming requests. Replies to circa 30% of outgoing requests have convictions.

**Prisoner Transfers (Council Framework Decision 2008/909/JHA)**

To date no prisoners have been transferred from England and Wales to other Member States under the prisoner transfer agreement, which entered into force on 5 December 2011. However, 157 prisoners have been identified for potential transfer at present and a small number of requests for transfer to other Member States have been made for which
decisions are awaited. EU nationals account for approximately 36% (3,950) of the current prison population of foreign nationality although they may not all be eligible for transfer. To date only a small number of Member States have implemented the agreement; we expect the remaining Member States to implement it by 2014. Once all Member States have implemented the agreement we expect to see the number of prisoners transferred to steadily increase.

7. Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

The UK has a strong record on implementation of EU legislation. We take our international obligations seriously and we have implemented the vast majority of the measures subject to the 2014 decision. Of those which have yet to be implemented or fully implemented, it makes sense to consider implementation alongside the UK’s participation in the measure, as part of our consideration of the 2014 decision.

The following measures have yet to be implemented in full:

- Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism
- Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
- Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
- Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders
- Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime
- Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA on stepping up of cross-border cooperation, particularly in
combating terrorism and cross-border crime


- Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities

- Council Framework Decision 2009/829/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities


8. What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

It is important to remember that the ‘third pillar’ legislation which is subject to the 2014 decision was agreed by the Council under unanimity. This means that it was often made to the ‘lowest common denominator’ in order to secure unanimity. It was also not negotiated with ECJ jurisdiction in mind so much of the drafting is somewhat ambiguous. Therefore, the practical effect of the ECJ gaining full jurisdiction in this area after the transitional period is that the ECJ may interpret these measures expansively and beyond the scope originally intended. This concern is compounded by the fact that the ECJ has previously ruled in the area of Justice and Home Affairs in unexpected and unhelpful ways from a UK perspective. For example, in 2008 in the Metock case, the Court made a ruling which extends free movement rights to illegal migrants if they are married to an EEA national who is exercising free movement rights. Since the Metock judgment we have seen a steady increase in sham marriages involving EEA nationals.
There is not much ECJ case law that has caused the UK complications regarding the operation of PCJ measures because the ECJ does not currently have jurisdiction over the interpretation of these PCJ measures in the UK. However, other Member States’ national courts could make preliminary references to the ECJ on questions concerning the validity or interpretation of PCJ instruments if that Member State has made a declaration accepting the jurisdiction of the Court. 17 Member States (Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Slovenia, Spain, Sweden) have decided to elect to accept ECJ jurisdiction to give preliminary rulings on pre-Lisbon police and criminal justice measures.

An example of an ECJ case that interpreted a pre-Lisbon PCJ measure is an Italian preliminary reference called Pupino which looked at the interpretation of the Framework Decision on standing of victims in criminal proceedings. This case established that a national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

9. If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

As set out above, we are concerned that the measures subject to the 2014 decision were drafted without ECJ jurisdiction in mind and could result in uncertainty, and potentially in an expansive interpretation by the Court. We must ensure that we carefully consider whether it is in the national interest for the UK to be subject to Commission enforcement powers and ECJ jurisdiction on these measures.

Where the Government thinks that participation in a measure benefits the UK, we will of course want to ensure that all Member States implement and abide by the legislation, in order to ensure its effectiveness. However, in practice we do not consider that accepting the Commission’s enforcement powers over the measures subject to the 2014 decision would assist this; all other Member States will be subject to the Commission’s enforcement powers and ECJ jurisdiction over these measures regardless of whether we exercise our opt-out.

The potential consequences of exercising the opt-out

10. The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

The UK Government sees extradition as a vital tool in the fight against international crime. The European Arrest Warrant (EAW) has had some success in streamlining the extradition process within the EU and has been used in a number of high-profile cases. For example, Hussain Osman was brought back from Italy under the EAW to stand trial for his part in the 21 July attempted bombings.

However, the Government has concerns about the disproportionate use of the EAW for trivial offences and for actions that are not considered to be crimes in the UK. There are also issues around the lengthy pre-trial detention of people, not just British citizens,
overseas. There have been a number of cases where British nationals have been extradited abroad to face lengthy pre-trial detention in foreign prisons; the case of Andrew Symeou, who was extradited to Greece in 2009 to face trial for the manslaughter of another British national, is an example of this. He was later acquitted at his trial in Greece in 2011.

The UK’s operation of the EAW was one of the areas considered by the independent review of the UK’s extradition arrangements, chaired by Sir Scott Baker. The panel found that the EAW operates satisfactorily, although a number of improvements could be made to the system. They made a number of recommendations to improve the UK’s operation of the EAW, including:

- Enhanced dialogue and co-operation between the UK and EU Member States to address the issue of proportionality.
- Any future amendment to the EAW Framework Decision should include a proportionality test to be applied in the issuing Member State.
- The issue of time spent in pre-trial detention was considered carefully by the panel, who suggested several possible solutions including greater use of instruments such as the European Supervision Order (ESO), or amending the EAW to include a system of postponed surrender.

The Home Secretary responded to the recommendations of the review on 16 October, saying that ‘Government will work with the European Commission, and with other Member States, to consider what changes can be made to improve the EAW’s operation’.

We will engage with our operational partners on this, who know first-hand how this measure works in practice. We will also be engaging with groups such as JUSTICE and Fair Trials International, who have valuable experience in this area and who have raised concerns about the EAW’s operation.

If we were to opt out and not rejoin the EAW, we believe our extradition relations with other European countries would be governed by the 1957 European Convention on Extradition (ECE).

11. What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?

As the Home Secretary’s Statement to the House on 15 October made clear, if the Government does exercise the opt-out, we will seek to rejoin measures where it is in the national interest to do so. In a letter to the European Scrutiny Committee of 7 November 2012, the Home Secretary also clarified that as ‘part of this the Government may consider how a measure contributes to public safety and security, whether practical cooperation is underpinned by the measure, and whether there would be a detrimental impact on such cooperation if pursued by other mechanisms. The impact of a measure on civil rights and liberties is also a consideration’.

Consequently, through our active engagement with operational partners we will better understand the operational implications of not participating in individual measures and that
will inform our views on what measures we would seek to rejoin (should we exercise the opt-out). Equally, the Government will be working with other Member States to consider where practical cooperation between our respective law enforcement and prosecution agencies is underpinned by any of the measures subject to the opt-out.

Nonetheless, the Government will have to weigh up the value of the cooperation underpinned by a measure against the human rights and civil liberties consequences of remaining bound by any individual measure. For example, whilst the EAW has had some success in streamlining extradition between Member States, the press, public and a number of Parliamentarians have all raised civil liberties concerns about its use.

The Government has demonstrated its firm commitment to strengthening its response to cross-border crime by creating the new National Crime Agency (NCA) which will be established in 2013, subject to passage of the legislation. A new Border Policing Command will feature as a key element of the NCA. Establishing the NCA is one element of the Government’s strategic response to the cross-border crime threat posed to the UK by organised crime as set out in “Local to Global: Reducing the Risk from Organised Crime”, which reflects the fact that while the impact of organised crime is often felt in local communities and by businesses within the UK, the scope of the threat is global in nature. It therefore requires an international response with the UK working closely with international partners.

It is too early to outline any possible financial implications for police forces, prosecution authorities and law enforcement agencies.

12. Which, if any, PCJ measures should the Government seek to opt back in to?

The Home Secretary made clear that, if we do exercise the opt-out, we will seek to rejoin measures where it is in the national interest to do so. As we said in our letter of 7 November 2012 to the European Scrutiny Committee, this may include how a measure contributes to public safety and security, whether practical cooperation is underpinned by the measure, and whether there would be a detrimental impact on such cooperation if pursued by other mechanisms. The impact of a measure on civil rights and liberties is also a consideration. Before coming to a final view on this, the Government is interested to hear the views of Parliament, including the outcome of this Inquiry.

13. How straightforward would it be for the Government to opt back in to specific PCJ measures on a case-by-case basis? What would be the approach of the Commission and the other Member States to the United Kingdom in this respect?

The UK would be exercising a Treaty right if we choose to opt out and seek to rejoin certain measures. The EU institutions and its Member States are all bound to respect the obligations and choices that flow from the Treaties. The Treaty also establishes the process for the Commission and Council to consider the UK’s applications to re-participate.

The process for rejoining measures if we do exercise the opt-out is as follows:

Schengen measures
The UK submits a formal request to the Presidency to rejoin certain measures. The Council acts by unanimity of the Schengen States, plus the UK, to agree a Council Decision
confirming UK participation in those elements of Schengen. The Schengen States are all of the EU Member States, with the exception of the Republic of Ireland.

**Non-Schengen measures**
The UK submits a formal request to the Council and the Commission to rejoin certain measures. Then either:

1. The Commission confirms UK participation through the adoption of a Commission Decision; or

2. The Commission confirms that conditions will need to be met for the UK to participate via a Commission Decision. If the UK then accepts those conditions then it notifies the Presidency, and the Commission then confirms that the UK has joined by the adoption of another Commission Decision; or

3. If we cannot get agreement with the Commission on whether the conditions have been met we would then refer the matter to the Council which would then decide on our request by way of a Council Decision.

14. **What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?**

If the Government does decide to exercise the opt-out, cooperation with other Member States could take a number of forms. The Home Secretary said in her statement of 15 October that ‘we will consider not just opt-ins and opt-outs but the other opportunities and options that are available’.

Firstly, the Government could apply to rejoin measures within the scope of the 2014 decision.

Secondly, the Government believes that in some cases it would be possible to rely on pre-existing Council of Europe Conventions or bilateral treaties. For example, if the European Investigation Order has not yet become operational and the Government did not opt back in to the Mutual Legal Assistance Convention and its Protocol, we believe that most forms of cooperation would continue on the basis of the 1957 Council of Europe Convention and its Protocols. Indeed, as not all Member States have ratified the EU’s Mutual Legal Assistance Convention and its Protocol the impact on our MLA relations with those States would be largely negligible.

Thirdly, in some cases it may be possible to negotiate bilateral treaties with each Member State or with the EU that would effectively replace the instruments in question.

Fourthly, in some cases there may simply be no need for any such agreement to be in place in order for there to be cooperation.

15. **Is Article 276 TFEU, which states that the Court of Justice has no jurisdiction to review the validity or proportionality of operations regarding the maintenance of law and order and the safeguarding of internal security, relevant to the decision on the opt-out?**

Article 276 is clear that ECJ jurisdiction is limited. It cannot review the validity or proportionality of operations carried out by the police or other law-enforcement services
nor can it review the exercise of responsibilities regarding the maintenance of law and order and the safeguarding of internal security. This limit on ECJ jurisdiction would, in our view, apply to the interpretation of former 3rd pillar measures as it would apply to measures adopted post-Lisbon. We will take this limit on jurisdiction into account when deciding whether to exercise the opt-out, and if we do opt-out, in deciding which former 3rd pillar measures we should opt back into.

16. If the opt-out is exercised, would there be any implications for the Republic of Ireland considering that the two countries work very closely on police, security and immigration matters, as well as participating in a Common Travel Area?

The Government values the close working relationship between the UK and the Republic of Ireland on police, security and immigration matters and recognises its particular importance in the context of the Common Travel Area. Both the Home and Justice Secretaries have met with Irish Ministers to discuss the 2014 decision and we welcome their views on this matter, including on which measures underpin practical cooperation between us. The Government is confident that effective cooperation with the Republic of Ireland will continue in the future.

14 December 2012
WEDNESDAY 13 FEBRUARY 2013

Members present

Lord Bowness (Chairman)
Lord Anderson of Swansea
Lord Avebury
Viscount Bridgeman
Baroness Corston
Viscount Eccles
Lord Elystan-Morgan
Lord Hannay of Chiswick
Lord Hodgson of Astley Abbotts
Lord Judd
Lord Mackenzie of Framwellgate
Baroness Prashar
Lord Richard
Lord Rowlands
Earl of Sandwich
Lord Sharkey
Earl of Stair
Lord Stoneham of Droxford

Examination of Witnesses

Rt Hon Theresa May MP, Home Secretary, Peter Storr, Director of International Directorate, Home Office, Kenny Bowie, Head of the Opt-In and Treaties Team, Home Office, Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, Tim Jewell, Deputy Director, Legal Directorate, Ministry of Justice, and Rebecca Stimson, European and International Advisor, Ministry of Justice.

Q274 The Chairman: Lord Chancellor, Home Secretary, may I welcome you to this meeting of this Committee? We are very grateful to you for coming to give evidence to this inquiry into the United Kingdom’s 2014 opt-out decision. We, like you, consider it to be an important matter and it may have far-ranging implications for the United Kingdom and the European Union. Bearing in mind the Government’s current thinking is in favour of exercising the opt-out and the undertaking to consult Parliament before making a final decision, we launched the inquiry in November, as you know. It is being conducted as a joint
inquiry between the European Union Sub-Committee on Justice, Institutions and Consumer Protection, which I chair, and the Sub-Committee on Home Affairs, Health and Education that Lord Hannay chairs.

We have had a lot of written evidence, which no doubt you have seen from the website, before the end of last year, and we have taken oral evidence from lawyers, academics, think-tanks and NGOs, as well as serving and former police practitioners and prosecutors, and that all will go to inform our deliberations.

As I think you know, the intention is that our report will inform the House’s debate and the vote on the matter. The report, we hope, will cover both the merits of the opt-out decision and which measures the United Kingdom should seek to rejoin, were it to be exercised, and we hope to publish just before the end of the current parliamentary session in May. We will wish to consider the Explanatory Memoranda that you have promised on the measures subject to the opt-out, and the House will want, no doubt, to hear our views on any indicative list of measures into which the Government may wish to rejoin if indeed you exercise the opt-out.

You, of course, both know as well as I do, but for the record, the session is open to the public. The webcast goes out live as an audio transmission and it is subsequently accessible on the parliamentary website. The transcript will be taken and put on the parliamentary website. We will send you a copy of that transcript to check for its accuracy, and we would be grateful if you could advise us of any necessary corrections. If, after the session, there are any points that we have not raised with you that you feel we should have raised, or further submissions that you want to make, please do feel to let us have any supplementary evidence.

Again, for the record—of course, we do not really have need for you to introduce yourselves—could you when speaking please introduce yourselves and perhaps introduce your officials if they are going to assist us during the course of this session? I do not know whether either or both of you wish to make an opening statement before we proceed to questions. That is entirely a matter for you, and the Committee will be pleased to receive a statement or indeed carry straight on with their questions. I have to ask you, Lord Chancellor, Home Secretary, to decide who will go first.

Chris Grayling: I think the Home Secretary will go first.

The Chairman: I cannot arbitrate from this distance, I am afraid.

Chris Grayling: The Home Secretary will start, but I do not know whether we want to introduce everyone first before we start.

Theresa May: Thank you very much. I think we are happy to go into questions, rather than making a statement, but can I introduce Peter Storr, who is the Director in charge of our International Directorate in the Home Office, and Kenny Bowie, who works within that International Directorate, particularly looking at European Union matters?

The Chairman: Thank you.

Chris Grayling: I have with me Tim Jewell, who is Deputy Director of Legal within the MoJ, and Rebecca Stimson, who is my European and International Advisor.

Q275 The Chairman: Thank you very much. If we are going to go straight to questions, perhaps I can begin by asking you whether, given how matters have progressed, you think the Government’s engagement with Parliament, including this Committee, regarding this
matter could have been better. I am sure you were aware that, despite the undertaking given by Mr Lidington on prior consultation, no consultation took place before the Prime Minister’s statement to the press in Brazil on 28 September and your own statement to Parliament on 15 October, and I wonder whether it would not have been preferable for the Government’s own analysis of each measure to have been completed before the statement was made.

**Theresa May:** May I first of all, Chairman, say thank you to everybody sitting around from both of your Sub-Committees for the work that you will be doing on this? I know this is a complex set of issues that we are dealing with here and, therefore, I recognise the amount of effort and work that will need to go into it, but we are grateful for both yourselves and of course the European Scrutiny Committee in the House of Commons for agreeing to undertake this work.

In looking at the decision-making process in relation to the 2014 opt-out, there are various stages within that. As a Government we have been very clear and we have since May 2010 been very clear of the need to increase the ability of Parliament to look at decisions that are taken around European Union matters and particularly about European Union legislation, and that is why there are more opportunities now for Parliament to debate these issues. That is why there are more matters being considered by the scrutiny committees and in Parliament itself, certainly on the floor of the House of Commons and, I believe, in the Lords as well.

It is against that background that we felt it was important that the Committees in both Houses were able to look at this, but, as I say, the decision-making process is a staged approached. What we have done is set out the Government’s current intention of opting out and seeking to opt back in to certain measures, but the final decision will be taken in due course. It is in that context that I think it was appropriate that this Committee is able to give its views to Parliament to inform a vote or votes that will take place within Parliament.

**The Chairman:** Thank you.

**Baroness Corston:** What is the answer to the Chairman’s question, Home Secretary, about prior consultation, which was promised?

**Theresa May:** Yes, prior consultation will be taking place before the final decision is taken by the Government, but the Government has indicated a direction of travel—our current thinking—on this. We did that because we felt it was appropriate to set out where the Government’s thinking was. It also has helped in terms of dealing with the European Commission, but this Committee’s views will be taken into account by Parliament when it looks at these issues and by the Government when it makes a final decision.

**Q276 Lord Hannay of Chiswick:** Home Secretary, Lord Chancellor, what consultations did the Government pursue with the Devolved Administrations and with their law enforcement agencies and UK law enforcement agencies or others before making that statement to Parliament on 15 October? Would it not have been preferable for such consultations to have been conducted before the statement was made, and are those consultations ongoing now, and what concerns have been raised by law enforcement agencies and the Devolved Administrations, if any?

**Theresa May:** Again, there were various stages of consultation. Consultations did take place before the statement was made in October. In relation to the Devolved Administrations, our officials had been in regular touch with colleagues in the Devolved Administrations before the statement was made in October, and they were able to feed in their thinking at
that stage to our initial analysis on the measures. Obviously, policing and criminal justice are devolved matters for Scotland and Northern Ireland, but I understand that organisations like the Crown Office in Scotland and PSNI, the Police Service of Northern Ireland, were given an opportunity to feed their thoughts in at that stage to the Devolved Administrations. That was prior to the statement.

Following the October announcement, consultations do continue and we have engaged again at different levels, at the level of officials but also at ministerial level. The Minister for Security visited both Belfast and Edinburgh in January and met variously with the Justice Minister David Ford, Cabinet Secretary MacAskill and the Lord Advocate. The Foreign Secretary chaired a meeting last December at which the Devolved Administrations were represented in order to discuss this particular issue. The Justice Secretary has visited Northern Ireland and has discussed the matter with the Justice Minister David Ford.

We are particularly aware of the issues in Northern Ireland in relation to taking into account the implications of any decisions we take in this area in relation to the land border with the south and maintaining effective judicial co-operation, and that has been an important part of conversations with both David Ford and Alan Shatter, who is the Irish Minister for Justice and Home Affairs. We will continue working with the Northern Ireland Executive and the Irish Government to make sure that we are taking full account of those issues.

In England and Wales, in relation to law enforcement agencies, which you also asked about, again their views were sought by officials prior to the statement being made, gathering our initial evidence base. Subsequent to the statement, there have been further meetings. There was a meeting between a number of law enforcement agencies, including Europol and Eurojust, with the Chief Secretary to the Treasury, the Minister for Government Policy and the Minister for Security. The Justice Secretary and I held a meeting last month with representatives of ACPO, SOCA, the Metropolitan Police, HMRC, the National Crime Agency, which we are establishing, and the Security Service, and this month we have met with the Director of Public Prosecutions, the Crown Prosecution Service and the Serious Fraud Office. There are bilateral discussions taking place as well with other Ministers, and officials have been meeting with a variety of other interested parties, such as the Law Society, Open Europe and the Centre for European Legal Studies, so we are trying to cast our net wide in terms of talking to and hearing from people about these issues.

You asked specifically about any concerns that had been raised. Obviously, we have been discussing with the various parties the use that they make of particular instruments and whether if we were not in a particular instrument there would be alternative arrangements that would be equally efficacious, and that is part of the ongoing dialogue that we are having with them.

Chris Grayling: It is also worth saying that last week I had a meeting with the Northern Ireland Justice Minister. I struggle to see that I would have felt comfortable having the discussions that I had with him if we had not previously at least indicated a direction of travel to Parliament. Surely it is right and proper that that direction of travel is indicated before we enter the more detailed discussions and secure the more detailed input that we were doing from all the bodies the Home Secretary referred to.

Q277 Lord Hannay of Chiswick: Thank you, but could I just follow that up? I have to say that not one single one of the witnesses we have seen, and they include many of the categories that you spoke about, has done other than say flatly that no consultation took place before the ministerial statement in October. They have all invariably said that. Although I understand what you are saying about the need the Government saw to indicate
Theresa May: I am talking about official-level discussions that took place with Devolved Administrations. Regular contact has been made with Devolved Administrations prior to the statement being made.

On the point about Parliament and the Minister for Europe’s reference, I would say that Parliament is going to be consulted probably more fully than it has been until the Government came in and changed the arrangements for consulting Parliament in relation to European matters, because there is more consultation that takes place and more discussion that takes place with Parliament now on European matters than did previously. The final decision will be taken following reports that have been received and views that have been taken from a wide variety of organisations, individuals and groupings within Parliament. This is not a one-off decision. It is an iterative process of coming to an initial view to give everybody an indication of the current thinking of the Government and the current intention of the Government, and it was important to give that indication to the European Commission as well in relation to some of the discussions we were having with them. There will be various scrutiny by your Committee, by the other Committees in the Commons, and by others looking at these measures and reporting on views on these measures, and then the Government will be in a position to take a final decision. Of course, the process will continue thereafter because the Government, if it goes down the route of opting out and wanting to opt in to certain measures, will by definition need a negotiation to take place, and in the interim it may very well be that the list of measures itself has changed because of decisions the European Commission has taken.

The Chairman: I think the difficulty, if I may say so, is that Members have had all this evidence, and of course it is difficult for us to appreciate how you were able to form even an initial view without having consulted these people before indicating it.

Chris Grayling: We have, over the last three months, between both departments, been involved in a number of quite detailed discussions about individual instruments, about what the right policy options are. Surely the right thing to do before entering that kind of detailed discussion would be to at least indicate to Parliament that we were going to do so.

Q278 Lord Anderson of Swansea: You have spoken about process. You have spoken about the direction of travel. You have spoken about regular meetings at official level. The fact is that that is contradicted by all the evidence we received from the Devolved Administrations, and indeed, of course, from key practitioners. Can you give us not just the regular, normal meetings between officials, but the dates on which you say these meetings were held, so we can try to resolve what is clearly a difference of evidence?

Chris Grayling: If it is helpful, I met the Justice Minister in Northern Ireland to discuss this last week.

Lord Anderson of Swansea: No, this is prior—prior to the decision being made. That was the question.

Theresa May: We do not normally give out dates of meetings that are held between officials in various ways like this. I can find a way of giving you some greater indication, if I may, of the fact, but some of these issues will have been raised in regular meetings that were
being held for other reasons. I can assure you that there were discussions taking place between officials.

