HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on the European Union

Justice, Institutions and Consumer Protection (Sub-Committee E)

Home Affairs, Health and Education (Sub-Committee F)

Inquiry on

THE UK'S 2014 OPT-OUT DECISION (PROTOCOL 36)

Evidence Session No. 8 *Heard in Public* *Questions 148 - 162*

TUESDAY 29 JANUARY 2013

3 pm

Witnesses: Professor Ilias G Anagnostopoulos and Evanna Fruithof

Members present

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 good will 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 competence 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 new-born 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 none the less 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.

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.

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.

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 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 those 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.