**Lord Anderson of Swansea:** Are you troubled by the fact that the evidence from all those whom we have consulted is to the contrary?

**Theresa May:** I am obviously as concerned as you are that there is a discrepancy between the evidence that you are receiving.

**Lord Anderson of Swansea:** Will you help us resolve it?

**Theresa May:** I think we will take it upon ourselves to see if we can help you resolve it.

**Lord Richard:** You were asked whether you were concerned about the discrepancy. Are you surprised at the discrepancy?

**Chris Grayling:** No. It is what I indicated to Lord Bowness: we have over the past three months significantly accelerated, enhanced and deepened the nature of the discussions we have been having about these issues, having made an initial statement to Parliament to indicate a direction of travel. What I cannot understand—

**Lord Richard:** I am talking about before you made the statement. Let us be clear about that.

**Chris Grayling:** But, Lord Richard, before we entered into the kind of detailed discussions that we have been involved in in the last three months with the stakeholder groups that the Home Secretary has just referred to, you would surely have expected us not to do that until we had indicated at least a direction of travel to Parliament, so discussions that would have taken place beforehand would have been on an entirely different level to those that have taken place since the statement was made to Parliament.

**Lord Richard:** I hear what you are saying, but it does seem to me that you made a statement to Parliament saying what you are minded to do. Before you made that statement as to what you are minded to do, you were, according to Mr Lidington, under an obligation to consult with the Devolved Administrations and the practitioners. We have been told very definitely by the Devolved Administrations and by the practitioners that no such consultations took place, while you say consultations did take place. That has to be resolved. Did you indicate to the Devolved Administrations or to the practitioners what your direction of travel was? Did you indicate to them what you were minded to do, what you were thinking of doing, or did it come, as they say it did, totally out of the blue?

**Theresa May:** I am tempted to say that if the Committee’s concern is that we made a statement before having asked these parties their view, then it would have been wrong for us in asking their view to give an initial statement to them as to what we were going to do. What we did was talk to them. Before the statement was made, there were discussions with a number of these parties about their views and where we were going and how we were addressing this particular issue, and how we—

**Lord Richard:** Where “you” were going?

**Theresa May:** Sorry. I was not party to the discussions, so officials—

**Lord Richard:** You said, “Where we were going”. That is all. I just want to establish that—

**Theresa May:** Yes, I know.
Lord Richard: you discussed with them where the Government was going on this matter.

Theresa May: I am not in a position to say that because I was not party to the discussions, but the officials had discussions about this issue, and within that I would have expected them to explore the initial views—and this is very much initial views—of other parties. We can write and explain perhaps more fully what happened if it would help, Lord Bowness.

The Chairman: I think that would be very helpful.

Q279 Lord Elystan-Morgan: Home Secretary, can you tell us whether there was ever a point in time in relation to the 133 or 135 matters that we are talking about when the Government had an open mind or a relatively open mind, bearing in mind that many of these are intricate mechanisms and that it is difficult in such a situation, unless one starts off from some preconceived, global idea, to have a global view of such intricate, individual matters?

Theresa May: We started off this process by recognising that there were a number of options available to us under the Lisbon Treaty, and looking overall at the measures and doing some initial work on individual measures, and you are absolutely right; some of them are intricate, some of them are inter-related. Indeed, part of the discussion with the Commission that continues at the moment is about the degree of inter-relation of certain of these measures, which obviously has an impact on those that may wish to opt out or opt in to. We started it by looking genuinely across the measures and doing an initial assessment of the measures to come to an initial view as to what our intention was.

Lord Elystan-Morgan: No discussions with any of the parties concerned took place previous to you taking that fairly global attitude towards these matters. Is that so?

Theresa May: The Government started off from the position of just looking at the measures, doing an initial assessment of the measures, and as I say, before the statement was made there were discussions with a number of the agencies and bodies that we have been talking about that have been referred to in the initial question, but this is an iterative process.

Lord Elystan-Morgan: May I put this point to you, and I hope without impertinence: is it the case that the Government started off with a preconceived idea that, in some way or another, by opting out of these matters, that one was repatriating sovereign powers?

Chris Grayling: Can I take that? I think it is important to remember that we inherited from the previous Government a view that we share: that it is certainly likely and was likely then, which is why they negotiated the opt-outs in the first place, that the United Kingdom would not wish to participate in the justice and home affairs measures on the same basis as other Member States. Had they not taken that view, we would not be having this discussion today. That view is one that has been shared within this Government. We have been open-minded about the end goal, but we started with a view that sits across the political spectrum, that this was an idea that at the very least we needed to ask serious questions about whether we would want to participate in all of these measures, and that is what we did. I think, listening to the comments here, when we reached the point, which we did last October, of starting to engage in very serious discussion about the degree to which we should participate, whether or not to exercise the opt-out, it is surely right and surely the duty of the Government of the day to inform Parliament first and foremost before embarking on the level of detailed discussion that we have been embarking on in Parliament in the last three months. I would make no apology for us having given a clear indication to Parliament of our
direction of travel before embarking on the level of discussion that we have been involved in in the last three months.

Lord Elystan-Morgan: So there was a globality—if the English language has such a noun—of attitude towards this as a corporate entity?

Chris Grayling: The reason that the opt-outs were negotiated—

The Chairman: I think we are going to be touching on a number of these matters in further questions.

Q280 Lord Judd: The matters with which we are dealing of course cover crucial issues like international terrorism, migration, international crime, asylum and the rest. Presumably, all these require international co-operation. What discussions are you having with other member governments of the European Union about how these matters will be effectively covered if we opt out? Can you tell us which countries you have talked to, can you tell us what was on the agenda, and can you give us an absolute, specific undertaking that we will have from you a written report on those conversations in order for us to complete our report to Parliament?

Theresa May: We do have discussions with other Member States on these particular issues, and those discussions have been taking place at various levels, but we do not feel it is appropriate that we disclose the content of those discussions. To do so would potentially put in jeopardy the willingness of other Member States to be open with us and have open discussions with us. But I can assure the Committee that, following the announcement in October, we have contacted the majority of Member States at variously ministerial and official level, and between us we have had a number of bilateral discussions with other Member States. Of course, talking to other Member States is an important part of the process, not least because, as you have indicated in your question, in areas where we might wish to opt out, we may wish to discuss with Member States the implications of that, but also because of those areas where we may wish to opt in, it will be Member States that will have a prime role in deciding whether or not it is possible for the United Kingdom to opt in. We have already had a number of bilateral discussions. Officials have visited a number of Member States. I can list those that have been visited. They include Sweden, Denmark, Germany, Finland, Czech Republic, Slovakia, Hungary, Romania, France, Spain, Portugal, Lithuania, Latvia and Estonia, and we have also spoken to Commissioners Malmström and Reding on a number of occasions.

Lord Judd: Do you have a systematic arrangement within Government among Ministers who are concerned with this policy on how this information from Member States, this reconnaissance, if you like, can be evaluated and taken into account before a final recommendation is made?

Theresa May: The Ministers who are primarily responsible or responsible for the majority of the measures are of course sitting here before you today. The larger number is in the Home Office. The Ministry of Justice has the second largest number. There are a small number of measures that affect other departments as well, such as the Attorney-General’s Office through the Crown Prosecution Service.

We are discussing at ministerial level across Government and at official level across Government the responses we get, but again I would perhaps refer back to the fact that this is an iterative process, so there are different stages. There will be different discussions to be held with other Member States when we have made a final decision and a decision on which
measures we wish to try to opt back into. Therefore, the discussions will go to a different level with Member States at that stage.

Lord Judd: But you do accept that it is not possible for us in these Committees to come to final conclusions on what we want to say until we know what your assessment is of these discussions with other member governments in terms of how these crucial matters will be covered in the event of an opt-out? Therefore, will you please give us an absolute undertaking that you will report to us on those conversations? All right, there may have to be some confidentiality about precise details, but report to us on those conversations fully so that we can take it properly into account in coming to our decision.

Chris Grayling: I do not think it is possible to give that undertaking. We have bilateral discussions, sometimes formal, sometimes informal. We are trying to do the right thing in the interests of the United Kingdom, and to provide a full report to Parliament of every ministerial conversation that took place I do not think would be in the interests of the United Kingdom.

Lord Judd: Minister, would you not agree that it is really quite outrageous to suggest that a serious Committee in making a recommendation, Parliament and the British people should be left in ignorance about how the Government proposes to cover these crucial issues of terrorism, migration, international crime and the rest before they come to a conclusion on what they want to decide themselves?

Theresa May: If I may separate two issues here, one is whether we report to you the detailed discussions we are having with other Member States, which, as I and the Justice Secretary and the Lord Chancellor have indicated, we do not think is appropriate. The second is at a point when the Government says, “Here is our current intended list if we do go down the route of opting out and wanting to opt back in. Here are the measures that we propose we will not opt in to. Here are the measures we propose we wish to continue to be part of”. Of course the Government will want to be able to assure itself and others, including Parliament, that for those measures we are not part of there are, if necessary, alternative arrangements that will be satisfactory. I think that is separate from reporting detailed discussions that we have had from Member States.

Q281 The Chairman: I think it possibly goes just a stage further, if I may, Home Secretary, though we would like to be assured that if there were matters that you wished to opt back into, that it is possible so to do. While we may disagree about the form the information takes, the discussions you have with the other Member States and the outcome of those discussions may be very relevant as to whether we are going to be successful in our application.

Theresa May: Again, if I may, Lord Bowness, there will be indeed, as I think you have indicated in the nature of your remarks, two or more stages to this. One is the Government taking a view on those measures that—as with our current intention, we opt out and then opt back in—we wish to negotiate to opt back into, and then there will be further discussions. There may be some initial discussions with Member States on the basis of whether or not that is likely. Some Member States may not be willing to have those detailed discussions and indicate their final position until they have had a further stage of decision from this Government as to where we are intending to go, and then detailed discussions would take place. In terms of the timing of the report of this Committee and indeed of debates in Parliament, there are bound to be a series of discussions with Member States beyond the vote having been taken by Parliament and the decision having been taken by
Government. There will then undoubtedly be a further stage of discussion, which is with those Member States, which comes to the final decision in the Council as to whether the UK can opt in.

**Lord Rowlands:** Surely you could at least intimate to us what has been the initial reaction of all these Member States that you have discussed the consideration with.

**Theresa May:** I can say that the initial reaction of Member States that we have met, and I think this would be a collective view, is that they are very keen to discuss with us and they are very keen to see the UK playing its role, as we intend to do, in justice and home affairs matters.

**Lord Rowlands:** Do you mean they are concerned about the opt-out? They are concerned about the opting-out, are they?

**Theresa May:** No. What I said is what they wish to ensure is that in the future the UK is playing a role in justice and home affairs matters, which we have indicated very clearly is the UK’s intention.

**Lord Rowlands:** Especially as most of these measures, which are mutual recognition measures, were constructed basically by the United Kingdom Government. It was this kind of initiative that was taken by the United Kingdom Government. I think surely they would be puzzled at the idea that we would opt out of measures that we had been promoting.

**Chris Grayling:** I think the key difference, though, with what we are discussing now, is that the Lisbon Treaty turns the third pillar into permanent EU law and jurisdiction. What we are doing is not maintaining the inter-governmental arrangements that existed prior to the Lisbon Treaty. We are passing over to the European Court of Justice and its jurisprudence sovereignty in perpetuity over these measures and the scope to have an evolving jurisdiction or an evolving jurisprudence around these measures. That is the step that the previous Government thought we should be extremely cautious about taking, hence it negotiated the opt-out, and one that we are also cautious about what the right steps are to take in the interests of the United Kingdom.

**Q282 Lord Rowlands:** As the question I am going to ask later will indicate, you have already done that post-Lisbon. You have opted in on a number of measures that mean the jurisdiction of the Court will apply, and I cannot remember, as a member of Committees that scrutinised all those decisions and mostly supported the pragmatic decision the Government has taken on opting in post-Lisbon, ever once seriously was the issue of the court raised.

**Chris Grayling:** I am raising it now, and I think that we have opted into measures where we have deemed it to be in the British national interest to do so.

**Lord Rowlands:** Despite the fact that the jurisdiction of the Court will apply to them.

**Chris Grayling:** Indeed. We are not suggesting that there are no measures that we would wish to participate in, but it is our job as Ministers, I think, to operate in the British national interest and judge what is in the national interest.

**Theresa May:** If I may, Lord Rowlands, going back to your earlier question, I think the position the Government has is that of course there will be certain areas where we wish to undertake co-operation with other Member States on these sorts of issues, as there are on other issues outside of the 2014 decisions, but it is our position that it is not the case that
every piece of co-operation has to be subject to EU legislation. Very often what is preferable is practical co-operation at a working level. It is against that background that I think it is appropriate that we look at these measures. There are other examples in the European arena where we are undertaking some very serious work with other Member States on the basis not of coming together to put a European measure together, but just of working together practically to achieve the ends that we want.

Lord Anderson of Swansea: On working together practically, but those who currently have the experience of working together practically at a European level—I am thinking of the police; I am thinking of the serious prosecuting authorities—are all of one mind that these are useful to them. As you know, we have had a vast amount of evidence. The Government put in their evidence. We had Mr Dominic Raab in support of the Government, partly Open Europe, and the United Kingdom Independence Party, and that is the sum total of those who appear to support the Government. All the practitioners and others are against your proposal. Are you troubled by this?

Theresa May: If I may, Lord Anderson, obviously, as I have indicated earlier, both I and the Justice Secretary, as officials have done, had a number of more detailed discussions with parties who are operating these various measures. It is not the case in our view or discussions that we have had that those parties are saying that every single measure within this list are ones that we have to be party to and opt back into, and therefore should not go down the route of opting out and attempting to opt back in. Of course we were having discussions about how useful, how practical certain measures are, and what alternatives would be if we were to opt out of certain measures. Could we achieve the same aims in different ways? But it is—

Lord Anderson of Swansea: By bilateral discussions, say.

Theresa May: Potentially by bilateral discussions. There are many areas where practical co-operation takes place today not on the basis of a piece of EU legislation.

Q283 Lord Hodgson of Astley Abbotts: I wonder if we can go on to the list of defunct or done measures. Could you update the Committee of the progress you are making in making a full list? Currently the list is pretty short. Would you agree that there are two broad approaches to this? One is that a bit of spring cleaning is a good idea, a bit of deregulation is good for the soul. The fact that they remain on the statute book does impose costs, whatever the case may be, because they have to make sure they are still defunct; or, on the other hand, they are moribund, defunct, and therefore we should let sleeping dogs lie. Which is your philosophical approach?

Theresa May: We would hope to be able to provide a list of the defunct measures—those that we consider to be defunct—as soon as possible. Of course, the Commission and other Member States may have some differing views on this, and this is one of the issues in the discussion on these various measures, ensuring that clarification for us all in relation to exactly which measures are defunct and which interact and so forth.

My philosophical point would be a slight variation on your first suggestion, if I may, Lord Hodgson, because it is not clear, where a measure is defunct, what it would mean to accept Commission infraction powers or ECJ jurisdiction, so we could well find ourselves, for example, in a position where there is a measure that is effectively no longer used, which required, say, information being given into the central point, where the measure is, where that has been stopped. But the Commission view and the Court view is that because the measure continues to be there, there is a continuing requirement for us to put the effort in
to put that information in. I think we take a simple view that we should look at measures on the basis of whether they are providing the co-operation, the benefit to the United Kingdom, to British interests, and that is the first stage that we should take and that is the basis on which we should decide on these measures. A measure that is defunct by definition is not doing that and could potentially have some implications.

Q284 Lord Mackenzie of Framwellgate: Home Secretary, you have indicated what you describe as your “direction of travel”, as it were. We have had a wealth of evidence, as has been mentioned earlier, against exercising the option. Indeed, this morning we were told that the Irish Government are worried and concerned that the Government would exercise the opt-out. Bearing in mind that these decisions should be based on evidence, could you tell us what the grounds are for the Government’s current thinking that the opt-out should be exercised, and, as a supplementary, are there any of the measures that you believe are detrimental to the United Kingdom?

Theresa May: The basis on which the Government indicated its current intention was an initial exercise in looking at the measures and making an assessment of the benefits of the measures to the UK. That work continues in greater detail, as we have both indicated, but I would, if I may, go back to something that the Justice Secretary said a little earlier, which is to make the point that this was not a decision that this Government suddenly came to. This is a decision that we are entitled to take because it was negotiated into the Lisbon Treaty by the last Government. Obviously there was a concern at that stage that the UK might not wish to be part of all of these measures. We have looked at all of the measures, and on the basis, looking across those measures, felt that it was right to indicate that our current thinking was to opt out and then to opt back into those measures.

Lord Mackenzie of Framwellgate: I suggest Protocol 36 clearly was a safety net in that sense, and I agree it was negotiated by the previous government, but to use an example the European Arrest Warrant, if that failed to be able to be used it would cause tremendous problems. It would gum up the works. How long would you think we would have to be out of the measures before we could opt back in? Is there any optimum time where you think damage could be caused to this country because we are not involved in these measures?

Theresa May: I do not know whether you want me to answer on the European Arrest Warrant specifically at this point or—

Lord Mackenzie of Framwellgate: I used such an example, so we can use that, yes.

Theresa May: The process is that part of the discussion we will be having with the European Commission is in relation to timetabling on any measures that we wish to opt back into, and the transitional arrangements in relation to those measures, and obviously where there are measures that we believe it is in the British interests to be part of we will be working to ensure that the transitional arrangements are such that measures continue to apply as far as possible to the UK during that period. I am not intending that there will be any significant gap between the initial opt-out and the opting back into any individual measures that we would choose to opt back into.

Chris Grayling: One of the reasons that we made the statement in October was to allow us to start to have the kind of conversation you are highlighting now. We have clearly had detailed stakeholder discussions. We have had discussions with the Commission. This is not a process where there is a clear road map. There never was, as set out in the treaty negotiations. We have to work through exactly how this works.
I do think it is important to say, though, that I would not want your Lordships to have the impression that we are simply talking about international crime-fighting co-operation in talking about this. This does contain some of the building blocks of a European justice system. We are in a position where our justice system is very different, a common law based system very different to many of the systems operating elsewhere in Europe. If we believe in the principles that underpin our own justice system, we have to be careful before we pass over sovereignty over parts of it in a way that could, in ways that might well prove to be unexpected, impinge on some of the principles of it.

**Lord Mackenzie of Framwellgate:** I understand that. Could you elaborate on that and tell us which measures are detrimental, which was the second part of my question? Which bits are you not happy with that you think could be detrimental?

**Chris Grayling:** Because these matters are still subject to discussion in Government, I do not think it would be right for me to start tabling individual measures as to ones that we might or might not want to participate in. Your Lordships will look through the list of measures and you will see that there are different kinds of groups of measures, some of which are more clearly associated with international crime-fighting, some of which are much more clearly associated with judicial harmonisation. In some cases, if you are looking at examples of where a measure might have proved problematic for us and it has now been superseded by events, the original victims measures that existed prior to the Lisbon Treaty were vague enough that there was a possibility that the European Court of Justice could have required us to provide translation services for a much wider range of documents related to criminal proceedings. That has now been clarified. It is not an issue and we have opted in to the Directive but, in the form it was in at the time of the Lisbon Treaty, had it been taken into ECJ jurisdiction, it might well have caused problems for our courts. These are areas where we have to be quite careful. We do not do things the same way in this country as much of the rest of Europe. I want to be careful about the inheritance that we have of a judicial system and a criminal system that is distinctive and has many strengths to it, and I do not want us to put ourselves in a position where we erode that without knowing exactly what we are doing.

**Q285 Lord Richard:** I am fascinated by that last answer, if I may say so, because what you are really saying to us is, “There is a danger. We cannot tell you exactly what the danger is. We know what it is we want to guard against. We do not know the details. We cannot tell you the details. You must trust us to be the guardians of the British judicial system”. I find that an extraordinary position for any Government to take up.

Let me come to the main point I wanted to make to you, which is—

**Chris Grayling:** Can I respond to that one first, Lord Richard?

**Lord Richard:** Certainly.

**Chris Grayling:** You will know, as an experienced internationalist, that international courts tend to evolve their jurisprudence—

**Lord Richard:** Of course.

**Chris Grayling:** —that the world moves on, the law changes, and the courts rewrite the law and change the law and adapt the law, depending on circumstances and cases that come before them. In the case of the European Union, our common-law-based system is very different to that in many other Member States. I want to be sure that in taking decisions
about where it is in the national interest to co-operate internationally, we do not endanger
the fundamentals of our law.

_Teresa May:_ Can I give a practical example, Lord Richard, of why we are wary of the ECJ
jurisdiction? We have had some examples where it has had a direct and negative impact on
the UK, and the decision in the Metock judgment is one of these. In that case, there were 11
Member States who intervened against the interpretation of the legislation. The Court
decided that third country nationals who had been illegally present in the UK but now
married to EU nationals who were exercising treaty rights could benefit from the provisions
of the Free Movement Directive. What have we seen as a result of that? We have seen an
increase in sham marriages and the abuse of the Free Movement Directive. It is more
attractive now for third country nationals to circumvent domestic immigration control and it
is harder for us to deal with sham marriages. That is a direct result of an ECJ judgment. That
is why we are wary of the jurisdiction of the ECJ.

_Lord Richard:_ That was not the point that your colleague was just making. He was saying
he wanted to preserve the British judicial system. How does the Metock decision affect that?
It does not. The British judicial system remains. The ECJ may have come to a particular
conclusion on a particular issue, but that does not affect the basis upon which the British
judicial system operates.

_Teresa May:_ But it is a decision that now means that we have to recognise certain people
who we previously would not have done, and what I understood the Justice Secretary to be
saying was two things. First of all, there is concern about how the jurisprudence evolves, and
therefore the impact of decisions, and secondly, the broader principle point about the
maintenance of the British judicial system.

Q286 _Lord Richard:_ That is nothing to do with preserving the common law. That is to do
with how the British system in fact operates in a European context. It is entirely different.
The point I intervened to try to raise with you was this one, which, I was about to say, was
slightly provoked by the remarks of the Lord Chancellor. It was this issue. We have heard a
great deal of evidence in this case about breaking down the various measures into
categories. Mr Raab broke it down into seven different categories. I do not have them in
front of me but there were seven of them. Various other people have broken it down to
about three: those that are defunct, those that are broadly neutral, and those that are, on
the whole, favourable, which we would wish to opt back into. None of them have given us a
list of measures that they consider to be detrimental to the UK’s interest. Of the 133, which
measures do you say are directly detrimental to the interests of the United Kingdom? Of the
133, can you give us a list of those that you think are detrimental and should be discarded?

_Teresa May:_ You are absolutely right, Lord Richard, in that people are carving these
groups up in a variety of ways. As we said, we will be providing a list of those measures that
are defunct. There are some measures that we will simply not be able in a practical sense to
be part of. Prüm is one of those; we have already made that clear, for a variety of reasons, at
least not part of it at this stage. There will be other measures, which, as you say, some
people might describe as neutral. I am not sure. Sometimes the defunct and the neutral tend
to morph into one another. Then on the other measures, the question we are asking is: is it
in the direct interests of the UK to be part of this measure? It is looking at it in a slightly
different angle.

_Lord Richard:_ Look at it from the opposite way. If you were looking at it to say not
“Which should we opt into?”, but “Which of these 133 should we actually try to get rid of?”
where it would be a positive action by the Government, saying, “That we do not like, that we do not like, that we do not like because we regard them as being detrimental to the interests of the UK”—can you give us a list of those?

**Theresa May:** We cannot at this stage because we are still in the process of going through the detail, because that will be part of the final list of those that we wish to opt out of and those we wish to opt in to.

**Lord Richard:** Can you give us some indication of what they might be?

**Chris Grayling:** Lord Richard, as you will be aware, there are discussions taking place within the Coalition Government about what the final lists we should opt in to and not opt in to are, and I do not think we are in a position to share that list with you today. We all individually have views about what is right and what is not right, and what I am trying to suggest to you is that, as a principle, the things that cause me concern are Directives where I can see a practical issue arising for the way our justice system works. Let me just give you a small example of that with a current measure, not one of the 133 we are describing. We have chosen not to opt in to the Access to a Lawyer Directive. I have absolutely no issue whatsoever with the principle of making sure that every European citizen that is arrested has access to a lawyer, but if the Directive that is in front of us requires us to materially change the way in which we operate our legal aid system and the mechanism by which we ensure a defendant has access to a lawyer for no good reason—and the Directive lacks the flexibilities that would allow every country to make sure it happens, with every country to do it in the way that they do, where they already have good practice—then I would be unwilling to sign up to something that forced us to change totally the way we do things. That is an example of a measure, which, if handled wrongly—and we have chosen not to opt in to it at this time—could in a material way change the way our justice system works, so I am trying to protect what I think is good practice in this country against unnecessary harmonisation.

**Lord Richard:** Could you give us a list of the ones you want to protect?

**Chris Grayling:** All of these are still subject to negotiation, so what I might want to protect—

**The Chairman:** I think we are not going to get a list.

**Lord Anderson of Swansea:** Would you just confirm that the other party to the Coalition agrees with the direction of travel?

**Theresa May:** The statement that I made on 15 October was an agreed Coalition Government statement.

**Q287 The Chairman:** Lord Chancellor, can I just go back very quickly to this question of access to lawyers? Indeed, the relevant Committee here agreed with the decision not to opt in at this stage, although we hope that it could be got into a form that it would be practical. But there is another interest, is there not? There is the interest of British people in other countries who need the protection of minimum standards.

**Chris Grayling:** Absolutely. The key to me with all of these things is it is eminently sensible that British citizens have the right to access a lawyer if they are arrested in another country. No dispute about that. I do not have an issue about the principle of the Directive. My worry is if the Directive comes along and says, “You must provide access to a lawyer in this exact way” and that causes us, at considerable cost, to recast the way we deliver that support through the legal aid system. At the moment I think what we do is pretty good. If we
suddenly are told, “You have to provide this number of lawyers in this place at this time and it cannot be the way you normally do things”, that would in my view be unnecessarily prescriptive and inappropriately prescriptive, and I am trying to ensure, in a time of straitened financial resources, we have the freedom to carry on with what I think is a pretty blue chip system internationally, hence the caution.

**The Chairman:** I think we should move on to the questions about the Court of Justice.

**Q288 Lord Rowlands:** Of the evidence we have taken so far, the case by those who are supporting the opt-out is heavily, heavily based upon a particular view of the Court of Justice—that it is expansionist; judicial activism; what UKIP say, “A political court of poor quality”; and so on. You seem to share quite a lot of this view of the court. Is that the basis on which in principle you wish to opt out? Is it one of the basic principles you are using to make the decision on the opt-out?

**Chris Grayling:** I think it is concern that an evolving jurisprudence where we have no control in terms of the ability to change the law is something we should be quite careful of. As Lord Chancellor, I take my role very seriously about the need to protect and defend the independence of the judiciary. You will not find me criticising a judge for an individual decision. The courts are there to take decisions independently of the Executive; sometimes I may find them infuriating. I may sometimes disagree if I am directly involved in it and regret a judgment. If a judge takes a daft decision—and everyone in every walk of life sometimes takes daft decisions—you will not find me attacking them and criticising them. My view is that if I do not like the decision the court takes I should change the law as a legislator, I should not attack the court. However, in the case of the international courts we do not have that same flexibility. Therefore, we have to be very careful about the degree to which we hand over to international courts the ability to evolve the law of this land without the people of this country actually being able to take a decision in their own right about what that law should look like.

If you take the case of the original measures, the pre-Lisbon measures, these were often compromised deals. They were measures that sought the lowest common denominator in order to achieve agreement by unanimity. They are not always necessarily the most perfect legal instruments. If they are passed over to the jurisdiction of the European Court—which has a remit to encourage and support European integration—then I would expect in a number of cases the jurisprudence to evolve in a way that goes beyond the detail of the original measures. I do not want us to be in a position where we are being taken step by step into a European justice system that may, as time goes by, look quite different to what we have been used to in this country, without being absolutely certain we are doing the right thing. That is why I am very cautious about the issue of the jurisprudence and the ability to evolve of the jurisprudence of the ECJ.

**Lord Rowlands:** I understand your caution but the suggestion is that really is going to be an inevitable process. Is there much evidence to prove it is going to be inevitable, that the court will be here in this particular way? For example—I do not know whether you saw—it has already given evidence of a number of rulings it has already made in this field on those measures. Have you been through those and checked whether they are in any way expansionist?

**Chris Grayling:** I have seen, in my own experience as Employment Minister in the last two and a half years, very clearly the expansionist nature of the European Court. We have seen a situation where an area that was specifically envisaged in the Lisbon Treaty as being a
national competence, social security, is being increasingly Europeanised by decisions taken by the ECJ, which is looking from the point of view of what it sees as the European citizen, as the right of that citizen to access support in the most advantageous way, wherever they are. So we have literally had decisions of the Court that require us to pay benefits to our citizens in other countries and to pay benefits to the citizens of other countries when they are in the UK. So, yes, I have seen very clearly the way in which the jurisprudence evolves beyond the intent of the treaty.

**Lord Rowlands:** But in the list that the Court has given us of the rulings it has made on these measures in other Member States, does it prove that it is on an expansionist course?

**Chris Grayling:** Well, the ECJ does not of course have jurisdiction over these measures until next year.

**Lord Rowlands:** It has had it on a number of Member States already, since 1999.

**Chris Grayling:** These measures do not fully move under the umbrella, they do not move away from the third pillar until—

**Lord Rowlands:** A number of Member States have already accepted the jurisdiction on all these measures, have they not?

**Chris Grayling:** But the ECJ does not take control of these measures until 2014. Indeed at a recent Council meeting the Commission bemoaned the fact that because the ECJ did not have jurisdiction they were able to do less in this area than they would have liked to be able to do.

**Q289 The Chairman:** Lord Chancellor, I think perhaps we are misunderstanding Lord Rowlands’s question. His point is that the Court of Justice has full jurisdiction in respect of pre-Lisbon measures where the Member States involved have chosen to allow it.

**Lord Rowlands:** As a result of that there has been a series of rulings, which the Court gave us the list of. I am sure your officials have seen that list. Does that list show any expansionist tendencies?

**Chris Grayling:** I cannot answer that question but I can tell you for certain that I have seen the Court evolve its jurisdiction in ways that goes beyond the Treaties. I am very cautious in this particular area at a time when full jurisdiction begins in 2014. If you look at areas like the Prisoner Transfer Agreement, for example, that does not come under the umbrella of the court until next year, and indeed the Commission complained specifically that it was not able to do things in that area precisely because that jurisdiction was not there at the moment. But we will see that from next year and I am absolutely clear that the evidence I have seen as a Minister in the last two and a half years is that the Court does extend and expand its jurisdiction beyond what I think the Treaty signatories intended to be the case.

**Lord Rowlands:** It did not do so in its very latest judgment when perhaps people wanted it to, did it?

**Chris Grayling:** I would not expect this to happen in every single case but I can tell you it definitely does happen.

**Lord Rowlands:** In some cases but not a majority of cases. This is very important because this is the basis on which much of the evidence we have seen supporting the block opt-out. The whole thing is based on this view of the Court and its role and its intentions.
Chris Grayling: It is absolutely clear that the purpose of the Court is and has always been to support greater integration across Europe. Its decision making has been—certainly in the areas I have worked in—very clearly based around the principles of European integration in the way that I have seen go beyond what I understand to be the intentions and the specifics of the Treaties. International courts more often than not evolve their jurisprudence and are very clear that they do so. We are talking about passing legal control of these matters from our courts to the ECJ, effectively making it the Supreme Court in this country in this area with the ability to evolve its jurisprudence in these matters. I think we have to be pretty cautious before we do that.

Lord Rowlands: I make one final point. However, this Government has very pragmatically already opted in to some 14 measures that brings the jurisdiction of the Court into play. Presumably in all those 14 measures you had no fear that the Court would be expansionist.

Chris Grayling: The whole point about what we are saying is we are minded to opt out of all of the measures and then we are minded to opt back in to some of them. That is entirely consistent with what you have just described.

Q290 Viscount Eccles: Lord Chancellor, I think what you have just told us does raise a very difficult problem for this Committee. What you are saying, I think, is that this is a much wider issue than the opting-out of the 130 or 133. We are not charged with looking at the role, the future role and the negotiations about the future role of the Court; we are charged with looking at an opt-out decision which, as you rightly say, was a kind of all or nothing position under Protocol 36. Would you be prepared to give us some more help on this question because I think if the target is really the Court and not, for example, the European Arrest Warrant, we need to be pretty clear about that, because otherwise it is going to be rather difficult to complete a sensible report?

Chris Grayling: I think that there are two parts to this. We have to understand that what we are talking about is the placing in the ultimate jurisdiction or position over these elements of justice and home affairs in the United Kingdom in the hands of the European Court of Justice. So these decisions will no longer stop in our Supreme Court, they will stop in the ECJ. This is an area where the previous Government said, “All right, we have to be very careful about this”, where this Government says, “All right, we have to be very careful about this”, where we have not in practice refused to take that step in a number of measures where we think it is beneficial to the United Kingdom to do so, but we have also been very reluctant to do so in a number of other areas.

The post-Lisbon measures and the approach we have taken to the post-Lisbon measures are no different to what we are taking now. The Treaty requires us to do this in one go and some people might think it would be easier to do it one item at a time but we cannot do that. Nor can the Commission. They tell me regularly they are guardians of the Treaty, we are signatories to the Treaty, we have to operate within the terms of what the Treaty permits and so, therefore, if we want to opt-out of any of those 133 measures we have to opt out of all of them and then opt back in again. That is the nature of the Treaty. Because we are not simply talking about measures that help us combat international crime, we are also talking about measures that take us a step further towards the integration of the justice system, towards common penalties in every country for individual crimes, towards common processes, a decision making tree around those common processes that finishes not in this country but at the ECJ, then I think it is only sensible that we approach this in the way we are with very great caution, with a view that we would be minded to exercise the opt-out
and then to look to opt in where it is in the British national interest—but to be very wary about taking steps that ultimately have a long term impact on our justice system.

**The Chairman:** I think we need to move on. Lord Elystan-Morgan, I think the Lord Chancellor has dealt with a number of parts of your question; there are one or two bits that may be relevant.

**Q291 Lord Elystan-Morgan:** Just as a supplementary: am I right in thinking that in your very candid answer, Lord Chancellor, you are saying that, as far as we are concerned the European Court of Justice is a dangerous tiger? We believe that it has the capacity to devour our sovereignty, even if it has not done anything that we can specifically point to as yet that is the nature of the beast? So as far as we are concerned, our attitude to that particular institution will always be negative? That is a fair assumption, is it not?

**Chris Grayling:** I do not think I would use the words you have chosen but—

**Lord Elystan-Morgan:** No, no, I am dramatising for the sake of effect.

**Chris Grayling:** I think we have to recognise that where you have an international court and where it has the freedom to evolve its jurisprudence, it will do. Indeed, where you have a supreme court and it has the freedom to evolve its jurisprudence it will do. That is the nature of the beast, it is the nature of an independent judiciary. Of course there is, in a society like ours, a balance between the judiciary holding the Executive and the Parliament to account and saying, “No, you cannot do that” and Parliament and the Executive turning around and saying, “Yes, but actually we do not agree with that decision so we are going to change the law”. That is a tension that I think is a positive tension in a society like ours.

I sat in this room yesterday talking about the European Court of Human Rights. In some areas, the European Court of Justice is a similar international organisation that has the freedom to evolve its jurisprudence. But our ability as a nation to provide that counterbalancing check and say, “Well, we do not actually agree with that, we are going to change the law” is limited by the fact that we do not have sole jurisdiction and sole management right over that system. In an area like this, like justice and home affairs, where we have a very different system to the one that operates in many parts of Europe we have to be very careful before we take a decision that says, “Actually, here is a block of what we do in this country that we are taking beyond our own supreme court and putting under the jurisdiction of that institution”.

**Theresa May:** If I may just add to that. I think one of the other factors is that when these pre-Lisbon Treaty measures were negotiated initially they were not negotiated with ECJ jurisdiction in mind. Of course other Member States may wish to look at this as well, and indeed I believe Commission Reding herself has referred to this fact, that of course the negotiations were taking place against a different background on these measures. So it is entirely right and proper for us as a Government, given the opportunity that we have because it was negotiated into the Treaty, to now look at these measures afresh with that in mind as well.

**Q292 Lord Sharkey:** You have published a list of the pre-Lisbon PCJ measures that had not yet been implemented in the UK, which includes the Prüm Decisions and the European Supervision Order. Do the non-implemented measures have some common characteristic that explains why they were not implemented, and do you agree that the European Supervision Order could help mitigate some of the shortcomings of the European Arrest
Warrant? If that is the case, is it not unfair if British citizens are being denied the mitigation that the European Supervision Order might bring?

*Chris Grayling:* A number of the measures that were set out pre the Lisbon Treaty have not been brought into effect, not simply within the United Kingdom but in many other parts of Europe. If you take the Prisoner Transfer Agreement, which has many potential advantages to it, that has been implemented by only a very few Member States at this moment in time. I am sure there is a number of people I would like to put in a bus and send back to other countries but the agreement is not implemented. But there is no common picture: sometimes it is financial reasons, sometimes it is for legislative reasons. There is no single reason why measures have not been implemented.

In terms of the European Supervision Order, it is a measure that you could look at in two ways: on the one hand clearly you can see why it would have some attractions, on the other hand how certain are we that if we return somebody who is on bail before a trial to another part of the European Union that it will be easy to get them back? So I think it is a measure that we need to look at, along with others, to really understand whether it is beneficial or not and indeed we are doing so.

*Lord Hannay of Chiswick:* Could I just follow that up, Lord Chancellor, because I do not know if you have had a chance to read any of the testimony we have taken, but every single witness we have had has said that the European Supervision Order would be of benefit to British citizens if it was in force now, and that the fact we have not brought it into force at the due date of December 2012 is depriving British citizens of their rights? Your testimony on this point seems to go completely contrary to that. Do you not think that the answer that you gave in relation to wishing to see other Member States implementing certain things they have not implemented is of course the reason why it is necessary to give the Commission the right to prosecute a state that does not implement its decisions?

*Chris Grayling:* In the case of the European Supervision Order it has only just passed its implementation date. We are not aware of any state. The implementation date has only just passed, nobody has yet used it. On the evidence you have taken, I can only say to you I have spoken to a senior figure in the policing world who started off by saying to me that he was in support of the European Supervision Order, to which my response was, okay, and I cited an example of somebody from another part of Europe who is in London and involved in perhaps a gang of pickpockets, who is returned under the European Supervision Order to another part of Europe—to another Member State. I said, “Just how confident are you that person will return to trial in this country?” He said, “Yes, okay, I see what you mean”. So there are two sides to this argument. I am not saying that we oppose the European Supervision Order; I am not saying that we support the European Supervision Order; I am saying that it is not as clear cut as you might think.

I want to see people that commit crimes in this country before the courts in this country and appropriately punished. If we have a mechanism that is failsafe to bring them back if they are under supervision elsewhere, all well and good, but I have yet to see clear evidence that we have that and so, therefore, you would expect me at least to be cautious in looking at an issue like the European Supervision Order to say, “Is it in our national interest to be part of
it?” I have not formed a view. We have not formed a view yet. But you would expect me at the very least to ask those questions.

Lord Hannay of Chiswick: I can see that the word “cautious” is coming to mean an awful lot of things.

Q293 Baroness Corston: Secretary of State, has the Government taken the initiative—and I emphasise taken the initiative—or any initiative with other Member States in attempts to reform the European Arrest Warrant?

Theresa May: We recognise here the use that has been made of the European Arrest Warrant but there are—as I am sure you are aware, Baroness Corston—a number of concerns that we have here. Some of those concerns are shared by some other Member States on issues like proportionality. We have begun talking to a number of Member States about their views on the European Arrest Warrant and the problems that have arisen in relation to its operation. Those discussions are at an early stage.

Baroness Corston: So are you suggesting that then fulfils the response that you made to the Scott Baker review of extradition where you said that you would work with the European Commission and with other Member States to reform the European Arrest Warrant so that it provides the protections that our citizens demand?

Theresa May: I have initiated some discussions in relation to this matter and those discussions are ongoing, so we have not had an end point yet. But there are concerns not just from ourselves, as I say, but from some other Member States as well. The Commission itself has highlighted the issue of proportionality as being a problem with the operation of the European Arrest Warrant. They have tried some ways to deal with that through extra guidance. That has so far not had the impact that it was hoped it would have. But it is also an issue that is of concern to some Members of the European Parliament. Around the European Arrest Warrant there are a number of issues where people feel that the way it operates could be improved and we are having discussions with Member States about this at the moment.

Lord Hodgson of Astley Abbotts: I should just declare that I am a trustee of Fair Trials International and we are familiar with some of the drawbacks of the operation of the European Arrest Warrant. Home Secretary, do you think it would be a good idea that the threat of an opt-out could act as Dyno-Rod in this rather complicated and difficult area to achieve some progress?

Theresa May: I have to say I think your Lordships are using rather more lurid language on some of these issues than I or the Justice Secretary might. If I may put it this way: there is an opportunity because of the opt-out for those Member States who believe the European Arrest Warrant should be improved to be able to potentially come together and look at ways to improve the European Arrest Warrant and to deal with the problems that have occurred. There are three key concerns here in the UK: proportionality is one of them, dual criminality is another, and the question of pre-trial detention is the third. Variously across Europe there are shared concerns in relation to those issues. I think there is an opportunity for us to look at the European Arrest Warrant as a result of the opt-out.

Q294 Lord Rowlands: Reading the Scott Baker report before this meeting, frankly I could not find any justification from this report to leave the whole warrant—to walk away
from it. This report does not give you sufficient evidence to justify walking away from the European Arrest Warrant, does it?

**Theresa May:** I do not think the Government has given any suggestion that it does.

**Lord Rowlands:** If you do opt out on that the warrant must be one of the prime candidates to opt in?

**Theresa May:** The decision as to which measures we wish to opt back into and try to opt back into, of course as we have said, we will in due course be providing a list. Apologies, Lord Rowlands, but if I may, Lord Bowness, take this opportunity to give an apology to the Committee that I think I should have done at an earlier stage, which is of course to apologise for the fact that we have not yet been able to provide you with the Explanatory Memoranda that we had hoped to have before this meeting. Obviously we will aim to get those to you as soon as possible so that you are able to see those. But what the Scott Baker report did say was it acknowledged there were problems with the operation of the European Arrest Warrant—

**Lord Rowlands:** But the problems were not sufficient to justify walking away from it.

**Theresa May:** It said there were problems with the operation of the European Arrest Warrant, it acknowledged that, and it said that the panel felt that it would be possible to do something through negotiation. We have seen and indeed it was obvious within cases that Members of Parliament have brought up in the House in relation to the European Arrest Warrant that there are significant problems in some areas of its operation. That is why we are discussing with other Member States who might share those views what we might do about.

**Lord Elystan-Morgan:** On the question of the ultimate verdict in relation to the European Arrest Warrant, this was the situation with the Scott Baker report, was it not? The report said, “We believe the European Arrest Warrant to be effective and valuable. We believe there to be wrinkles” and they mention the three matters that you have quoted. They said, “We believe that these wrinkles can be ironed out and should be ironed out” but then the report said, “But if you fail to iron out the wrinkles you must still maintain the European Arrest Warrant”. That is an accurate summary, is it not?

**Theresa May:** In addition they also said that they felt that the introduction of the European Investigation Order might very well deal with some of the issues around proportionality of the European Arrest Warrant. The report said what it said.

**Lord Elystan-Morgan:** But it still said it has to be kept.

**Theresa May:** Yes. But that was a report to the Government on a number of matters relating to extradition. The Government has accepted some matters in that report and—as you will be aware by the fact that we will be introducing a forum bar to extradition which was not recommended by Scott Baker—we have decided to take a different route on some issues.

**Lord Elystan-Morgan:** We have heard overwhelming evidence in support of what I would describe as the Scott Baker review.

**The Chairman:** I am sure the Home Secretary and the Lord Chancellor have read the evidence.
Q295 Baroness Prashar: Can I move on to look at the two agencies of the European Union: Europol and Eurojust. In your view how effective are these two agencies?

Theresa May: We do believe that Europol does do important work and it does support Member States in the fight against organised crime. It is very well led; it is currently led by a British national, Rob Wainwright, who is doing a very good job in heading Europol. Europol’s role is about helping Member States and obviously it has a particular role in terms of Joint Investigation Teams between Member States, but bringing Member States together and ensuring that there is that co-operation, and providing some technical and analytical support for the operational activity. In 2011 Europol supported over 13,000 cross-border law enforcement cases. But Europol may very well not be one of the issues that we need to look at in the 2014 opt-out decision because the Commission have indicated that they will be bringing forward further proposals in relation to the future of Europol—probably doing so certainly this year and fairly soon—in which case it drops out of the 2014 list.

The same would be true of Eurojust. It is harder to indicate at the moment, I think, the degree of effectiveness of Eurojust. I think in the last two years combined, 2011 and 2012, the UK national desk registered around 5% of cases at Eurojust and only was asked to be involved in around 7% of the case work. So it is not very easy to put an actual quantitative value on it but once again we expect that there may very well be some proposals in relation to the future of Eurojust, which would affect its relevance to this 2014 opt-out decision.

Baroness Prashar: So you are suggesting that both these organisations are effective and that concurs with the evidence that we have had. Now you are saying that these will not be impacted upon by the opt-out because there will be separate arrangements for these two organisations?

Theresa May: I am saying in relation to these organisations that certainly the European Commission is perhaps further forward in relation to Europol; it will be bringing forward further proposals about the future of Europol. We know what Europol is at the moment. The Commission is looking potentially to bring forward further proposals in relation to Europol this year, certainly possibly in the earlier half of this year. At that point it becomes a separate decision, it is not part of the 2014 decision. We would then be operating our post-Lisbon process in which we would need to decide whether to opt in or out of the proposals that the European Commission brings forward. Whereas there has been benefit from the operation of Europol, we need to look at what requirements would be put in place by the European Commission. Europol operates very effectively at the moment. The nature of the relationship between Member States and Europol is such that there are not, for example, requirements to put certain data into Europol. If the European Commission were to go down that route then we might very well look at the organisation in a different way.

Q296 Lord Hannay of Chiswick: Could I just say, Home Secretary, before asking another question, that the figures you gave on Eurojust are not very much like the figures that we were given by Eurojust? Perhaps you would have a look at the figures to see whether these really are as low as you say they are because the evidence that we were given in Brussels by Eurojust was rather different as to the number and we were given some figures also by the Council Secretariat of all Member States’ use of this.

But could I ask you something rather more topical about Europol and Eurojust, which relates to horsemeat? As I think you know, because your colleague the Secretary of State for the Environment, Food and Rural Affairs has stated it, Europol is involved in the ongoing investigations into what appear to be criminal offences, and I assume that if—as everyone
will hope—these matters are brought to justice Eurojust will be involved too since a large number of different countries and different legal systems will be involved in this matter. Does this not demonstrate that Europol and Eurojust are in fact indispensable parts of law enforcement in the Europe of today? If that is so, why are you contemplating opting out?

**Theresa May:** If I may in a minute I will bring Peter Storr in because he actually spoke to the Director of Europol this morning on the very issue that you have referred to in relation to horsemeat and the role the Europol can play. Europol is not a police force, Europol does not investigate. Europol provides some analysis, some technical support to Member States. It is important to remember that it is Member States that undertake the investigation, albeit that they may have some support from Europol and co-ordination from Europol in doing that. Now, I would say we need to understand exactly where Europol will be able to assist in relation to that matter. But as I have said in answer to the previous question, from the noble Baroness, the question of whether Europol is going to be part of this 2014 opt-out is at the moment in the balance because the Commission have indicated they will be bringing forward proposals for a potential new direction for Europol. We would then be taking a decision on Europol itself, not as part of 2014 but on whether to be part of an organisation that might be significantly changing, depending on what proposals the Commission bring forward.

**Peter Storr:** I do not think I have much to add to what the Home Secretary said, other than the fact that the Europol mandate is clear: it must be related to a serious crime, it must involve two Member States or more, and Europol is invited to take part at the instigation of the Member State, not by its own initiative. When I spoke to the Director this morning about this very issue he was entirely clear that he was determined to keep to his mandate in that respect, which is I think only right and relates back to the answer the Home Secretary gave about making sure that Europol’s mandate is, roughly speaking, in conformity with what the Home Secretary sees as being the appropriate role of Europol.

**Lord Hannay of Chiswick:** I am sorry; I did not ever say that Europol should be involved, I quoted the Secretary of State for the Environment, Food and Rural Affairs saying that it was involved. Is your answer that it is not involved or that it is involved?

**Theresa May:** No, Europol is involved but it is involved within the confines of its mandate.

**Lord Hannay of Chiswick:** Yes, I understand that, Home Secretary. That is not the purpose of my question. The purpose of my question was to ask whether you confirmed that the Secretary of State was correct when he said that it was involved. Naturally, if it is involved it is involved within its mandate, that goes without saying. But it does surely demonstrate, if it is involved and is involved within its mandate, that it is of value to this country in dealing with day-to-day problems. The answer you gave, if I may say so—and I will ask you a simple question about this—was about Europol further down the track: is one to interpret from what you said that Europol and Eurojust are in fact going to be on your list of institutions to rejoin if that becomes a practical issue in the negotiations that lie ahead?

**Theresa May:** I apologise if my answer previously was not clear on this point. The point I was trying to make is that I do not believe Europol and Eurojust will be in the list, the overall 130-odd measures list. Therefore, the decision we take on Europol and Eurojust will be against the background of a different proposal as to what Europol and Eurojust are. Certainly in the Europol situation the Commission will be bringing forward proposals. There is no coercive nature to Europol at the moment in relation to national law enforcement agencies. If that were to be part, for example, of a Commission proposal we might take a different view of Europol.
Lord Rowlands: Just on a very important point that I think came across to us when we met Commission officials: you say possibly that Eurojust and Europol will not be a part of the list because they will be being dealt with separately, but there will be interconnected measures that will be in that 130, the Joint Investigative Teams and a number of others. That is the point that was made strongly to us by Commission officials—that although they feel they have an obligation under the Treaty to respond positively to any request to opt in, it has to be a coherent request. As I understand coherence to mean all the interlocking measures, you cannot say, “We will do Europol or Eurojust but not, say, the JITs”. There is going to have to be a coherent group of measures if you are going to opt in and you are going to get the Commission’s support. Do you accept that is the situation?

Theresa May: Yes, there are certain measures that are interrelated and if you want to opt back in to one, either it will be necessary to opt back into another or it may be that in the negotiations the Commission would say one of the requirements would be that we would opt back into another. So we are well aware of that fact. One of the discussions that is ongoing with the Commission is to identify exactly which measures are interrelated to which other measures, so we have a clearer understanding from their point of view of how they see those relationships.

Lord Rowlands: What I am saying is there is little doubt that in fact, whether or not Europol or Eurojust are part of the 130 or treated separately because of the new Regulations, there will be other measures connected to that but you would have to opt in with them as well.

Theresa May: That will depend on the nature of the bodies that are developed as a result of the other work the Commission is doing as to whether they still do interrelate or not. At the moment they do.

Lord Rowlands: Yes, but the JITs, the Joint Investigative Teams, are an essential part of that process, are they not?

Theresa May: As far as I am aware there is no indication at the moment the Commission would be doing anything to change the Joint Investigation Teams. All I am saying is we have not seen the Commission’s final proposal so, therefore, we do not know exactly what it is that they will be proposing in terms of Europol and its relationship with Member States’ law enforcement agencies.

Lord Mackenzie of Framwellgate: Am I right, Home Secretary, in saying that Europol made the announcement about the match fixing fraud inquiry, which clearly illustrates that they do have an important role in presumably running the Joint Investigation Teams? Can you confirm that such teams were involved in that particular case? I do appreciate it is sub judice.

Theresa May: I am not sure about the answer to the specific question, match fixing, but I am told, yes, it was Europol that announced that.

Lord Mackenzie of Framwellgate: Yes, which supports Lord Hannay’s point that it obviously plays an important part in co-ordinating crime inquiries throughout Europe.

Theresa May: There are investigations that the UK’s law enforcement agencies are involved and that involve other Member States in which we do involve Europol, yes.
Lord Richard: Can I turn now to the list of items that you might like to opt back into? In your letter on 14 December to this Committee you said this, “We have opened discussions with the Commission and Member States on the 2014 decision. These discussions are at an early stage, it is not yet clear what approach our EU partners will take.” Earlier on this afternoon you told us that discussions with Member States were ongoing as to which issues we would like to opt back into. Mr Ken Clarke has told us there are 30 items that you would like to opt back into. I am sure you will appreciate that for us to produce a sensible report and a full report we need this information. It passes belief, with respect, that you have not got a pretty clear idea of what it is that you want to opt back into and what you do not want to opt back into. So please can you tell us?

Chris Grayling: Lord Richard, I am afraid I am going to have to disappoint you. First of all, it is important to make clear that the discussions that are taking place with other Member States and with the Commission are not at the level of us going through a list of items and saying, “We want this one and that one”. What we are developing with them is the process we have to go through. We are having conversations about linkages. But before we get involved in a serious set of negotiations about the list we will have to complete our own decision making process. We have not done that yet and I am afraid I cannot give you a firm indication as to when we can present you with such a list.

Lord Richard: Are you telling me that you do not know what items you want to opt back into yet?

Chris Grayling: I am telling you that the Government has yet to take a final decision about what is on its initial list. Of course that will evolve as times goes by because we can come up with a list but we will then discover in conversations with the Commission and with other Member States whether there are any barriers if we exercise the opt-out to opt back into any of those measures. But in terms of an initial Government list, we will reach a position but we have not yet done so and I cannot give you a firm timetable for that.

Lord Richard: Lord Chancellor, one hears all sorts of rumours about the fact that within the Coalition there has been some difficulty in agreeing a list, even an initial one, of the items that you want to opt back into. But at least there must be a number which are common to both sides of the Coalition in which both sides say, “Yes, we want that, yes, we want that and, yes, we want that and there may be others we want to add to that list”. Why can you not give us the first list, the list where you have agreed?

Chris Grayling: All I can say is that as soon as we are in a position to provide with a list we will do so.

Lord Richard: What does that mean? Before we make the report? After we make the report?

The Chairman: Can I just add to this? I am sure that both the Home Secretary and the Lord Chancellor appreciate that we will not be able to report fully until we have that list.

Chris Grayling: I can only state, Lord Bowness, what the current position is, which is that we are aware that we will have to produce a list.

The Chairman: I understand that. I am sure you appreciate what I have just said is the case.
Lord Hannay of Chiswick: Can I just follow that up? When we took evidence from the Commission recently they made it very clear that they would not be able to respond to the British Government’s position until they were told with precision those items we wished to rejoin. They were very clear and categorical about that. Do you not have a chicken and egg problem?

Chris Grayling: The informal conversations that we are having with the Commission, and that we have started with other Member States, are to try to lay the ground for those discussions. The Treaty does not set out a detailed process for this. There is no route map that is available to us, so we have to not simply discuss a list but we also have to discuss and agree a process for this whole exercise. It is perfectly possible to start informal discussions before we get into the detail of the list, to establish what that road map looks like.

Lord Richard: I think the Home Secretary was kind enough to say that we would get the Explanatory Memoranda and we make no complaint about the fact we have not had it yet. In those Explanatory Memoranda will we then get a list of what it is that you want to opt back into?

Theresa May: The Explanatory Memoranda will not necessarily provide the list, it will be—

Lord Richard: It will not provide the list?

Theresa May: But the list will be provided at a time when the list is available.

Lord Richard: The list is not available because you cannot agree it within the Coalition.

Theresa May: Discussions are taking place about the final list that is going to be put forward.

Lord Richard: Within the Coalition?

Theresa May: Across Government.

Q299 Lord Anderson of Swansea: Ministers, to opt out is easy. To opt in may not be so easy. You appear to be assuming that the process of opting in will be smooth and without any reasonable delay. What is your basis for saying that? It is always possible, of course, there will be one or more awkward countries, someone who will want to bargain for matters that relate to themselves as against something that is of relevance to us. Of the discussions which you have had over the past five months since October, not with all partner countries but with perhaps the majority, have you had any sympathy for your views and have had you any assurances that you will be able to opt in, both smoothly and without any undue delay?

Chris Grayling: I think there is an understanding across the European Union of the position the United Kingdom takes on these matters. I think though we have to deal with the Treaty as we find it. It might have been cleaner and easier to deal with all of this one issue and one measure at a time, but we do not have that luxury. Unless we want to participate in all 133 measures then we have to exercise the opt-out and then seek to opt back in, and the Government has indicated it is minded to do just that.

Lord Anderson of Swansea: “Understanding” is a wonderfully ambiguous word. De Gaulle used it in relation to the Algerians. Has there been any sympathy by any other country to the position you are taking?
Chris Grayling: I do not think it would be right to start to share private conversations between ourselves and other ministers. There is no doubt that other countries want to collaborate with us—want to work with us in the fight against international crime. We want to work with them in the fight against international crime. But equally we are concerned to protect the long term integrity of our criminal justice system and the sovereignty of this country where we believe we need to do so.

Q300 Viscount Bridgeman: Secretaries of State, a direct and I hope simple question: do you believe the issue of the opt-out can be kept separate from the wider debate about the UK’s continued membership of the EU, especially in the light of the Prime Minister’s recent speech?

Theresa May: Yes, I do, in the sense that obviously the UK has taken the position that the Prime Minister has set out in relation to the future election and the future Conservative manifesto commitment is a background. But I think there are very great differences between what we are going through at the moment and that particular issue. Notably, the 2014 opt-out decision is an existing Treaty right. If I may say, partly in response to Lord Anderson’s previous question, I think the overwhelming view from Member States is recognition that this is a Treaty right that the United Kingdom has and, therefore, we have this opportunity to exercise this opt-out and take this decision. But that is an existing Treaty right that we are dealing with. What the Prime Minister was talking about was the future structures within the European Union and the future basis of the relationship between Member States and the European Union, a matter on which there will obviously be a number of views within the European Union. Those discussions have yet to take place.

Lord Stoneham of Droxford: Many of the witnesses we have seen have told us that the UK has played a very significant role in the development of EU police and criminal justice cooperation over the years. Law enforcement professionals have raised concerns about potentially negative consequences of exercising the opt-out. Are you taking any account that this leadership role could be undermined if the opt-out is exercised, and are you concerned that the opt-out may have an impact on other areas of UK-EU relations?

Theresa May: Of course it is right to say, as you have, that the UK has played a leading role in a whole range of areas in relation to the justice and home affairs arena, and particularly in practical operation in relation to dealing with matters around crime. Of course we also have a very good reputation in the issue of counterterrorism and have often led debates in relation to that particular issue. I think the question to me is not whether we have led those discussions in the past and whether we will continue to lead them in the future, because we are absolutely clear that we will continue to play our full role in the justice and home affairs matters around the Justice and Home Affairs Council, but the question for me is whether it is always necessary for such a role to be played through the prism of legislation. There are many areas where what the UK has been doing has been leading work on practical cooperation among Member States that has the intended impact in whatever area it is. It is not just in criminal matters but I am thinking, for example, that there are some matters in relation to migration issues where we have taken a lead in a practical way, and you do not always need legislation in order to be able to do that. Therefore, I think the issue I have is an assumption that you can only lead within the European Union—you can only get that cooperation that is advantageous to us and to other Member States, you can only show that best practice and example—through the prism of legislation. I do not believe that is true.
Lord Stoneham of Droxford: What about the impact on our other areas of UK-EU relations?

Theresa May: I have no evidence that the fact that the direction that we have indicated in relation to the 2014 opt-out is having any impact on other business either in the justice and home affairs area or in other aspects.

Q301 Earl of Stair: The provisions of the European Arrest Warrant particularly have received fairly widespread support from many witnesses principally because of the rapid exchange of suspects. Witnesses have also told us that they have serious concerns following an opt-out that the UK may become a safe haven for those who commit crimes both in the UK and Member States and who cannot then be deported or extradited easily. Do you agree that this is a very real possibility?

Theresa May: As Home Secretary, I will not be doing anything that I believe would put the safety and security of UK citizens in jeopardy and that has to be the first and foremost consideration. When I talk about British interests in my role, obviously safety and security are paramount among those British interests. So what we are looking at, in terms of the opt-out and those measures into which we would wish to try to opt back, is very clearly where there are measures that are in our interest in that area and where there are measures where either there is an alternative that can provide the co-operation that is needed or there are, as we have talked about, some measures that are defunct or that we are simply not able to enter into at the present time, but it is not our intention to do anything that reduces our ability to keep citizens safe and secure. Indeed, what we are doing in terms of some of these areas, such as organised crime, is increasing our ability to deal with these here in the UK through creating the National Crime Agency, which will also have an international role operating across borders with other law enforcement agencies, again in the British interest.

Q302 Lord Avebury: Can you talk about the ECJ measures that we do not intend to opt back in to assuming that we exercise the opt-out? Can you say how easy it is going to be for the UK to negotiate and agree with 27 other Member States regarding the alternative arrangements that will substitute for those that we have now under the Lisbon Treaty? How willing do you think the other Member States are going to be to facilitate this and what sort of reactions have you had to that so far? Supplementary to that, could I ask in relation to what the Lord Chancellor said in one of the replies to question 5—he said that transition arrangements were being discussed and that measures should apply to the UK where the UK has expressed an intention to opt back in—does that apply also to measures that we opt back out of? What would be the position in the hiatus between us opting out and the negotiation of the arrangements that we have made with the 27 individual states?

Chris Grayling: On the latter point, if we are not part of something we are not part of something, so if we have taken the decision to opt back out on the day in which the opt-out comes into effect, we would cease to be part of whatever measure we were talking about. As to the question about what the situation is, it is certainly theoretically possible to have bilateral and multilateral arrangements with other Member States. There is no recent precedent because there has not needed to be, as we were part of intergovernmental arrangements within the EU before the third pillar was collapsed in the Lisbon Treaty. We have certainly had experience of negotiating bilateral agreements. We have just negotiated a bilateral compulsory prisoner transfers arrangement with the Albanians, so while we have had plenty of recent experience in negotiating deals with third countries, we have not
needed to do so with EU countries because of the nature of the pre-Lisbon arrangements, but we see no theoretical barrier. It is perfectly theoretically possible if we exercise the opt-out to negotiate such an arrangement.

Lord Avebury: But this is not just any old bilateral arrangement that we are talking about, is it? We are talking about, first of all, defining what the groups are to which coherence has to apply and then negotiating with 27 other Member States what arrangements you want to arrive at with them, which will substitute for those that have formerly been in effect.

Chris Grayling: That is correct. We will have to do that, but that is, I am afraid, what the Treaty requires us to do if we choose to opt out of any of the measures involved.

Lord Avebury: For how many years do you think that process is going to take?

Chris Grayling: I think my sense is that our partners in Europe will want to work with us and it is in their interest to work with us in the way that it is in our interest to work with them. As the Home Secretary has said, that does not always have to be done through legislation.

Lord Avebury: Are you not worried at all about the hiatus that will exist between us opting out and coming to these alternative arrangements?

Chris Grayling: I am concerned that we do whatever we believe is in the British national interest and we will make sure that we do that.

The Chairman: Can we ask you about one detail following Lord Avebury’s question? Referring back to the 1957 Council of Europe Convention on Extradition, some of our witnesses have said that that no longer applies in a number of Member States—in particular, the Republic of Ireland has repealed that legislation. So in terms of Lord Avebury’s question of will it not take a long time, is it not true that some of the Member States at least would have to implement fresh domestic legislation to put a bilateral arrangement in place?

Chris Grayling: In some cases, that might be necessary but it is perfectly possible to do so.

The Chairman: It might be possible but it might not be at the top of their list.

Q303 Lord Anderson of Swansea: We heard this morning evidence from a representative from the Republic of Ireland that the old Council of Europe Convention is very faulty in many respects. For example, it excludes political offences and no doubt clever defence lawyers will seek to use that as a means of delay. Do you think that the old Council of Europe Convention or something like it is an adequate substitute?

Chris Grayling: Both countries are still party to that Convention, but of course these are all issues that we will consider in preparing a final decision on whether to exercise the opt-out. However, our job as Ministers is to operate in the British national interest, to take into account all the factors that we have discussed this afternoon and to reach a view that we can recommend to the Prime Minister for him to discuss with our coalition partners and reach a final decision. You would expect no less of Ministers.

The Chairman: We have three more questions and very little time, I fear. I do not want to rush anybody.

Q304 Lord Judd: In the sphere of cross-border crime, terrorism and the rest, when it comes to extradition, would you agree that speed and effectiveness are very important?
Could you tell us a bit about the comparisons you have made? What was the outcome of those comparisons in terms of those countries that are members of the European Union and those that are not?

**Theresa May:** Obviously, speed and effectiveness are two of the issues that we have to take into account. I think the fairness of the arrangements and human rights considerations are also factors that will be taken into account. Obviously, we co-operate with both EU and non-EU countries in relation to extradition. We are in the process of making some alterations to some of our extradition arrangements. The speed with which it is possible to exercise any extradition in any individual case would depend on the individual case, but the figures are that it is on average roughly three months from the receipt to surrender for a European Arrest Warrant. There is one notable case of course at the moment where other circumstances have delayed that extradition, which is the case of Julian Assange. That would, if we included that, put the average up. In non-EU cases, completed requests take approximately 10 months from the date of arrest and the date of surrender, but the time varies significantly. There have been extradition cases, as your Lordships will be aware, where extradition has taken considerably longer. It depends on the legal processes to go through and how far appeals are going in particular cases, so individual cases will vary.

**Lord Judd:** But time varies also within the European Union. Could you not indicate how speedy it can be within the European Union?

**Theresa May:** I do not have the figure for the speediest, but obviously there have been a number of occasions where it has been possible to do it within that three-month period. There has been publicity about recent cases—for example, the case of the teacher who allegedly went abroad with an underage pupil. I think the time that that individual was brought back was within the three-month period so it can be done in less time.

**Lord Judd:** I think it is fair to point out to you, but I am sure you have seen from the evidence, that quite a number of people in key areas from whom we have been taking evidence have said that they find the EU arrangements extremely helpful in terms of extradition.

**Theresa May:** I am aware that is evidence that you would have received but I am also aware that there is considerable concern. On average, any single EAW request costs us £20,000. We have a real issue about proportionality in relation to EAW requests. It is one of the issues that I referred to earlier that we are discussing with other Member States. When I made the Statement in relation to the Scott Baker report in the House of Commons, parliamentary colleagues stood up and indicated that they supported the speed of the EAW but other colleagues stood up and had significant constituency cases of individuals who had been held for a considerable period of time in pre-trial detention because EAW had been operated before the case was ready to go to trial. So there are problems with the way the EAW operates.

**Lord Judd:** But would you not agree that with these issues, which are clearly important—no one would discount that—it is more sensible to work with colleagues in the Union so as to get the issue and the operation right than to take the sledgehammer and destroy the whole operation?

**Theresa May:** I indicated in response to an earlier question—I think it was Baroness Corston’s question—that we are indeed having discussions with other Member States about the European Arrest Warrant, about the issues that we have identified with the European Arrest Warrant and about ways in which we can deal with those issues as part of our
decision-taking in looking at the 2014 opt-out decisions. The European Commission has accepted that there are problems with the European Arrest Warrant. It has tried non-legislative routes to deal with those. Those non-legislative routes have not so far produced results, so it is absolutely right for us to look, as indeed Lord Hodgson suggested, at the opportunity from our 2014 opt-out to discuss with other Member States how the European Arrest Warrant can be improved to overcome the problems that we all recognise exist—not just the UK but other Member States and the Commission recognise this.

Lord Judd: You really are insisting that it is not possible to get together with our fellow members of the European Union and do that without opting out as distinct from having a flag flying behind you while you are saying, “We have the option to opt out”.

Chris Grayling: One of the challenges that we all have as Member States—I will go back to my experience as Employment Minister—is that however many of us may wish to deliver change, it is far from straightforward to do so. In the area of benefit tourism and the ability to move around Europe claiming benefits in different countries, there is profound concern among Member States. We had something like 20 Member States backing us in our desire to secure a reopening of the legislation and real change. Without the co-operation of the Commission and the European Parliament, it is very difficult to do that.

Q305 Earl of Sandwich: Can I briefly take you to the rejoining problem? It seems as though negotiations on rejoining are going to be very complicated—we have seen reports in the FT and the Telegraph to that effect from the Commissioner. Surely there are no guarantees that we will be allowed to choose certain measures without conditions being imposed by the Commission and the Council. The view of the former Director-General of the Council Legal Service is that this will be a gamble. Do you accept that and are you concerned about any legal challenges resulting from the Commission or Council Decisions or the transitional measures?

Chris Grayling: My view on this is, yes, of course it is a complicated process where we are operating without a road map, but this is a Treaty entitlement the UK has. It was very expressly negotiated by the last Government. It was negotiated for a purpose, which was to recognise the difference between our system and that of other parts of Europe. It was to recognise the direction of travel that was envisaged in the Lisbon Treaty of building a much more uniform European justice system. There was a doubt on the part of the last Government that Britain would want to fully be a part of that and therefore they negotiated for us in the Lisbon Treaty the right not to be part of that if we chose. I think in the discussions with the Commission, yes, it is complicated. Yes, we lack a road map of exactly how this is done. Our prime driver is to operate in the British national interest, but that is because this is a Treaty right that we expect everyone involved to respect.

Earl of Sandwich: What about the legal challenges?

Chris Grayling: I do not understand why we would face legal challenges to exercising a Treaty right and following a process that was set in place in the Lisbon Treaty.

Q306 Lord Hannay of Chiswick: To avoid misunderstanding, nobody who has given evidence to us has suggested for one minute that the British Government does not have the absolute right to exercise the opt-out. It is not a point at issue. It has not been raised in any of the discussions of this Committee. The point we are trying to put to you is the same point that you have made, Lord Chancellor: is it in Britain’s interest to exercise the opt-out, not does it have the right to exercise the opt-out?
Chris Grayling: Absolutely, but it is also whether it is in the interest of other European countries to cease to work with us in areas where we are happy to work with them and I do not believe it is. I think that it would have been much easier and much more straightforward if we had been able to deal with one issue at a time but, unless we are willing and confident to sign up in perpetuity and hand over the jurisdiction to the European Court of Justice of all 133 measures, not just in their current form but in the form they may evolve through the Court judgments, then we will have to go through this process. As the Government, we are quite rightly asking long, hard questions about what is in the British national interest before we take a decision one way or the other.

Q307 The Chairman: Can I just ask you both one last question? Members have quoted a lot of evidence from different witnesses during this afternoon. Of course we also heard evidence from the Fresh Start Group, which is in favour of this opt-out. Do you happen to agree with them that the Government should pursue Treaty changes in order to opt out of the post-Lisbon measures that you have already opted in to and that we will stay in whether or not you exercise the opt-out? Coupled with that, what is your view about their stated opinion that we should not opt back in to anything?

Chris Grayling: There are a number of different views in this debate and we obviously as the Government listen to all of them, but we will form a view and act in what we believe is in the British national interest.

Lord Richard: Following up that last point, what is the logic in saying in relation to the ones you have recently opted in to that you accept the jurisdiction of the Court of Justice but then saying in relation to all the others that you are opting out of that it is a terrible thing and it is trying to take over the British system of justice? How can you reconcile this?

Chris Grayling: What I have said is that we have to understand what we are doing. In opting in to a measure post-Lisbon or in staying with a pre-Lisbon measure, we are accepting that the jurisdiction for that area passes to the ECJ. What I am not saying is that we will never do that, because self-evidently we have done that on a number of occasions, but what I am saying is that we need to be very careful before we do so and that is what we are seeking to be.

Lord Richard: So in relation to those areas you accept the ECJ is not trying to subvert the British system of justice in the common law but in relation to the 133 you think that it is.

Chris Grayling: I am not accusing the European Court of trying to subvert the British system of justice in the common law. What I am saying is that, in an international court that evolves its jurisprudence, where we have a system that is very different from that in operation in many parts of Europe, it is a very real possibility that that evolving jurisprudence will come into conflict with the way in which our criminal justice system works. Therefore, we need to be mindful before we take a decision about opting in to any justice and home affairs measure—and we have been given the power under the Lisbon Treaty to take that decision—that we are happy for the ECJ to take sovereignty in that area and that we understand how and whether in future we could see the jurisprudence creating an issue for us in this country.

Q308 Lord Rowlands: Looking at the post-Lisbon experience, are you suggesting that the post-Lisbon measures that you have opted in to—14 of them, I think—are better drafted or drafted differently from those pre-Lisbon measures?
Chris Grayling: It is certainly the case that the pre-Lisbon measures were drafted on the basis of unanimity. The Commission itself has said that often it sought the lowest common denominator in order to secure agreement, so it may indeed be the case that some of them are not perfectly drafted and indeed some of them have been changed by the Commission as time has gone by. My concern is simply that, where we are taking decisions in individual areas that remove from this country the ultimate decision-making over a part of our justice system, we need to be quite clear what we are doing, why we are doing it and what the implications are of doing so.

Lord Rowlands: In the 14 measures you have opted in to, you are clear of what you are doing but also you are happy with the drafting of that measure, obviously. Is that right?

Chris Grayling: We would not opt in to a measure if we were not happy with it.

Lord Rowlands: Therefore, you do not believe they could be subject to expansionist tendencies by the Court of Justice?

Chris Grayling: It is a decision taken by the Minister at the time and by the Government collectively at the time based on the best evidence available and their judgment of whether it is in Britain’s national interest to be passed along. I do not think that is fundamentally different from what we are talking about with the 133. I guess the difference is that we have to do it in one block.

The Chairman: Home Secretary and Lord Chancellor, thank you very much indeed for giving so much of your time to the Committee this afternoon. Thank you to your officials, too, who have accompanied you. Obviously, your evidence is an essential part of this report, which we will be preparing. We look forward to receiving the Explanatory Memoranda as soon as possible. I would just like to emphasise, if you will forgive me, the list of measures that you are going to seek to opt back in to, if there are any. It is a very important constituent part of the report that we will be preparing so we hope that we will be hearing from you very soon. Thank you again very much. I wish everybody a restful recess in a day’s time. Our next meeting is on 27 February 2013 at 11 am and at 4 pm. Thank you.
United Kingdom Independence Party—Written evidence

Summary of the main points of this submission:

i. The UK should opt-out of all 135 EU ‘police and criminal justice’ measures.

ii. We should not then opt back into any of them at a later date.

iii. We have categorized the measures into two categories and 11 sub-categories. Measures in Category 1 do not require EU legislation to be effective and there is no case for an opt-in. Measures in Category 2 should be replaced with an adequate system of international cooperation on bilateral and/or multilateral basis.

iv. The EU legislation on police and criminal justice has mainly failed to achieve any legitimate purposes, but instead has placed our own legal system into a situation of a constitutional crisis, with sovereignty, rule of law, and our most fundamental liberties all in jeopardy.

v. The European Arrest Warrant stands out as the greatest problem. Its benefits to the UK are almost entirely illusory, and it is a major threat to liberty of UK citizens, with grossly inadequate safeguards to the rights of the accused. EAW should be replaced with a fair system of extradition based on assessment of \textit{prima facie} evidence against the accused.

vi. On the whole, the Council of Europe conventions and other non-EU mechanisms of international cooperation provide an adequate legal framework for extradition, mutual legal assistance, and other forms of cooperation in combating crime.

vii. The significance of subjection to the jurisdiction of European Court of Justice must not be underestimated. ECJ is a ‘political’ court of very poor judicial quality, and it should be expected to use its new powers to actively promote the EU-integrationist constitutional agenda, rather than uphold the rule of law or do justice in individual cases.

viii. The opt-out is therefore a step in the right direction, towards re-establishing democratic control over our system of criminal justice, in accordance with our own constitutional and legal tradition.

ix. However, further reform will be required. The opt-out in itself will not cover post-Lisbon ‘police and criminal justice’ measures such as European Investigation Order, or other EU’s ‘Justice and Home Affairs’ in the fields of immigration and asylum and civil law. The government will need to take further action to re-establish democratic control over these areas, protecting UK’s constitution and national interest.

Introduction

1. This is the submission made on behalf of the UK Independence Party to the House of Lords Select Committee on the European Union in response to its Call for Evidence on the UK’s 2014 Opt-out Decision (Protocol 36).

2. This submission is made by Gerard Batten MEP on behalf of UKIP. Mr. Batten is the UKIP spokesman on Home Affairs, and MEP for London since 2004; he has sat on the European Parliament’s \textbf{Civil Liberties, Justice and Home Affairs Committee} since 2009. He has taken a great deal of interest in the European Arrest Warrant and other EU ‘police and criminal justice’ measures adapted in the UK. Over the past eight
years, he made numerous parliamentary speeches and written questions on the matter, and was involved in public campaigns over controversial EAW cases, especially those of his constituents Andrew Symeou and Miguel-Angel Meizoso-Gonzalez. He made a detailed written submission for the recent extradition review by Sir Scott Baker’s panel. By the leave of the Supreme Court, he was a Public Interest Intervener in the landmark EAW case of Assange v Swedish Prosecution Authority (2012). He is the author of Freedom, Security & Justice? Or the creation of a European Union Police State (2012).

3. As a preliminary comment, with the greatest respect to the Select Committee, we note that this is not the first detailed inquiry focusing on the European Arrest Warrant. Before coming to power, both government parties recognized that the threat posed by it to the civil liberties called for an urgent reform. Still, no action has been taken; and instead, we have only seen an excessive number of reviews on that subject. That includes the review by the Joint Committee on Human Rights, the review by the independent panel appointed by the Home Secretary and chaired by Sir Scott-Baker, the review by the Home Affairs Select Committee, and in the statement of 15th October, she has effectively commissioned another four reviews by four separate parliamentary committees. With respect, this is an entirely inadequate approach to a situation posing an immediate and grave threat to civil liberties, where urgent action has been promised. We would invite the Select Committee to make it clear in its report that the government should take an urgent action to protect the constitutional liberties, as the both government parties have pledged, and in the circumstances, seven detailed reviews of this subject are quite sufficient and it is not really necessary to commission the eighth and ninth reviews, in whatever form. It is time to act.

4. The Call for Evidence invites responses to 16 specific questions; most of them are answered below. References in square brackets are to the number of each legislative act of the EU on the Home Secretary’s list.

Q. 1. Should the Government exercise its block opt-out?

5. **Yes.** The UK should exercise its right to a ‘block opt-out’ from the EU’s pre-Lisbon police and criminal justice (PCJ) measures. Moreover, the opt-out should be seen as the first step towards a much more comprehensive range of reforms aimed at restoring national sovereignty over criminal justice and policing as well as developing international cooperation in that field on a fair, efficient, and constitutionally coherent basis.

6. There is an obvious public interest in international cooperation in combating crime, and the UK’s participation in PCJ measures was originally motivated by hopes that the EU legislation would help to facilitate that. In reality, the EU measures have been very ineffective in this respect. Indeed, practice has shown that the EU pursues quite different goals in this area, namely establishing its own systems of criminal justice and law enforcement which would gradually absorb or replace national systems. Those emerging EU-wide systems have proven to be fundamentally incompatible with the British legal system. The inevitable result is a mounting constitutional crisis, where we see most fundamental common law liberties being superseded and ousted by EU innovations, and the very rule of law in this country called into question.
7. While the opt-out is often portrayed as an ‘extreme’ anti-EU step, the reality is very different. The right to this opt-out was expressly reserved in the Lisbon Treaty, and it is indisputable that the opt-out would be entirely consistent with the UK’s international obligations.

8. As for the UK’s national interest and especially the interest in preservation of the rule of law in this country and the constitutional liberties of its citizens, the opt-out will be a step in the right direction. However, its effect will be limited by the following factors:

   - The ‘opt-out’ may be rendered totally ineffective by subsequent ‘opt-ins’ into a number of individual measures, such as the European Arrest Warrant. Indeed, the government has been careful to leave this option permanently open for itself and its successors.
   - Even without subsequent ‘opt ins’, the majority of pre-Lisbon PCJ measures has been transposed into national legislation. Unless the opt-out is accompanied by a corresponding comprehensive reform of domestic legislation, it will be of little effect.
   - In any event, the ‘opt-out’ will not extend to any of post-Lisbon measures, most notably European Investigation Order (EIO). The EIO has been credibly criticized as a major threat to civil liberties, and it is deplorable that the government chose to ‘opt in’ without ensuring those liberties are safeguarded. This is now a major problem, which will not be solved by the block opt-out from pre-Lisbon measures.
   - ‘Police and Criminal Justice’ measures represent only a segment of the EU legislation on ‘Justice and Home Affairs’, which forms the true basis of the EU’s emerging legal system and disables reforms urgently required at the national level in such vital areas as immigration and asylum. The PCJ opt-out will not affect the larger ‘Justice and Home Affairs’ bloc, which is another area where an urgent ‘repatriation of powers’ is required, yet the government has not even begun solving that larger problem.

9. Even if the opt-out is carried out in the most ‘radical’ version, i. e. with no subsequent opt-ins whatsoever, the effect of it will be limited to a literal ‘repatriation of powers’ and will not necessarily mean a substantive legal reform. Most notable effects will be two:

10. Firstly, the Parliament and the Crown will untie their hands for amending or reforming the domestic law on criminal justice and law enforcement. Constitutionally, this would be a very positive development, as the legislative decision-making will be subjected to proper democratic controls. To make the reform effective in practical terms, the Parliament will then need to make full use of its newly regained legislative powers to restore a fair and efficient system of criminal justice at the national level. Likewise, the Crown will need to be active in restoring and improving the network of international cooperation in this area, whose development has been effectively blocked by the EU unsuccessful experiment of developing a pan-European coercion-based system.

11. Secondly, the opt-out would allow the UK to stay outside the jurisdiction of the European Court of Justice in this area. In this respect, it does not ‘repatriate powers’, but merely prevents a further ‘transfer of powers’ to the EU. The position in this respect is often misunderstood. Doing nothing would not preserve the status quo, but result in the subjection of ECJ jurisdiction, with dramatic changes to the law. The legal
effects will be detailed in response to Question 8 below. By way of example, and in summary only:

- the entire body of ECJ case-law in this area will become binding in all UK courts;
- one of the consequences of that is a dramatic change to the British rules of statutory interpretation: the courts will have to interpret every Act of Parliament in a way best promoting the goals of the corresponding EU legislation (see the ECJ ruling in Criminal Proceedings against Pupino (2005));
- that, in turn, will politicize the judicial decision-making, as the courts will have to pay due regard to the political declarations in preambles to EU legislation as to its goals.
- In a large number of criminal proceedings, each party will have a right to apply for the case to be referred to the ECJ to resolve a dispute on interpretation of EU law. That may delay the proceedings for years. If UK court refuses to refer the case to ECJ, the refusal could be appealed.

12. The EU integration in this area has now reached a point where its legal framework leaves hardly any scope for half-way solutions which were often adopted by the UK before. In this respect, the block opt-out is now the only way to maintain the status quo. However, it is submitted that a much more far-reaching reform is necessary. The real choice is between subjecting this country to the EU-wide uniform system based on coercion or, alternatively, restoring UK sovereignty in this area and developing a flexible and efficient network of international cooperation.

Q. 2. What are the likely financial consequences of exercising the opt-out?

13. While it has been reported that the European Commission has threatened the UK with “direct financial consequences” of the block opt-out, that threat does not seem realistic. The opt-out is fully consistent with the UK’s international obligations; its possibility has been negotiated and agreed by every EU member-state in the course of Lisbon treaty negotiations. Consequently, the EU would have no legal grounds for imposing any financial penalties.

Q. 3. What are the wider implications for the United Kingdom’s relations with the European Union if the Government were to exercise the opt-out?

14. While it has been suggested (or even taken for granted) that the opt-out may be detrimental to our relations with Europe, it is submitted that the opposite is true. As a rule, international relations are not improved by supranational systems based on coercion. Historical examples of the contrary include Austro-Hungary, Yugoslavia, or the Soviet Union, to name a few. Good international relations, as we understand them, consist in voluntary and mutually beneficial cooperation. That does not require any supranational structures enforcing their own law.

15. In this particular case, it is likely that the block opt out would benefit our relations with Europe at several levels:

- It would clarify the constitutional position and prevent future ‘demarcation disputes’ over constitutional competences between the EU and UK. The
responsibility and control over our system of criminal law would be reserved
to the UK national government and Parliament, leaving no scope for disputes
with Brussels over these matters. These are half-way solutions, with
ambiguous power-sharing models, that put strain on relations.

- It would eliminate mutual grievances arising out of practical injustices caused
by such ill-designed measures as European Arrest Warrant, where the
standards of one legal system are being imposed on another by coercion. For
example, Poland is often blamed for ‘disproportionate’ use of the EAWs for
minor crimes; what is overlooked is that the Polish law leaves the authorities
with no discretion and obliges them to issue an EAW where it is necessary to
arrest the suspect. As a result, Poland as a country is being blamed for
injustices really caused by the flaws of the EAW system itself. Similar
situations arise in relation to countries whose law allows lengthy pre-trial
detention or whose standards of fair trial and/or treatment of prisoners are
lower than ours. Again, the cases of injustice arising from such difference of
standards cause strain on our international relations, while in fact, they
merely illustrate the flaws of the EAW system. These causes of international
hostility need to be removed, and this is another reason favouring the opt-
out.

- In the past, where the UK raised legitimate concerns over the effect of PCJ
measures on civil liberties, that caused irritation in some other EU member-
states as frustrating integration. It was felt that without the UK, European
states with similar legal systems could reach agreements faster and easier.
This is another strain on our foreign relations in Europe, which needs to be
removed.

- Above all, in the medium term the opt out would lead to a restoration of a
much fairer, more efficient and flexible system of international cooperation on
this area, based on voluntary bilateral and multilateral cooperation between
sovereign states. The EU system of criminal justice has failed, and it is
necessary both for this country and its foreign partners to find an alternative
way forward. At present, clinging to the EU project in this area only hampers
genuine development of international cooperation.

Q. 4. Which of the pre-Lisbon PCJ measures benefit the United Kingdom the
most? What are the benefits? What disadvantages result from the United
Kingdom’s participation in any of the measures? - [Questions 4 and 5 are answered
together]

Q. 5. In her 15 October statement the Home Secretary stated that “… some of
the pre-Lisbon measures are useful, some less so; and some are now, in fact,
entirely defunct”. Which category do you believe each measure falls within?

16. With respect, questions 4 and 5 are formulated in a biased and misleading way (to an
extent, mirroring the Home Secretary’s approach). It is assumed without question that
EU measures, as a rule, “benefit the UK”, albeit some of them more so than others;
and that those measures should only be divided into more or less “useful” ones on
one hand and “defunct” ones on the other. It is true that a lot of EU measures are
useless. But it is also true, and more worrying, that a lot of others pose a serious
threat to our civil liberties and the rule of law in this country. With respect, any review of the EU’s PCJ measures should focus, first and foremost, on those threats.

17. At present, the European Arrest Warrant stands out as the single most significant PCJ measure, dwarfing the other 134. People in the UK are arrested on EAWs every day, and then transported to a foreign prison on the force of a piece of paper, whether or not there is any prima facie case against them. No other PCJ measure is used at a nearly similar scope or with nearly as dramatic consequences to the lives of their victims. The EAW will be considered in detail in response to Question 10, but it is appropriate to stress at this stage that the Protocol 36 opt-out/opt-in decision is, first and foremost, the decision about the future of EAW regime in this country. Without exaggeration, if the government opts back into the EAW, the entire ‘block opt out’ of other measures will be only of marginal significance, and its positive effect will be largely negated.

18. Taking a wider look at the 135 legislative acts on the list, those fall into two large categories, and then a number of sub-categories, as listed in the Appendix.

19. **Category 1: measures of little or no legal significance in the present constitutional framework.** This category includes not only measures which are literally ‘defunct’, but all the arrangements which would operate (or not) just as well without any EU legislation, be that simply at the administrative level (for example, exchange of various liaisons, designation of specialized agencies for cooperation with foreign counterparts, Joint Investigation Teams, etc.), on the basis of national legislation, or on the basis of bilateral/multilateral co-operation. At present, indeed, a lot of EU legislation has no practical effect except affixing the EU trademark to various aspects of voluntary international cooperation. We would identify the following sub-categories:

   **I(A). EU legislation superseded/replaced by subsequent pre- or post-Lisbon measures.**

   **I(B). EU legislation duplicating national legislation.** In some cases, the EU ‘harmonisation’ legislation has been fully transposed into national legislation and thus served its purpose; in others, it duplicated pre-existing UK legislation from the outset.

   **I(C). Mutual legal assistance (MLA) instruments.** By definition, MLA can and should be facilitated by bilateral/multilateral agreements and not by supranational legislation. In practice, the EU legislation on MLA duplicates Council of Europe Convention and the domestic law and practice.

   **I(D) Other measures where EU legislation is plainly unnecessary.** This includes ‘defunct’ measures as well as those where national legislation, bilateral/multilateral agreements, and administrative measures would have exactly the same effect.

20. It should be noted that the very existence of the measures in subcategories I(B), I(C) and I(D) is **inconsistent with the EU’s own constitutional principle of subsidiarity**, i.e. that the Union shall only intervene where sufficient measures cannot be taken at the national level.

21. While the EU legislation in this category has, in itself, no legal effect in the present constitutional framework, it would be wrong to assume that none of it should be a
cause for concern. Thus, many measures transposed into national legislation in Subcategory 1(B) have their origin in the EU coercive ‘harmonisation’, and many of them pose a threat to civil liberties. Yet, they would be unaffected by the block opt-out; separate legislative action would still be needed.

22. Nor is it correct to assume that the effect of an ‘opt-in’ into these measures would be purely symbolic. These measures have no effect in the present constitutional framework; yet the extension of the ECJ jurisdiction would bring many of them to legal life of their own. Even a generally worded declaration to the effect that all member-states must work tirelessly to combat fraud may expose all national anti-fraud law to the dictate of Luxemburg.

23. At the same time, this legislation will remain of no practical utility. The opt-in would mean a naked transfer of power to Brussels and Luxemburg, and there is really no case for opting into any of the measures in this category.

24. **Category 2: Measures of substantial legal significance**, which may be roughly divided into the following sub-categories:

**Sub-category 2(A). ‘Mutual Recognition’ Instruments.**

25. The principle of ‘mutual recognition’ requires that a judicial or prosecutorial decision taken in one EU member-state should be enforced automatically in any other EU member-state. The European Arrest Warrant is the most infamous of the EU ‘mutual recognition’ instruments. Others extend the same principle beyond arrest warrants to criminal sentences, fines and penalties, probation, bail (European Supervision Order), confiscation orders, freezing of assets, etc.

26. The European Arrest Warrant, having received the highest circulation of all these instruments, has highlighted the fundamental flaw of mutual recognition. Such a system cannot work between nations whose legal systems and standards of justice are so different. Trials *in absentia*, widespread in many EU member-states and abhorrent to our own legal tradition, are only one example of this. Council Framework Decision 2009/299/JHA [92] was adapted in order to mitigate that problem and introduce safeguards to the rights of defendants tried in absentia, but as a number of EAW cases demonstrate, the safeguards remain grossly inadequate.

27. Mutual recognition effectively means that *every ex-communist prosecutor or judge in an East European state run by a local mafia is given an equal standing to the judges in the Old Bailey*. That is why the EAW has caused so many horrible and tragic cases of injustice. The potential for similar injustice is inherent in all other ‘mutual recognition’ instruments; many of them are a threat to liberty almost as much as the EAW, while others pose a similar threat to property rights. It is from this angle, not from a viewpoint of their real or illusory utility, that those measures should be assessed.

28. Out of the 10 ‘mutual recognition’ measures, four (European Confiscation Order [68], European Probation Order [88], European Evidence Warrant [91] and European Supervision Order [97]) have not been implemented in the UK in spite of our initial opt-in. That was mainly due to entirely justified concerns over the threat to civil liberties posed by these measures, and it is unfortunate that the other measures in this sub-category have been implemented in spite of those concerns. If the block opt-out does not take place, the UK will have to implement all outstanding ‘mutual
recognition’ measures, as the lack of implementation will expose us to an enforcement action by the European Commission.

29. Not all ‘mutual recognition’ instruments are pre-Lisbon, and the block opt-out will not eliminate the threat posed to civil liberties by the post-Lisbon European Investigation Order (EIO), which the present government has chosen to opt into. EIO will supersede the European Evidence Warrant [91] and European Freezing Order [48], so the EIO opt-in renders the block opt-out ineffective in relation to these two instruments. Unless the block opt-out is followed by the UK’s withdrawal from the EIO, it will remain a half-measure.

Sub-category 2(B). Eurojust and subordinate institutions.

30. The actual and potential significance of Eurojust is not fully visible to a superficial observer. Eurojust brings together the so-called ‘College’ of 27 experienced lawyers (mostly prosecutors, but also some judges and police officers), one from each member-state. Each National Member is accompanied by a relatively small team of Deputies, Assistants, and Seconded National Experts. At least one of them for each member-state is legally obliged to be ‘on call’ 24 hours a day, 7 days a week.

31. In practice, most of Eurojust work at present consists in answering queries from member-states on cases involving a complex international dimension, or forwarding such queries to colleagues in another member-state who are able to assist. In this respect, Eurojust is of some utility: according to its 2011 annual report, it has answered 71 requests from UK, and sent 197 requests to the UK, during that year. Nevertheless, with all due respect to experience and expertise of Eurojust members, there are many respected international law firms offering similar advice on a private contractual basis. Eurojust may be said to be simply the most expensive of them, with the annual budget of 33,000,000 Euros. 11.5 per cent of that budget (3,795,000 Euros) comes from UK contributions to the EU.425

32. Yet the greatest concern, again, comes from the threats which the rising powers of Eurojust pose to the civil liberties and constitutional integrity of our legal system. In due course, Eurojust is destined to mutate into the European Public Prosecutor’s Office, or at least, its closest subsidiary. Accordingly, the questions of UK’s participation in the ‘pre-Lisbon measure’ (Eurojust) and the future ‘post-Lisbon measure’ (European Public Prosecutor) cannot be separated from each other; indeed, it is really one and the same question. In our opinion, the obvious answer is that we should opt out of both.

33. Given that the government has already decided to opt-out of the European Public Prosecutor (EPP) scheme, continued participation in Eurojust makes no sense, except as a backdoor entrance into the EPP scheme. On the basis of the EU legislation already in force, Eurojust represents an unprecedented concentration of judicial, prosecutorial, and police power in Europe. Each National Member has the legal powers to order arrests, searches, seizures, interrogations, surveillance, freezing or monitoring of bank accounts, confiscations, electronic tagging, etc. in his own country – on an EU instrument such as a European Arrest Warrant, or even without such an instrument (Articles 9c and 9d of the Eurojust Decision; however these powers are subject to national law). In this respect, Eurojust may serve as a back door for a de facto mutual recognition even where a member-state chooses not to implement such controversial

425 Cooperation not Control. The case for Britain retaining democratic control over EU crime and policing policy. By Dominic Raab, Open Europe, 2012; p.p. 17-18
instruments as European confiscation orders or freezing of assets. Further, each member has access to his country’s databases of criminal record, registers of arrested person, investigation register, DNA registers and “other registers of his Member State where he deems this information necessary for him to be able to fulfil his tasks.” (Article 9(3)).

34. The amount of the collective power of the College is something unheard of in the UK legal system. At this level, there is no mutual independence, no separation of powers, no checks and balances between judges, prosecutors and the police. In the future, all those vast powers will, no doubt, be placed at the disposal of the European Public Prosecutor.

35. Furthermore, Eurojust situated in the Hague is merely a tip of the iceberg. Eurojust also has a network of ‘National Coordination Systems’ in each EU member state, led by the ‘National Correspondent for Eurojust’. Each NCS also includes a National Correspondent for terrorism matters and a National Correspondent for European Judicial Network. In addition, the National Coordination Systems link the Eurojust with all sorts of other EU police and judicial networks by incorporating their respective members or ‘contact points’.

36. All these networks are effectively part of the Eurojust system. They consist of judges, prosecutors, and law enforcement officers who are actually working and exercising power in their respective member-states. This obviously gives rise to potential conflicts of interest, especially bearing in mind that someone’s membership in one of Eurojust’s networks is not necessarily a matter of public record, or at least, not widely known. Rather secretive institutions such as the European Judicial Network clearly pose at least a potential threat to the independence of judiciary. Given the English tradition of political independence of prosecutors and police, the same applies to nearly all other Eurojust networks.

37. Accordingly, just like the opt-out from European Public Prosecutor scheme makes it imperative to opt out of Eurojust Decision as well, the Eurojust opt-out must also be accompanied by the opt-out of all measures in Sub-Category 2(B). A subsequent opt-in into any of them would deprive the UK of the substantive benefits of opting out of the EPP and Eurojust, and re-open the door to the constitutional threat posed by those institutions.

Sub-category 2(C). Europol and subordinate institutions.

38. Like Eurojust, Europol has its own web of ‘networks’ of ‘contact points’ within national authorities, operating under Europol’s supervision. Measures which form the basis of those networks and their link with Europol are also included in this category, along with the (rather numerous) EU legislation regulating the powers and functions of Europol itself.

39. While sometimes referred to as ‘EU police force’, in fact Europol is a criminal intelligence agency, modeling itself on US FBI or UK National Criminal Intelligence Service. At the same time, there are well-founded concerns that it has every potential to develop into some kind of political secret police.

40. Europol employs over 700 staff, who enjoy immunity from prosecution or civil lawsuits in relation to everything they do or say as Europol officers, with just one technical
exception. The names of Europol staff are kept secret, with the exception of its Director and his three Deputies. In 2006, I wrote to the then Director of Europol, Max-Peter Ratzel, requesting the names of brief CVs of other Europol employees, but Mr. Ratzel declined to provide them.

41. Since its foundation as the Europol Drugs Unit in 1992, Europol’s remit has been steadily widening; since 2010, it has power to investigate any organised crime, terrorism, and a further list of 24 very broadly defined categories of illegal activity. Like the EAW list of offences, some of those strike an English reader as manifestly inadequate definitions of criminal offences, for example ‘racism and xenophobia’, ‘computer crime’ or ‘corruption’.

42. There are no reliable safeguards to ensure that Europol does not gather intelligence on lawful political or other activities under such ill-defined headings. Given Europol’s secretiveness and lack of accountability, one would not be surprised if ‘racism’ was extended to include opposition to uncontrolled immigration, ‘xenophobia’ – opposition to the EU; or ‘computer crime’ – such web-sites as Wikileaks. It is worth noting that the 2010 EU legislation explicitly authorised Europol to investigate such activities outside its ‘organised crime’ remit, i.e. without any evidence of organised crime involvement.

43. An EU Council document dated 16 April 2010 instructs Europol to build a database on ‘the processes of radicalisation in the EU’ in order to ‘generate lists of those involved in radicalising/recruiting or transmitting radicalising messages and to take appropriate steps’. Well-founded concerns have been voiced that this project is effectively aimed at political persecution, and amounts to spying on political activists whom Europol arbitrarily deems to be too ‘radical’.

44. In substance, the work of Europol is organised around so-called Analysis Work Files. Each AWF is a massive project with a big database and a team of officers working on it full-time. Some of them (such as DOLPHIN – ‘Non-Islamist extremist terrorist organisations threatening the EU) might cause obvious civil liberties concerns (although there is no hard evidence of any specific impropriety in Europol’s work on those files at the moment).

45. The priorities for Europol’s work are set by the political leadership of the EU in documents called Council Conclusions. Up to a dozen of such ‘conclusions’ are issued monthly at the meetings of EU ‘Justice and Home Affairs’ ministers.

46. There is a Europol National Unit in each member-state. In the UK, Europol officers work within the international department of the Serious Organised Crime Agency (SOCA). Each national unit seconds a liaison officer to the central Europol in Hague.

47. At least one Europol officer was involved in the infamous killing of Jean Charles de Menezes following the 7th July 2005 terrorist attacks in London. In connection with that, I wrote to Europol, the Home Office, Metropolitan Police and SOCA, expressing concern over the immunity enjoyed by Europol officers. All my correspondents defended the present position. However, Brian Minihane, the then head of Europol National Unit UK, confirmed to me that a Europol officer was involved in the incident, although his role was limited to ‘facilitation of enquiries with other member-states’ and he was ‘desk bound’.

426 if a Europol officer takes part in a Joint Investigative Team between member-states, his actions as a member of JIT are not covered
48. It is submitted that the civil liberties risks associated with Europol are too great for any serious consideration of an opt in, and this approach should be extended to all measures in this sub-category.

**Sub-category 2(D). Schengen measures.**

49. *Police and criminal justice* measures under the Schengen Agreement are obviously supplementary to its principal part – effective abolition of borders between the parties. The logic of it is understandable: where the state borders are effectively abolished, it becomes almost impossible to combat crime without some form of enhanced cooperation between police authorities.

50. Yet, this rationale obviously does not apply to the UK. Fortunately we have not joined the main plank of Schengen Agreement and have no plans to do so. In this situation, our participation in Schengen policing measures has hardly any rational basis; especially bearing in mind that our joining a significant part of the Schengen system has not been subject to any public scrutiny – indeed, most of the people in the UK would assume we are entirely out of it. In practice, the government has simply taken us into it by stealth, without the country’s knowledge or consent.

51. Schengen measures provide for even closer integration of police and judicial authorities than other *police and criminal justice* measures of the EU; accordingly, they are often even more dangerous to civil liberties and the rule of law. The essential problem is, however, typical of many EU measures in this sphere: it fails to draw clear lines of separation of power, or to introduce any checks and balances, between the police powers, prosecutorial powers, and judicial powers.

52. Thus, an alert placed on the SIS database should be treated as a European Arrest Warrant. So, within the Schengen Zone, people are being extradited simply on the basis of a hit in a database. Because the UK is due to join SIS-II in 2013, but not the Schengen Zone, it is not clear whether the same will happen in the UK. However, the Scott Baker Report states that the number of EAWs received in the UK is expected to rise sharply after we join SIS.

53. Again, to someone belonging to an English legal tradition, it seems self-evident that an operational police database cannot be trusted in the same way as a judicial decision, and mixing these two is, by definition, a major threat to liberty. Especially so where the data is put into the database by foreign police forces of far lower quality and integrity than our own.

54. The matter is not limited to the database; what comes with it is SIRENE, a little known but powerful organisation created to manage SIS, which has by now developed into virtually a second Europol. SIRENE has a central office and national bureaus, i.e. a number of officers attached to a respective national authority - the equivalents of UK’s Serious Organised Crime Agency. One Czech SIRENE officer jokingly told my researcher that his organisation is “top secret”. In reality, he added, about 30 per cent of the staff at the International Department of Czech Republic’s Criminal Police Investigation Service are SIRENE officers, the others working for the Interpol or Europol. However, SIRENE bureau does about 60 per cent of all work. He believed the situation was similar in analogous agencies in other EU member-states.

55. Unlike other EU police organisations, SIRENE **has actual executive powers in some countries.** For example, SIRENE officers can escort prisoners who are being
surrendered under a European Arrest Warrant. In some other member-states, SIRENE officers help to organize ‘execution’ of EAWs without being directly involved.

56. The UK is expected to join the SIS/SIRENE system in 2013; however, there is already a German SIRENE officer working in UK’s Serious Organised Crime Agency, Jan-Per Ruehmann, apparently in an advisory role.

57. It would be absurdly futile to opt out of other PCJ measures of the EU, and then to opt in the enhanced integration measures under the Schengen acquis. It is submitted that the opt out of this sub-category is also imperative.

Sub-category 2(E). Databases.

58. The sub-category includes several EU-wide police and criminal intelligence databases. Obviously, sharing confidential personal data is a very sensitive issue in terms of civil liberties, and even where some limited rights of invading people's privacy may be given to the British police, sharing this with the police of some other 26 states is a different matter. Some degree of data sharing is justified, but the UK authorities must always retain the control, and it is obviously too risky to transfer the ultimate control to the EU, as an opt in would do.

59. Of particular concern is the Prum Database [79] and [80], which would combine national databases of fingerprints, DNA, and vehicle registration data. The UK police holds the biggest DNA database in the world, and our current law authorizes retention of DNA data of innocent people not charged with any crime. Other EU states have much more limited DNA databases. The UK has quietly declined to implement the decision in spite of the opt-in, due to the concerns over the cost of implementation, the lack of reciprocity, and the threat to civil liberties. It is submitted that we should continue to stay out of this measures, and to opt-out of other common databases of the EU (e.g. databases of ID documents [18], criminal records [93] and [94] and Customs Information System [100]).

60. In addition, the example of SIS and SIRENE demonstrates that the EU databases tend to grow large organizations to manage them, which in time develop into powerful agencies of their own right.

Sub-category 2(F). Cooperation agreements between EU and third countries (Bosnia, Norway, Macedonia, Ukraine, Croatia, Iceland, United States, Switzerland, and Russia).

61. The agreements concern “exchange of classified information” and, in the case of the US, also extradition and mutual legal assistance.

62. Opt-out or opt-in in relation to these agreements would have no immediate effect on the UK, as the cooperation takes place directly between the EU and the ‘third country’. Yet the very existence of some of these agreements highlights the dangers of our overall involvement in the EU’s ‘police and criminal justice’ system. It is manifestly counter-productive to exchange classified information on combating crime with countries with such level of corruption as in Russia and Ukraine, where it is sometimes impossible to distinguish between the law enforcement agencies and the organized crime. And in terms of civil liberties, if we are rightly anxious about sharing sensitive information with some of the EU member-states, what should we say about sharing people’s sensitive personal information with Moscow?

Sub-category 2(G). Other measures of substantial legal significance.
63. **European Police College (CEPOL) [67]**. The purpose of CEPOL is to train senior police officers from across Europe to operate in the framework of the emerging EU legal system. Following the block opt-out, there is no utility in such training for UK senior police officers, and their time would be best spent on something else. Further, there are concerns that the leadership of CEPOL may be misusing the organisation for indoctrination and advancing their own Euro-federalist political agenda. The current director of CEPOL is Ferenc Banfi, an ex-communist who made a brilliant career as a police officer in communist Hungary. As Ted Jeory revealed in *Sunday Express* (29 August 2010), Mr. Banfi advocates a drastic centralisation of policing in the EU. The *Sunday Express* quotes him as saying: “I am 100 per cent sure it is just a question of time when Europol will have executive powers in the future. It may be five years or 10, but it will happen”. Mr. Banfi was reportedly discussing that idea with the director of Europol, Rob Wainwright. Since the UK (hopefully) is not going to participate in such a centralisation, the continuing participation in CEPOL would also be unnecessary and wasteful.

64. **Special Intervention Units [81]**: the EU legislation provides for setting up ‘special intervention units’ in each member-state and assistance they may provide at the request of another member-state in case of a vaguely defined ‘crisis’. The assistance may take the form of sharing expertise, equipment, or “carrying out actions on the territory of that Member State, using weapons if so required”. The civil liberties risks are obvious, especially if the jurisdiction over interpretation of that legislation is transferred to the ECJ. **On the face of it, the legislation seems to permit, for example, for a government to request an intervention of a foreign police to control civil unrest.** Needless to say, the UK should under no circumstances become involved in this kind of cooperation, either as the intervener or as a victim of such an intervention, and there should be no question of an opt-in.

65. **Framework Decision on Racism and Xenophobia [86]** requires all member-states to criminalize “certain forms and expressions of racism and xenophobia”, without properly defining the legal meaning of either; most notably the offences include ‘inciting hatred’ and ‘publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes’. However, member-states are permitted to limit the offences to “conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting”. Therefore, the current UK legislation is compliant with this Framework Decision.

66. Criminalisation of mere opinion, however deplorable it may be, is entirely alien to our legal tradition, primarily because political and moral categories such as ‘racism’, ‘xenophobia’ or ‘hatred’ are incapable of a precise legal definition. It would be only too easy to extend these definitions to cover entirely legitimate political opinions, e.g. construe concerns over mass uncontrolled immigration as ‘racism’ or ‘xenophobia’. Therefore, it remains controversial whether such a criminalization is appropriate at all; but at any rate, it would be grossly irresponsible to remove control over interpretation of these laws from UK courts, and entrust it to the politicized European Court of Justice.

**Q. 6. How much has the United Kingdom relied upon PCJ measures, such as the European Arrest Warrant, to date? Likewise, to what extent have other Member States relied upon the application of these instruments in the United Kingdom?**
67. According to the report of the Joint Committee on Human Rights, the EAW figures are as follows (more detailed data is also available):

<table>
<thead>
<tr>
<th>Years</th>
<th>EAWs received by UK</th>
<th>EAWs issued by UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006–7</td>
<td>3515</td>
<td>146</td>
</tr>
<tr>
<td>2007–8</td>
<td>2483</td>
<td>182</td>
</tr>
<tr>
<td>2008–9</td>
<td>3526</td>
<td>257</td>
</tr>
<tr>
<td>2009–10</td>
<td>4100</td>
<td>203</td>
</tr>
<tr>
<td><strong>TOTAL 2006-10</strong></td>
<td><strong>13,624</strong></td>
<td><strong>788</strong></td>
</tr>
</tbody>
</table>

68. The disparity is obvious, and the ratio is likely to rise many times if the UK continues to participate in the EAW and joins the Schengen Information System in 2013: the number of EAWs received in this country is expected to rise dramatically as we will recognize SIS alerts, but the number of UK’s own EAWs will remain unaffected.

69. Further, the figures do not reveal the full extent of the disparity. **UK prosecutors only ever issue European Arrest warrants when they are ‘trial-ready’ i.e. have all the evidence against the suspect ready to be presented to the court.** Therefore, in practically all cases, we could have just as well secured extradition of suspects to the UK through normal extradition proceedings, even if we were required to present a *prima facie* case against them in a foreign court. **The benefits of EAW, compared to traditional extradition, are thus illusory for the UK; in practice, they are limited to saving the costs of translation of the file.**

70. By contrast, many of the foreign EAWs received in this country are notoriously issued for investigation rather than for the trial, without the requesting foreign authority having a *prima facie* case against the accused, and even before the decision to charge them or not. Undoubtedly, the re-introduction of *prima facie* case requirement would have reduced the number of requests dramatically and restored the balance, both in terms of numbers and in terms of protection to the rights of the accused.

71. Thus, in 2003 – just before the introduction of the EAW – the overall number of extradition requests received by the UK was **114**, and the number of requests issued **87** (Scott Baker Report, p. 461).

72. Further, the dramatic growth in the numbers of EAW since it was introduced clearly does not correlate with any comparable growth of crime rates, and suggests that the instrument is being increasingly abused where requesting states have little or no evidence against the accused. A re-introduction of *prima facie* case requirement would deter unmerited requests without any significant detriment to our own interest in securing extradition of genuine fugitives.
Q. 7. Has the UK failed to implement any of the measures and thus laid itself open to infringement proceedings by the Commission if the Court of Justice had jurisdiction?

73. At present, the UK is in breach of the EU legislation in not implementing at least seven pre-Lisbon measures, including four ‘mutual recognition’ instruments:

- European Confiscation Order [68]
- European Probation Order [88]
- European Evidence Warrant [91]
- European Supervision Order [97]
- Prum database [79] and [80]
- Framework Decision 2009/948/JHA [107], empowering Eurojust to resolve conflicts of jurisdiction in criminal cases.

74. There are obvious good reasons why the government has quietly declined to implement these measures, and why they should not be implemented in the future. Most importantly, implementation of these measures would have raised very serious concerns over civil liberties.

75. For instance, European Supervision Order (the EU version of bail) issued by a foreign prosecutor, court, or any other designated authority, would oblige the UK courts and police to enforce on the citizens such measures as curfew, electronic tagging, living at a certain address, regular reporting to the police, limitations on entering certain places or obligation to avoid contacts with certain people. The same measures could be enforced on the force of European Probation Orders. In addition, European Probation Order may require enforcement of mandatory therapeutic treatment or any ‘instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity’.

76. Similar concerns apply to the Prum database (see above); and to the ‘conflicts of jurisdiction’ Framework Decision. If the power to resolve such conflicts of jurisdiction is transferred from UK prosecutors and courts to Eurojust, this may lead to situations where Eurojust may order us to terminate prosecution in a given case, and instead extradite the suspect to another member-state, even if the UK court is, legally, the most appropriate forum.

Q. 8. What would be the practical effect of the Court of Justice having jurisdiction to interpret the measures? Have past Court of Justice judgments caused any complications regarding the operation of PCJ measures in the United Kingdom, in terms of their interaction with the common law or otherwise?

77. Even putting aside the obvious concerns over sovereignty, frankly, there is very little to be said in praise of the European Court of Justice. It is a heavily politicized court of very poor judicial quality, which makes even the European Court of Human Rights shine by comparison.

78. While formally the ECJ consists of judges from all member-states, in reality the judgements are effectively made by one person, the Advocate General, who delivers
his own legal opinion on the case before the full court starts its deliberations. Nearly all ECJ judgements substantively repeat the opinion of the Advocate-General.

79. ECJ’s natural tendency is to turn any case into a major constitutional judgement transferring power from member-states to the EU. It was ECJ who, as early as in 1964, claimed the EEC’s “sovereignty” over member-states in so many words, in the case of Costa v ENEL. It was ECJ who, as early as in 1986, held the EEC Treaty to be a ‘basic constitutional charter’ in the case of Partie Ecologiste ‘Les Verts’ v. Parliament (1986). It was only twenty years later that the EU dared to utter the word ‘Constitution’ aloud; and from that it was forced to retreat. Yet, in the ECJ jurisprudence, the EU constitution had been there from the outset.

80. The ECJ judicial activism is not limited to constitutional issues. This September, the Advocate General has given the Opinion in the Bulgarian case of Belov. The ongoing case concerns the practice of a Bulgarian electricity company to fix electricity meters much higher than usual in some areas, to prevent widespread fraud by tampering with electricity meters. The Advocate General found that the practice amounted to ‘indirect discrimination’ against the large Roma populations of those areas.

81. In the filed of criminal justice, perhaps the most significant ECJ judgement was the one in Criminal Proceedings against Pupino (2005), which had a disastrous effect on the operation of the European Arrest Warrant. In that case, the ECJ arbitrarily elevated the constitutional status of Framework Decisions, turning them from a kind of international agreements into effective legislation.

82. Article 34(2)(b) of the EU Treaty provides:

Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.

83. Thus a Framework Decision per se is not a source of law. Like an international treaty, it merely imposes an international obligation on the UK government to modify the domestic law to achieve certain results. The government discharges this obligation by enacting a statute (e.g. Part 1 of the Extradition Act 2003), and it is the statute, not the Framework Decision, that the courts in this country have to apply.

84. However, the ECJ held in Criminal Proceedings against Pupino:

When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2) (b) EU.

85. The reasoning of this ruling (blueprinted by the Advocate General and then rubber-stamped by the Court) was demonstrably poor in legal terms, and displayed political motivation. In summary, the following reasons were given:

- The Framework Decisions on Police and Judicial Cooperation are binding, because to rule otherwise would make it more “difficult” for the Union to “organise… relations between the Member States and between their peoples” in the spirit of “solidarity”.
- The principles of ‘loyalty to the Union’ and ‘loyal cooperation’ between the member-states
• The transfer of sovereignty from the member-states to the Union by force of the EU Treaty.

86. By a characteristic oversight, the House of Lords then failed to appreciate the significance of UK’s opt-out of the ECJ jurisdiction in police and criminal justice matters, and held that Pupino was binding in UK courts, which have to interpret the Extradition Act 2003 in conformity with the Framework Decision (Dabas v High Court of Justice in Madrid [2007] UKHL 6). It was only recently that, in the case of Assange v Swedish Prosecution Authority, the Supreme Court recognized its earlier error and acknowledged that Pupino was not binding in the UK. This confusion illustrates that, even putting aside the substance, the sheer complexity of the EU law may put our legal system in total jeopardy, with tragic results to innocent British citizens.

87. Indeed, the judgements in Pupino and Dabas had profoundly disastrous effect. The reason was the ambiguity of such phrases as ‘result to be achieved’, ‘wording and purpose of the framework decision’, and ‘result which it pursues’. Every Framework Decision starts from a lengthy preamble, setting out its purely political ‘purposes’ and ‘results to be achieved’, such as the ‘common area of freedom, security and justice’ or ‘ever closer union’. In light of the ECJ’s binding case-law, our own legislation had to be interpreted by our own courts with reference to political slogans of the EU. Needless to say, this contributed much to the systemic injustice of EAW cases.

88. Thus, in the case of Andrew Symeou, it was on the basis of Dabas judgement that the High Court held it had no jurisdiction to look into the actions of Greek police in an EAW case. The judges added:

The absence of even an investigation before extradition into what has been shown by the defendant here may seem uncomfortable; the consequences of the Framework Decision may be a matter for legitimate debate and concern. But we have no doubt but that the common area for judicial decisions in criminal matters means that the judicial systems of the countries of the European Union must be regarded as capable of providing sufficient minimum safeguards for a fair trial in a civilised country, including provisions for the exclusion of evidence obtained by coercion.

89. One would expect to see a reference here at least to a provision of the Extradition Act which provided a basis for this monstrous ruling; instead, we find a reference to the purely political objective of the “common area for judicial decisions”.

90. In another case of my constituent, Juzgado de Istruccion Cinco de Palma de Mallorca, Spain (Judicial Authority) v Miguel Angel Meizoso Gonzalez, a Spanish magistrate requested a surrender of Dr. Meizoso to answer an unsubstantiated private complaint against him at a very early stage of her preliminary inquiry into the case. It was not in dispute that he had not been charged and that there was no substantive evidence against him. Dr. Meizoso resisted the EAW on the grounds that it was not issued for prosecution and that he was not ‘an accused person’. The District Judge applied Pupino and Dabas and held that to accept Dr. Meizoso’s contention would be incompatible with the purposes of the Framework Decision.

91. In Atkinson v Supreme Court of Cyprus [2009] EWHC 1579 (Admin), the defendants had stood trial for manslaughter in Cyprus, were acquitted, and subsequently returned to the UK. The prosecution appealed the acquittal to the Supreme Court of Cyprus,

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428 3 June 2010, City of Westminster Magistrates Court, unreported
which heard the case in absentia, substituted a guilty verdict, and issued EAWs. The defendants relied on S. 20 of the Extradition Act 2003, which provides that an EAW for a conviction in absentia can only be executed if the convict “deliberately absented himself from his trial” or if he would be entitled to a retrial, neither of which applied to them. Collins J applied Dabas and held that the statute should be construed to avoid ‘a barrier to surrender which was not authorised by the Framework Decision’ and in a way ‘which ensures that the necessary co-operation and so speedy surrender takes place’. Accordingly, Collins J construed ‘trial’ in S. 20(3) as meaning a continuing process which included the subsequent prosecution appeal, and held the defendants had deliberately absented themselves from that part of their ‘trial’. In effect, the Court read down the entire S. 20 of the 2003 Act, which was undoubtedly intended by Parliament to serve as an important safeguard against convictions in absentia.

92. These are merely examples, few of the many, showing how the application of ECJ case-law politicised the decisions of our own courts in EAW cases. As a result, even the insufficient safeguards provided for in the Extradition Act 2003 were not applied. The law itself is poor and has insufficient protection to the rights of the accused; and even that law was largely substituted by political objectives. In effect, our courts would now answer legal questions on the basis of tailoring their decisions to bring us closer to the EU’s political objectives. So the ECJ influence is not just that it changes our law to the worse; it undermines the rule of law itself, and substitutes the rule of EU ideology.

93. After the enormous harm Pupino had done to the lives of innocent EAW victims, the Supreme Court fortunately held in the case of Assange that Pupino should have never been applied in the UK at all! This confusion is symptomatic. Quite apart from the poor substance of Luxemburg jurisprudence, the sheer complexity of EU law is perplexing even to our top judges. As demonstrated above, in such a sensitive area of law as police and criminal justice, the results may be truly catastrophic.

94. If we opt-in back into any PCJ measures, Pupino and the rest of deeply deficient ECJ case-law will become binding on our courts again. Indeed, unless urgent action is taken to reverse this government’s opt-in to European Investigation Order, Pupino will be binding in all EIO cases. It is not difficult to foresee that the results will be as disastrous as with the EAW.

95. (The misapplication of Pupino by UK courts was the primary subject of the author’s intervention in the case of Assange, so I would be bold enough to claim some expertise in this area, and hope that the Select Committee may benefit from this detailed submission. The lead judgement of Lord Phillips praised our intervention as “interesting” and “well reasoned” but concluded it did not bear on the ultimate issue in Mr. Assange’s case – see para 9 of the judgement).

Q.9. If the opt-out was not exercised what would be the benefits, and drawbacks, once the United Kingdom becomes subject to the Commission’s enforcement powers and the jurisdiction of the Court of Justice?

96. As the answers to questions 1, 7 and 8 above demonstrate, it is extremely mistaken to expect any benefits. The Commission would be able to take action against the UK for any alleged failure to implement the EU legislation in this area. The politicized ECJ case-law of very poor legal quality will become binding on all our courts.
97. In addition, criminal proceedings in UK courts will be frustrated by endless references to Luxembourg, delaying the proceedings for years. Many lawyers say that, in the end, Luxembourg’s answers to such references are not only unhelpful, but actually complicate matters further. This is partly because the ECJ often does not keep its judgement within the limits of the question referred by the national court, but seeks to intrude into the national court’s area of competence. For example, rather than simply resolving the ‘EU law’ question, ECJ would seek to re-write the national court’s findings of fact.

98. The EU legislation we have categorized above as Category 1 currently has no legal effect. If the block opt-out is not exercised, or is weakened by subsequent opt-ins, all that legislation will spring to life. The ECJ will have the final say on many purely national legal questions, simply because they fall within some broadly framed declaration in one of the legislative acts of the EU: see the answer to questions 4-5 above.

Q.10. The European Arrest Warrant has been the subject of both praise and criticism. What are the advantages and disadvantages of participation in that measure? Would there be any consequences for extradition proceedings in the United Kingdom if it were to cease participating in this measure?

99. There are two arguments usually advanced in ‘praise’ of the EAW, and both are factually incorrect.

100. Firstly, it is said that EAW allows the UK to secure extradition of criminals who would otherwise be safe abroad. Several cases of notorious terrorists or pedophiles extradited to the UK are normally cited in support of this proposition. In fact, there can be no doubt that all these criminals would have been extradited to the UK without EAW, on traditional extradition requests, just as well. This is because UK prosecutors only ever issue an EAW or an extradition requests when they are trial-ready. There would be no practical difficulty in presenting the *prima facie* case to a foreign court before extradition, since exactly the same evidence would have to be presented to UK court, and satisfy more stringent legal and procedural requirements, immediately after the extradition. In reality, the only benefit of replacing outgoing extradition requests with EAWs consists in saving the costs of translation. This is a very cheap price for sacrificing the sacred and ancient constitutional liberties such as *habeas corpus*.

101. Secondly, it is said that EAW has brought simplicity and speed into extradition proceedings in UK courts. We would answer by quoting the High Court judgement of Lord Justice Smith and Mr. Justice Irwin in the case of *Regina (Hilali) v Governor of Whitemoor Prison and another* [2007] EWHC 939 (Admin), para 33:

> We accept without hesitation or reserve all that Mr Perry urged upon us about the need for simplicity and expedition in dealing with the execution of EAWs. We would say, in parenthesis, that anyone who is familiar with the jurisprudence which has developed under Part 1 of the Act would be bound to observe that it has not succeeded in providing a simple and speedy process. [emphasis added]

102. On the basis of my experience of involvement in several EAW cases of constituents, I can confirm this is absolutely correct.
103. Indeed, while the **substantive** requirement to provide **prima facie** evidence against the suspect has been removed, the judicial **procedure** remained essentially the same. The EAW has to be considered by City of Westminster Magistrates Court, whose decision may then be appealed to the High Court. There are all sorts of further legal moves which may delay the process, from an application to the European Court of Human Rights to an asylum claim (the Extradition Act affords all asylum-seekers an absolute immunity from EAW proceedings, so long as they remain asylum-seekers).

104. As before, there is only a handful of extradition judges, and the EAW has dramatically increased their case-load. The only difference is that they now have no power to look into the substance of the case. These are still the same courts, the same judges, the same number of hearings in each case, and approximately the same amount of time that is required. It is just that meaningful hearings are replaced with meaningless ones, where desperate victims seek to cling to hopeless legal technicalities. Indeed, the traditional extradition proceedings are lengthy and complex, but at least they lead to a just result. The EAW proceedings are also lengthy and complex, but in the end the defendant is doomed to lose. Is this really an improvement?

105. While the lengthy procedure creates some illusory safeguards, the substance of the EAW legislation is that the suspect must be surrendered to the requesting authorities on the force of a piece of paper, so long as the form is completed correctly.

106. This is all there is fairly to say about ‘advantages’ of the EAW. As for the ‘disadvantages’, the list of its innocent victims is already long, and growing. The author was one of the first to raise the alarm over the case of my constituent **Andrew Symeou**, which was then largely ignored, and has now become notorious. Mr. Symeou, a 20-year-old student, was surrendered to Greece in spite of proving in English court that the Greek police had fabricated the evidence against him by mistreatment of witnesses. He then spent almost a year in horrible prison conditions in Greece, which were themselves tantamount to torture, only to be acquitted by the Greek court on the same grounds he advanced from the outset: that the evidence was fabricated and the police had extracted false testimonies by mistreating witnesses.

107. It was on a similar ‘no questions asked’ basis that the court ordered the surrender of my constituent **Dr. Meizoso** to Spain for a fraud he certainly did not yet commit, but allegedly wanted to commit in the future. In fact, as Dr. Meizoso credibly contended, the EAW was procured by corrupt elements in a local government to gain an advantage in a property dispute. After the surrender was ordered, we helped Dr. Meizoso to delay it for another year by claiming asylum in Britain: the Extradition Act grants all asylum-seekers the special privilege of immunity from extradition until the asylum claim is determined. In the meantime, his Spanish lawyers eventually managed to secure a withdrawal of the EAW. Yet, this was a very narrow, almost miraculous, escape, Dr. Meizoso’s life was put into considerable jeopardy for a number of years, and the huge potential for injustice in similar cases is obvious.

108. Other notorious cases include those of **Edmond Arapi** (whose surrender was ordered in spite of solid **alibi** and the fact that he was convicted **in absentia**); **Garry Mann** (who was surrendered and served two years in a Portuguese prison after being convicted at a manifestly unfair trial); **Deborah Dark** (whose acquittal was secretly reversed **in absentia** by the French court, so she was repeatedly arrested on an EAW issued 17 years after the acquittal); **Patrick Connor** (extradited to Spain where a guilty plea was extorted from him by unlawful pressure), etc. We only know about these people because their families, friends and supporters managed to wage energetic
The fact that Part 1 of the Extradition Act 2003 requires an urgent and radical reform is now recognized by everyone who has looked into this subject. Even the European Commission has acknowledged that the EAW in its present form is a threat to liberty. The only exception was the ‘independent panel’ chaired by Sir Scott Baker, commissioned by the Home Secretary to examine the issue, which came up with an enthusiastic endorsement of status quo. It was only a year later that the evidence submitted to the panel was finally published, revealing that the real picture was not nearly as rosy as the one drawn by Sir Scott in his report. It was simply a whitewash, which shamelessly ignored adverse evidence and included direct lies on the key points. For example, the report falsely asserts that ‘No evidence was presented to us to suggest that European arrest warrants are being issued in cases where there is insufficient evidence.’ As we now know from the published evidence, a great many of submissions (including my own) included evidence of a lot of such cases.

Lord Justice Thomas is Britain’s most senior extradition judge. In oral testimony to the Scott-Baker inquiry he stated: "Looking at the 27 (countries of the EU) - I’ve said this to many people - this system becomes unworkable in the end. It becomes unworkable unless you bring up the standards...politically this is a huge problem.” He added, "One of the problems with the way in which a lot of European criminal justice legislation has emerged is that it presupposes a kind of mutual confidence and common standards that actually don’t exist." Lord Justice Thomas' testimony was not published when the inquiry first reported.

It is now a matter of urgency to pass a new, fair Extradition Act which would include all the necessary safeguards of liberty, most importantly:

- The *prima facie* case requirement. The requesting state must prove, by admissible evidence, that there is a case for the suspect to answer.

- Dual criminality. The allegation against the suspect must amount to an offence under UK law.

- Home Secretary’s discretion to refuse extradition if it appears to be unfair, oppressive, unreasonable, or not in the national interest – for example, if the suspect may be denied a fair trial in the requesting country. (As explained above, the ‘human rights bar’ to extradition has proven to be a purely illusory substitute to that traditional safeguard).

- The right to be freed by a writ of *habeas corpus* if the suspect can show that the extradition request is unlawful.

There may be other safeguards as well, but these four should be enshrined as immutable principles of any extradition, subject to no exceptions whatsoever.

It will, of course, be necessary to bring the government’s international obligations in line with its constitutional duties to UK citizens. That does require an opt out of the European Arrest Warrant, and the 2014 block opt-out is a good opportunity to do so quite painlessly.
Q.11. What would the implications be for United Kingdom police forces, prosecution authorities and law enforcement agencies – operationally, practically and financially – if the Government chose to exercise its opt-out? Would there be any consequences for other Member States in their efforts to combat cross-border crime?

114. By definition, any change of legal framework causes some inconvenience to law enforcement authorities. However, this inconvenience can be minimized. As explained below (question 14), the non-EU framework of international cooperation in criminal matters is well developed. Not only is it constitutionally safer in preserving our sovereignty and the rule of law; it is also fairer to all parties concerned, more efficient, more flexible, simpler and cheaper.

Q. 12. Which, if any, PCJ measures should the Government seek to opt back in to?

115. None.

Q. 14. What form could cooperation with other Member States take if the United Kingdom opts-out of the PCJ measures? Would it be practical, or desirable, to rely upon alternative international agreements including Council of Europe Conventions?

116. In this respect, measures in Category 1 present no problem at all. Most of them concern cooperation which can be easily arranged simply at administrative level; where national legislation or a simple international agreement (e.g. a memorandum of understanding) are necessary, we foresee no difficulty in securing that or using the existing legal framework.

117. The European Arrest Warrant should be replaced with extradition on the basis of bilateral or multilateral international treaties. The Council of Europe Convention on Extradition would be the obvious choice, although one flaw in our participation in the Convention needs to be fixed.

118. The Convention does not include a mandatory requirement of presenting a prima facie case against the accused. However, the signatories can reserve the right to require prima facie case to be presented, and six participants (Andorra, Denmark, Iceland, Israel, Malta and Norway) have made such a reservation. Unfortunately, at the time UK joined the Convention in 1990, we did not make a similar reservation, and extradition without a prima facie case remains possible. This needs to be urgently renegotiated. In the meantime, under the Convention (unlike in EAW cases) the Home Secretary can veto any extradition request that does not satisfy the prima facie case requirement.

119. Other ‘mutual recognition’ instruments, including the post-Lisbon European Investigation Order, can be adequately replaced by restoring the system of mutual legal assistance (MLA). Again, while there is an excessive network of international treaties, the natural substitute is the Council of Europe Convention on Mutual Legal Assistance. Not only would it adequately replace the ‘mutual recognition’ system, but also would allow us to retain the benefits of data-sharing, with adequate data protection safeguards, on a case-by-case basis after opting out of EU databases.
120. As the experience shows, data-sharing and other forms of international cooperation in this area are best organized on the case-by-case administrative basis. Undoubtedly, one of the most successful examples of international cooperation in combating crime is the Interpol (notwithstanding all its imperfections). Interpol began as, and largely remains, merely an informal club of senior police officers, and it is submitted that this form of cooperation has proven to be the most flexible and efficient.

13 December 2012

Appendix

(The numbering and annotations of measures below are copied from the Home Secretary’s Table of Measures)

Category 1: Measures of little or no legal significance in the present constitutional framework

Sub-category 1(A). EU legislation superseded/replaced by subsequent pre- or post-Lisbon measures.

<table>
<thead>
<tr>
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<th>Measure</th>
<th>Description</th>
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<tr>
<td>6</td>
<td>Joint Action 96/747/JHA concerning the creation and maintenance of a directory of specialized competences, skills and expertise in the fight against international organized crime, in order to facilitate law enforcement cooperation between the Member States of the European Union</td>
<td>The aim of this piece of legislation is to create a directory of areas of specialised competences, skills and expertise, which would make the latter more widely and easily available to authorities in Member States, thus enhancing the means at the disposal of Member States in the fight against crime.</td>
</tr>
<tr>
<td>22</td>
<td>Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents</td>
<td>Council Decision 2000/261/JHA of March 2000 introduces a standard form and questionnaire for use when providing information alerts about counterfeit documents other Member States. The instrument followed on from Joint Action 98/7000/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO). It was recognised that it would be some years before FADO was fully functional and this standard form was designed to fill the gap until then.</td>
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<tr>
<td>28</td>
<td>Council Framework Decision 2001/220/JHA of 15 March 2001 on the</td>
<td>The Framework Decision requires each Member State to give</td>
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<td>No.</td>
<td>Reference</td>
<td>Description</td>
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<tr>
<td>74</td>
<td>Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security</td>
<td>Repealed and replaced by EU-US PNR Agreement in 2011 – the UK opted in.</td>
</tr>
<tr>
<td>82</td>
<td>Council Decision 2008/651/CFSP/JHA of 30 June 2008 on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service</td>
<td>Repealed and replaced by EU-Australia PNR Agreement in 2011 – the UK opted in.</td>
</tr>
<tr>
<td>113</td>
<td>SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition)</td>
<td>This measure requires states to notify other Member States when detention pending extradition no longer applies.</td>
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<tr>
<td>134</td>
<td>Council Decision 2003/169/JHA</td>
<td>[superseded by EAW]</td>
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**Sub-category I(B). EU legislation duplicating national legislation.**

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<th>No.</th>
<th>Reference</th>
<th>Description</th>
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<tr>
<td>9</td>
<td>Convention on the fight against corruption involving officials of the European Communities or officials of</td>
<td>The Convention of 26 May 1997 requires Member States to have minimum standards for criminal</td>
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<td>Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties. Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA. Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2. Council Decision 2005/387/JHA of 10 May 2005 (“2005 CD”) on the information exchange, risk-assessment and control of new psychoactive substances. Council Decision 2008/206/JHA of 3 March 2008 defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions.</td>
<td>The 2005 Council Decision places a requirement on the UK to share information and intelligence with other Member States on new psychoactive substances (narcotic and psychotropic) (NPS) and, if required by a decision of the European Council, the UK is under a duty to submit a NPS to control measures and criminal sanctions. The other measures listed are the instances where the Council has made such decisions and required such control measures.</td>
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<tr>
<td>Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with The Framework Decision is designed to ensure that the Euro is appropriately protected against counterfeiting.</td>
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<tr>
<td>Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment The Framework Decision ensures minimum standards for offences and penalties for fraud and counterfeiting involving all forms of non-cash means of payment (e.g. credit card and cheques).</td>
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<td>39 87</td>
<td>Council Framework Decision 2002/475/JHA on Combating Terrorism and Council Framework Decision 2008/919/JHA amending 2002/475/JHA</td>
<td>These measures set requirements for the creation of a number of terrorism and terrorism-related offences. Whilst not prescriptive, they require that Member States must be capable of prosecuting those offences, both where they are committed wholly or partially within its territory, and also where an offence has been committed elsewhere but extradition is not possible.</td>
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<td>43</td>
<td>Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence</td>
<td>This Framework Decision requires Member States to create a penal regime to prevent the facilitation and unlawful entry of illegal migrants to the EU.</td>
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<td>47</td>
<td>Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector</td>
<td>The Framework Decision requires Member States to have minimum standards for criminal law on corruption in the private sector.</td>
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<tr>
<td>54</td>
<td>Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking</td>
<td>The instrument requires member states to ensure their domestic legislation meets minimum standards on the constituent elements of criminal acts and penalties in the field of drug trafficking.</td>
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<td>58</td>
<td>Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property</td>
<td>The aim of this measure is to ensure all Member States have effective rules governing the confiscation of proceeds from crime, and that they can confiscate all a criminal’s assets and not just those generated by the instant conviction. Essentially it requires Member States to take measures to enable them to perform two types of confiscation: Confiscation of instrumentalities and proceeds of crime that are punishable by deprivation of liberty for more than a year, or property of a value corresponding to such proceeds; and</td>
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Confiscation of property belonging directly or indirectly to persons convicted of certain serious offences, in particular where the property has been obtained as a result of criminal activities.

| 60 | Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems | The measure sets out how Member States should tackle attacks on information systems, such as illegal access, data theft and damage. The measures seek to tackle cyber crime through legislative, law enforcement and public / private partnership measures. |
| 84 | Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime | The measure relates to Member States having legislation in place to counter organised crime, including minimum maximum imprisonment penalties (i.e. specifically to make it a criminal offence to participate in a criminal organisation in the Member States of the European Union with a maximum sentence of at least x years). It aims to enhance police and judicial cooperation in serious criminal matters with cross border dimensions. |

**Sub-category 1(C). Mutual legal assistance (MLA)**

| 16 | Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters | This measure requires Member States to send the Council Secretariat a statement of their good practice in the sending and executing of requests for mutual legal assistance (MLA). |
| 25 32 | Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union | The Convention on mutual assistance in criminal matters between the Member States (‘the 2000 Convention’) is currently one of the main instruments used between Member States for the provision of mutual legal assistance (MLA). It supplements the 1959 Council of Europe |
### Sub-category I(D) Other measures where EU legislation is plainly unnecessary

| 1 | Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests  
Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests  
Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests | Under the Convention and its protocols, all Member States must take the necessary measures to ensure that all acts of fraud and corruption affecting both expenditure and revenue of the EU budget receive adequate punishment including custodial sentence if offence is of a serious nature, to discourage and act as a form of deterrence to potential criminals. The instruments require provision in Member States' criminal law relating, for example, to the definition of criminal acts (fraud, corruption, money laundering), criminal liability or admissible sanctions in criminal proceedings. |
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<td>2</td>
<td>Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union</td>
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<tr>
<td>Joint Action</td>
<td>Description</td>
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<td>3</td>
<td>Joint Action 96/610/JHA concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist cooperation between the Member States of the European Union. This measure seeks to create and maintain a Directory of specialised counter-terrorist competences, skills and expertise to facilitate counter-terrorist co-operation between EU Member States.</td>
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<tr>
<td>4</td>
<td>Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking. This measure aims to combat drug trafficking by requiring Member States to establish or further develop Memoranda of Understanding (MoUs) between the customs authorities of the Member States and business organisations operating in the EU, and provides guidelines for what such a MoU may include.</td>
</tr>
<tr>
<td>7</td>
<td>Joint Action 96/750/JHA concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking. The aim of this measure is to ensure Member States take measures to tackle drug addiction, drug tourism and drug trafficking, including imposing penalties for drug trafficking offences. These objectives are broad based, e.g. consider further legislative proposals to combat synthetic drugs, endeavour to work with EU enforcement partners, take the most appropriate steps towards illicit plants.</td>
</tr>
<tr>
<td>10</td>
<td>Joint Action 97/339/JHA of 26 May 1997 with regard to cooperation on law and order and security. This measure mandates information sharing between Member States regarding large scale events which are attended by large numbers of people from more than one Member States such as sporting events, rock concerts, demonstrations etc. The primary purpose of this information sharing arrangement is to maintain law and order, protect people and their property and prevent criminal offences.</td>
</tr>
<tr>
<td>11</td>
<td>Joint Action 97/372/JHA of 9 June 1997 for the refining of targeting criteria, selection methods, et. and collection of The action requires Member States to make the best use of targeting and selection methods.</td>
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<tr>
<td>13</td>
<td>Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime</td>
</tr>
<tr>
<td>14</td>
<td>Council Act of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations (Naples II)</td>
</tr>
<tr>
<td>15</td>
<td>Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications</td>
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<tr>
<td>17</td>
<td>Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime</td>
</tr>
<tr>
<td>23</td>
<td>Council Decision 2000/375/JHA to combat child pornography on the internet</td>
</tr>
<tr>
<td>27</td>
<td>Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of Member States in respect of exchanging information</td>
</tr>
<tr>
<td>30</td>
<td>Council Decision 2001/419/JHA on the transmission of samples of controlled substances between Member States</td>
</tr>
<tr>
<td>No.</td>
<td>Decision</td>
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</tr>
<tr>
<td></td>
<td>These instruments set up the National Football Information Points to co-ordinate and facilitate international police co-operation and information exchange in connection with football matches with an international dimension.</td>
</tr>
<tr>
<td>38</td>
<td>Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams</td>
</tr>
<tr>
<td></td>
<td>The instrument provides a framework for competent authorities in two or more Member States to set up a joint investigation team (JIT) to carry out criminal investigations in one or more of the Member States setting up the team</td>
</tr>
<tr>
<td>44</td>
<td>Council Decision 2002/956/JHA of 28 November 2002 setting up a European Network for the Protection of Public Figures</td>
</tr>
<tr>
<td></td>
<td>These relate to setting up a European Network for the Protection of Public Figures (ENPPF) to enable the sharing/exchanging of information and intelligence relating to the protection of public figures (such as Heads of State) and members of Royal Families.</td>
</tr>
<tr>
<td>45</td>
<td>Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism</td>
</tr>
<tr>
<td></td>
<td>The instrument establishes a mechanism for peer evaluation of legal systems between Member States with regards to the fight against terrorism. The instrument provides that the Presidency shall select evaluation teams of experts from experts proposed by Member States to visit and assess the national arrangements in Member States.</td>
</tr>
<tr>
<td>46</td>
<td>Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States</td>
</tr>
<tr>
<td></td>
<td>The aim of this instrument is to promote cooperation between Member States in relation to the use of their Liaison Officers (LO) posted in third countries and international organisations. It provides that LOs should meet regularly and that and that they should respond to a request to...</td>
</tr>
<tr>
<td>51</td>
<td>Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes</td>
</tr>
<tr>
<td>56</td>
<td>Council Decision 2004/919/EC of 22 December 2004 on tackling vehicle crime with cross-border implications</td>
</tr>
<tr>
<td>57</td>
<td>Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>98 Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA</td>
<td>The EUCPN focuses on reducing ‘volume crime’ deemed to be juvenile, urban and drug related via the sharing of best practice examples and promotion of crime prevention cooperation at national and local level. A public access website has been set up to facilitate this exchange.</td>
</tr>
<tr>
<td>73 Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime</td>
<td>This instrument obliges Member States to set up or designate national Asset Recovery Offices (ARO) to facilitate, through cooperation, the tracing and identification of the proceeds of crime and other crime related assets by exchanging information and best practice.</td>
</tr>
<tr>
<td>99 Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities</td>
<td>The measure focuses on the quality standards to apply to forensic science laboratories covering DNA profiling and fingerprint development to ensure that the results of these activities carried out by accredited forensic science providers in one Member State are recognised by the authorities responsible for the prevention, detection and investigation of criminal offences as being equally reliable as the results of laboratory activities carried out by forensic science providers within any other Member State.</td>
</tr>
</tbody>
</table>
proceeds of crime (repealing Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA) freezing, or seizing and confiscation are processed with the same priority as given to domestic proceedings. It also recommends that that the scope of criminal activities which constitute principal offences for money laundering should be uniform and sufficiently broad in all Member States.

| 41 | Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States | The European Arrest Warrant (EAW) provides a mechanism for the surrender of alleged offenders between Member States. |
| 48 | Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence | This measure establishes rules under which a Member State recognises and executes a “Freezing Order” for property or evidence issued by the judicial authority of another Member State in the framework of criminal proceedings. |
| 59 | Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties | This Framework Decision requires Member States to collect fines (of over €70) transferred to them by other Member States as they would a domestic fine. |
| 68 | Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders | This instrument facilitates the direct execution of confiscation orders for the proceeds of crime by establishing simplified procedures for recognition among Member States and rules for dividing confiscated property between the Member State issuing the confiscation order and the one executing it.429 |
| 83 | Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings | This Framework Decision requires each Member State to ensure that its courts take account of previous convictions in EU Member States “to the extent previous national convictions are taken into account”. |
| 85 | Council Framework Decision 2008/909/JHA of 27 November 2008 | The Framework Decision permits Member States to transfer |

429 Not implemented in the UK
on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union

<table>
<thead>
<tr>
<th>88</th>
<th>Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions</th>
</tr>
</thead>
</table>
|     | The Framework Decision provides a basis for the mutual recognition and supervision of suspended sentences and alternative sanctions (e.g. community sentence) where a person has been sentenced in one Member State and voluntarily wishes to return to the Member State where he is ordinarily and lawfully resident, or where he wishes to go to another Member State and that State is willing to accept the sentence.  
430 | |

|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     | The European Evidence Warrant was intended to speed up MLA between Member States through the introduction of a standardised request form and deadlines for dealing with requests (principally for search and seizure).  
431 | |

|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     | EU instruments require mutual recognition of judgments in absentia (trial decisions where the defendant did not appear). This measure amends each to ensure adequate safeguards for the defendant.  
431 | |

<table>
<thead>
<tr>
<th>97</th>
<th>Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The European Supervision Order (ESO) provides a mechanism for a person to be released on bail back to their Member State of residence and supervised there, while awaiting criminal</td>
</tr>
</tbody>
</table>
to provisional detention proceedings in another Member State. 432

Sub-category 2(B). Eurojust and subordinate institutions.

<table>
<thead>
<tr>
<th>No.</th>
<th>Decision/Decision text</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>35</td>
<td>Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime</td>
<td>Eurojust is mandated to “stimulate and improve coordination and cooperation” between judicial and law enforcement authorities in the investigation and prosecution of serious cross-border crime involving two or more Member States. Eurojust itself does not lead on or direct investigations or prosecutions. Rather, Eurojust’s core role is about support to judicial and law enforcement authorities in the investigation and prosecution of serious offences across Member States.</td>
</tr>
<tr>
<td>40</td>
<td>Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes</td>
<td>The purpose of Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.</td>
</tr>
<tr>
<td>89</td>
<td>Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network</td>
<td>The aim of the European Judicial Network is to improve judicial cooperation between EU Member States both at the legal and practical level in order to combat serious crime.</td>
</tr>
<tr>
<td>107</td>
<td>Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters</td>
<td>This Framework Decision lays down procedures to be followed to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts. It obliges authorities in one Member State to contact authorities in another Member State where they have reasonable grounds to believe that parallel proceedings are being conducted in that other Member State and to enter into direct consultations. If</td>
</tr>
</tbody>
</table>

432 Not implemented in the UK
they fail to reach consensus the matter must be referred to Eurojust if it is competent to act. 433

| 135 | Council Decision 2008/852/JHA on a contact-point network against corruption |

### Sub-category 2(C). Europol and subordinate institutions

<table>
<thead>
<tr>
<th>5</th>
<th>Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved cooperation between Member States in combating illicit drug trafficking</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees</td>
</tr>
<tr>
<td>21</td>
<td>Council Decision of 2 December 1999 amending the Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, with regard to the establishment of remuneration, pensions and other financial entitlements in euro</td>
</tr>
<tr>
<td>64</td>
<td>Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro-counterfeiting</td>
</tr>
<tr>
<td>104</td>
<td>Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information</td>
</tr>
</tbody>
</table>

The aim of this piece of legislation is to enable the exchange of information relating to chemical profiling of drugs; facilitating interaction between Europol and Member States through Europol National Units and liaison bureaux. The instrument envisages the exchange of information relating to the chemical profiling of cocaine, heroin, LSD, amphetamines and their ecstasy-like derivatives MDA, MDMA and MDEA.

Europol is mandated to support Member States in the fight against organised crime and terrorism; to combat specific forms of serious crime and; to deal with crimes such as drug trafficking, trafficking in human beings, computer crime and forgery. Europol also has a role in assessing threats from a European perspective, producing relevant threat assessments and strategic analyses. Europol provides a secure platform enabling direct contact between liaison officers from the EU member states and a number of third countries based in Europol's Headquarters.

433 Not implemented in the UK
<table>
<thead>
<tr>
<th>26</th>
<th>Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)</th>
<th>The Decision establishes a single, independent joint secretariat for the existing supervisory data protection bodies set up under the three Conventions listed in its title – the Europol Convention, the Convention on the Use of Information Technology for Customs Purposes and the Schengen Convention.</th>
</tr>
</thead>
<tbody>
<tr>
<td>33</td>
<td>Council Decision 2001/887/JHA of 6 December 2001 on the protection of the Euro against counterfeiting</td>
<td>This measure lays down procedures for expert analysis of suspected counterfeit notes and coins and requires that the results of those analyses are forwarded to Europol.</td>
</tr>
<tr>
<td>66</td>
<td>Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences</td>
<td>The decision relates to the provision of information concerning terrorist offences to Eurojust, Europol and to other Member States. This includes designating a specialised service within the police service or law enforcement authorities to access, collect and make information available to Europol and Eurojust.</td>
</tr>
</tbody>
</table>

**Sub-category 2(D). Schengen measures.**

<p>| 110 | Convention implementing the Schengen Agreement of 1985 Article 39 to the extent that that this provision has not been replaced by Council Framework Decision | These measures set the basis for the UK’s participation to a part of the Schengen Acquis – the UK participates in the police cooperation elements of Schengen. |</p>
<table>
<thead>
<tr>
<th>Article Numbers</th>
<th>Description</th>
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<tbody>
<tr>
<td>Article 40</td>
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<tr>
<td>Article 42 and 43 (to the extent that they relate to article 40)</td>
<td>which include SIS II. The UK’s participation in these articles includes MLA, sharing of assistance and equipment, cooperation on tackling narcotic drugs and cross border surveillance. The cross border surveillance sets out the process by which law enforcement officers can get assistance with continued surveillance if the person they’re surveying crosses into another state.</td>
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<tr>
<td>Article 44</td>
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<tr>
<td>Article 46</td>
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<tr>
<td>Article 47 (except (2)(c) and (4))</td>
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<tr>
<td>Article 48</td>
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<tr>
<td>Article 49(b) – (f)</td>
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<td>Article 51</td>
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<td>Article 54</td>
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<td>Article 57</td>
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<td>Article 58</td>
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<td>Article 71</td>
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<td>Article 72</td>
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<td>Article 126</td>
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<td>Article 127</td>
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<td>Article 128</td>
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<td>Article 129</td>
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<tr>
<td>Article 130</td>
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</table>

120 Final Act - Declaration N° 3 (concerning article 71(2)) Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65(2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

121 Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

111 Accession Protocols: (amended in conformity with article 1 (b) of CD 2000/365/EC and CD 2004/926/EC article 1) Italy: Articles 2, 4 + common declaration on articles 2 and 3 to the extent it relates to article 2, Spain: Articles 2, 4 and Final Act, Part III, declaration 2 Extending the application of areas of Schengen to Switzerland, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden
<table>
<thead>
<tr>
<th>Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation’s association with the implementation, application and development of the Schengen Acquis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Council Decision 2008/149/EC of 28 January 2008 on the conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis</td>
</tr>
<tr>
<td>SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen</td>
</tr>
<tr>
<td>SCH/Com-ex (98)52 on the Handbook on cross-border police cooperation</td>
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<tr>
<td>SCH/Com-ex (99) 6 on the Schengen acquis relating to telecommunications</td>
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<td>118</td>
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</table>
| 123 | 124 | Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism
Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism
Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism | Council Decision 2005/211/JHA amends the sub-categories of information that may be entered into SIS I in order to enhance public security, particularly national security, in the territories of the Member States participating in that system. The other three instruments set the date for the application of certain provisions of Council Decision 2005/211/JHA and are purely procedural in nature. |
| 128 | Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) | SIS II is the new EU database for swapping alerts between Member States in relation to missing and wanted people and objects. It will also become the main way of transmitting data about people wanted on European Arrest Warrants (EAWs). |
| 130 | Commission Decision 2008/334/JHA of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II) | This decision contains the SIRENE manual which controls the detailed rules for the exchange of supplementary information in relation to the Schengen Information System. |
| 131 | Council Decision 2008/328/EC of 30 November 2009 amending the Decision of the Executive Committee set up by the 1990 Schengen Convention, amending the Financial Regulation on the costs of installing and operating the technical support function for the Schengen Information System (C.SIS) | This Decision amends the C.SIS Financial Regulation by setting out the dates from which the Swiss Federation are liable for the installation and maintenance costs of the central SIS 1. Once SIS II enters into operation (scheduled for Quarter 1 2013) this Council Decision will no longer be valid. |
| 133 | Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) | This Commission Decision contains a sole article requiring Member States migrating from SIS 1+ to SIS II to use a specific, interim technical architecture under the arrangements provided for in Council Decision 2008/839/JHA. |

**Sub-category 2(E). Databases.**
| 18 | Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO) | FADO is a computerised archive containing images and textual information relating to falsified and authentic identity documents such as passports, identity cards, visas, residence permits and driving licences. A read-only, control authority version of the database called iFADO has also been developed which has been made available over the Government Secure Intranet (GSI) to the UK Border Agency and to other UK government departments with an interest in checking identity documents, such as the police, IPS, DVLA and the DWP. |
| 69 | Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union | This instrument provides a systemised (standard form to be used) and time bound (8 hours) process for the exchange of information between Member State’s law enforcement agencies. |
| 79 | Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime | Prüm requires Member States to allow the reciprocal searching of each others’ databases for: DNA Profiles – required in 15 minutes. Vehicle Registration Data (VRD) – required in 10 seconds. Dactyloscopic Images (Fingerprints) – required in 24 hours. For DNA and fingerprints the initial reply is a hit/no-hit. Personal data is not exchanged in this process. Prüm does not set out any requirements for following up any hits. For VRD personal data about the registered keeper will automatically be transmitted following a hit. Prüm also contains provisions relating to the following areas: supply of data in relation to major events; supply of information in |
order to prevent terrorist offences;
other measures for stepping up cross-border police cooperation.

<table>
<thead>
<tr>
<th>No.</th>
<th>Document/Decision</th>
<th>Description</th>
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<tbody>
<tr>
<td>93</td>
<td>Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States</td>
<td>These instruments require Member States to inform each other about convictions of EU nationals in another Member State. They also permit Member States to request the previous convictions of individuals from the Member State of nationality.</td>
</tr>
<tr>
<td>100</td>
<td>Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes.</td>
<td>Customs Information System (CIS) is an EU database which aims to strengthen and improve customs law enforcement cooperation through the sighting and reporting of discreet surveillance or specific checks. Specific checks refer to searches on individuals, objects and means of transport.</td>
</tr>
</tbody>
</table>

**Sub-category 2(F). Cooperation agreements between EU and third countries.**

<table>
<thead>
<tr>
<th>No.</th>
<th>Document/Decision</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>53</td>
<td>Council Decision 2004/731/EC of 26 July 2004 concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information</td>
<td>These agreements put in place the rules by which classified EU information is shared with these third countries.</td>
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<td>71</td>
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<tr>
<td>75</td>
<td>Council Decision of 2004/843/CFSP 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information</td>
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<tr>
<td>78</td>
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<tr>
<td></td>
<td>Agreement on mutual legal assistance between the European Union and the United States of America</td>
<td>The EU-US agreement required a number of changes to the pre-existing 1994 MLA treaty between the UK and US (UK-US Treaty). Amendments were made to the UK-US treaty via an Exchange of Notes on 16 December 2004. These amendments were intended to supplement, not replace, bilateral arrangements.</td>
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</tbody>
</table>
November 2009 on the extension, on behalf of the European Union, of the territorial scope of the Agreement on extradition between the European Union and the United States of America package at a Justice and Home Affairs Council in September 2001 and entered into force on 01 February 2010. In order to meet the requirements of the EU-US Agreement the US and each of the EU Member States (including the UK) either entered into new agreements or adopted changes to current extradition treaties. Council Decision 2009/933/CFSP extended the territorial scope of the Agreement to the Dutch Antilles.

**Sub-category 2(G). Other measures of substantial legal significance.**

|   | Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA | CEPOL provides training courses, seminars and conferences for senior police officers across the EU. Its specific tasks are:
1) to increase knowledge of the national police systems and structures of other Member States and of cross-border police cooperation within the European Union;
2) to improve knowledge of international and European Union instruments; and,
3) to provide appropriate training with regard to respect for democratic safeguards, with particular reference to the rights of defence |
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<td>81</td>
<td>Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations</td>
<td>The instrument is designed to provide a legal framework for Member States to provide law enforcement assistance (equipment or operational support) to one another in order to deal with man-made crisis situations, e.g. terrorist attack, hijacking, hostage-taking etc. It provides for a list of competent authorities to act as contact points and the provision of expertise, equipment and support</td>
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<td>86</td>
<td>Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law</td>
<td>The Framework Decision calls on Member States to take necessary measures to ensure that criminal law is implemented in order to safeguard citizens from racism and xenophobia.</td>
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<td>Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters</td>
<td>The measure governs data protection for data processed within the framework of JHA. The purpose of the measure is to encourage the cross-border exchange of law enforcement information by establishing a common level of privacy protection and a high level of security when Member States exchange personal data. It aims to balance the rights of data subjects with the need to protect the public.</td>
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Further to my written submission for this inquiry, made in December 2012, I am writing to draw the Committee’s attention to the recent judgement of the European Court of Justice in the case of *Radu* (C-396/11), given on 29 January. The judgement illustrates important points about the inadequacy of Luxemburg jurisprudence and the oppressiveness of European Arrest Warrant.

The essential legal question before the Court was whether a member-state (in this case, Romania) may refuse to execute a European Arrest Warrant because the suspect’s human rights under the European Convention and/or Fundamental Charter would be at risk in the requesting member-state. In this particular case, Mr. Radu took objection to a German EAW issued against him, on the grounds that he was given no chance to oppose it in Germany by making representations through his German lawyers. However, the question for the ECJ was formulated in broad terms of a constitutional principle (see, for example, paras 19, 20(4), and 23 of the judgement).

The Court has ruled that no EAW can be refused or qualified on grounds other than those specified in Articles 3-5 of the Framework Decision (see para 36 of the judgement). Accordingly, ‘EU law’ does not permit a refusal of an EAW on human rights grounds.

This decision is of particular importance for the UK debate over the EAW. **Section 21 of the Extradition Act 2003** provides for a mandatory refusal of the EAW on human rights grounds. UK advocates of EAW celebrate that section as a sufficient safeguard for the rights of the accused; critics such as myself have always taken the view that the safeguard was illusory and of no practical effect.

The ECJ judgement in *Radu* puts an end to this argument. ‘EU law’, as interpreted by its highest court, prohibits any such safeguard. Effectively, the ECJ has overruled our Parliament and held that S. 21 of our Extradition Act is illegal and void. If we submit to the jurisdiction of the ECJ in these matters, our own courts will have to accept this judgement as a binding precedent. No victim of a European Arrest Warrant will be able to rely on their human rights to oppose execution. So far as European Arrest Warrants are concerned, human rights are no longer recognized under ‘EU law’. Nor are they now recognized in our own law, so long as we accept ‘EU law’ as supreme.

In short, even if an EU member-state is shown to be in breach of human rights, the UK courts will not be able to refuse its EAWs on that account. The intended safeguard in section 21 of Extradition Act 2003 has been effectively overruled by the ECJ, and shall become invalid if this country subjects itself to ECJ jurisdiction.

The above facts alone are an overwhelming argument as to why Her Majesty’s Government must exercise its right to the opt-out, and must not opt back in the European Arrest Warrant.

19 February 2013
I am writing further to my submission of 14th December 2012 and my letter of 19th February 2013 to draw the attention of the Select Committee to the European Court of Justice judgement in the case of Melloni (C-399/11), handed down on 26th February 2013. The judgement is of great significance.

The case concerned a European Arrest Warrant issued by an Italian court after sentencing Mr. Melloni in absentia to 10 years imprisonment. In the circumstances where he would have no right to challenge the fairness of trial in absentia in an Italian court, the Spanish court considered that execution of the warrant would breach Mr. Melloni’s right to a fair trial guaranteed by Spanish Constitution. The case was referred to the ECJ.

The ECJ held that even the most fundamental principles of a national constitution always have to give way to stated objectives of any EU directive or Framework Decision: “by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (...), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law” (para 59 of the judgement).

If the Spanish court was “allowed” to refuse an EAW for the sake of a right to a fair trial, that would cast “doubt on the uniformity of the standard of protection of fundamental rights” across the EU, “undermine the principles of mutual trust and recognition... and would, therefore, compromise the efficacy of [the] framework decision” (para 63).

It is evident that the “uniformity of standard of protection of fundamental rights” in the EU is a myth. Not only does this judgement demonstrate the constitutional expansionism of the ECJ and its hostility to national sovereignty; the ECJ approach undermines the rule of law itself, by placing a political expedient above the right to a fair trial. A vital constitutional liberty has been thrown away merely to avoid “casting doubt” over what we all know to be a political fiction.

Trials in absentia are repugnant to the English Constitution to a much greater extent than to the Spanish one. It would be very naïve to expect the ECJ to show any more respect towards English constitutional liberties than they have shown to the Spanish ones.

Our proposed subjection to the jurisdiction of Luxembourg court would be wrong in every respect, and I respectfully urge the Select Committee to raise its voice in defence of the English Constitution and the rule of English law.

6 March 2013
Aled Williams, Association of Chief Police Officers, William Hughes and Mike Kennedy—Oral evidence (QQ 229-248)

Submission can be found under Association of Chief Police Officers