HOUSE OF LORDS

EUROPEAN UNION COMMITTEE

JUSTICE, INSTITUITIONS AND CONSUMER PROTECTION SUB-COMMITTEE

HOME AFFAIRS, HEALTH AND EDUCATION SUB-COMMITTEE

UK's 2014 Opt-Out Decision ('Protocol 36'): Follow-up Written Evidence

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Better Off Out—Written evidence

Introduction

1.This submission is written by Jonathan Lindsell, writing as an outside consultant for the Better Off Out campaign. Better Off Out is a campaign to encourage, support and promote national debate on European Union issues. It is a subsidiary of The Freedom Association, a non-partisan libertarian centre-right pressure group which seeks to protect the freedoms of the individual and society. As such, Better Off Out seeks to challenge potential encroachments on civil liberties, individual liberty and freedom of expression. It publishes research in a number of areas related to the European Union (EU), including economics, sovereignty and law.

2. This submission seeks to examine under Protocol 36 those European Union Police and Criminal Justice Measures into which the Home Office has indicated a desire to 'opt in'. The evaluation focuses on measures with potential negative consequences for freedom, and measures which the United Kingdom would manage better outside of European Court of Justice (ECJ) auspices.

2. What is your view on the list of 35 measures that the Government will seek to rejoin if the opt-out is exercised? Are there in your view any measures that are not on the list that ought to be; or that are on the list but should not be?

3. In the original evidence submitted to the House of Lords EU Select Committee regarding the UK's use of the block opt-out, numerous stakeholders argued that such an opt-out was undesirable because of the great cost, both financial and diplomatic, required in achieving re-entry to those measures the Home Office desires. Now that the Home Secretary has firmly indicated her intention to exercise the opt-out, the logic follows that the UK should restrain itself to attempting to re-join only those measures absolutely vital to UK interests. Opting back in to measures already replicated in UK domestic law, or measures that operate/can operate via non-EU channels, unilateral memoranda of understanding, or informal agreement, would be a gross waste of Foreign Office resources and the resources of our fellow member states.

4. Anecdotal evidence obtained by the *Guardian* newspaper suggests that the final number of the Home Office's published opt-ins (35) are the result of crude coalition bargaining between the Liberal Democrats' desire to join 45 and the Conservatives' hope to limit the number to 29.[1] As such, several of the measures below are not considered vital for the country's interest in the eyes of the senior coalition partner, and are included merely for party political reasons. Such considerations are not suitable justification for the permanent sacrifice of parliamentary control over potentially harmful areas of legislation to the ECJ.

5. Joint Action 97/827/JHA of 5 December 1997 is a typical example of the kind of measure to which paragraphs 3-4 refer. As an evaluation mechanism for member states' international measures against organised crime, its spirit has genuine value. However, because the reports are made publicly available, and because the evaluation can be made without ECJ oversight, there is no need to re-join this measure. Indeed, this may be a measure included to 'make up the numbers' to satisfy Liberal Democrat demands, since formal EU participation will have

[1] Nicholas Watt, ' Britain to keep the European Arrest Warrant but try to reform it', *Guardian,* 08/07/2013. Online: http://www.theguardian.com/law/2013/jul/08/britain-european-arrest-warrant-reform [Accessed: 01/09/2013]

no practical impact other than making it impossible for a future domestic government to terminate the measure (for unforeseen circumstances).

6. Council Framework Decision 2008/675/JHA, taking into account previous criminal convictions in other member states, is already implemented in the UK.[2] To re-join the EU law is an unnecessary threat to future liberties. The decision implies that judicial systems are synonymous and of equal validity, which certain much-publicised reports of European Arrest Warrant victims undermine. US State Department reports comparing different EU justice systems underline how divergent some member states are from British standards.[3] This measure appears to be another replication, with potentially negative consequences in that re-joining the measure implies ECJ competence over UK court sentencing if the accused has convictions in other member states, with the possibility of the ECJ requiring a retrial or even demanding a different sentence if it judges an inferior national court has 'weighed' previous criminal convictions incorrectly. In the explanatory memorandum, paragraph 56, the Government '*estimates the economic impact of non-participation in this measure to be negligible*' meaning there is very little disincentive to opting out. However, re-joining risks being compelled to give longer prison sentences, which would cost the taxpayer more. Once again, Britain would be better off outside EU control in this matter.

7. Council Framework Decision 2008/909/JHA (transfer of sentenced prisoners) poses similar liberty difficulties in terms of respecting other member states' justice systems. The UK currently conforms to the decision through the Criminal Justice and Immigration Act 2008's amendments to the Repatriation of Prisoners Act 1984 - but to opt in to the measure would make the suspension of the 'dual criminality' principle immutable. The UK should remain out of this measure, with the domestic legislation in place, and operate according to the Council of Europe Convention (Transfer of Sentenced Persons, 1983) on the matter, which operates a 'request' model rather than 'command' model - thus avoiding ECJ oversight on marginal cases where the UK may wish to exercise amnesty, non-recognition of judgements, factor in proportionality and cost, or investigate further. Domestic oversight, and sensitivity to UK freedom norms, is essential - and to retain it would cost nothing.

8. Council Framework Decision 2009/299/JHA (recognition of trials *in absentia*) poses difficulties even assuming the Government dismisses the argument that judgements *in absentia* are an affront to British legal traditions and freedoms (which we would oppose). The measure is not yet fully implemented, suggesting that permanently opting out of the measure will not cause undue dislocation. However, opting in fully would give the EU the final decision in ascertaining whether a European Arrest Warrant can be denied for procedural failings - in effect, this expands ECJ power in marginal cases. This is antithetical to the spirit of the decision itself: it implies that member states should trust one another's courts to make correct judgements, but that the EU does not trust those same courts. It would be far better for future civil liberties for UK courts to retain full control over such cases, however rare they may be.

9. EU measures relating to property should be rejected in favour of cooperative agreements for similar reasons. The right to property has been an important conceptual British freedom

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[2] In England and Wales and Northern Ireland by s.144 and Schedule 17 of the Coroners and Justice Act 2009; in Scotland by section 71 and Schedule 4 of the Criminal Justice and Licensing (Scotland) Act 2010.
[3] For example: Bureau of Democracy, Human Rights and Labour, *Bulgaria,* Country Reports on Human Rights Practices for 2011, online: http://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm?dlid=186338#wrapper [Accessed 03/09/2013]

since the Civil Wars. Council Framework Decision 2003/577/JHA (freezing evidence and property), Council Framework Decision 2006/783/JHA (mutual recognition of confiscation orders) and Council Decision 2007/845/JHA (coordinating Asset Recovery Offices and reclaiming the proceeds of crime) all give scope for EU institutions to later interpret what currently seem fair rules differently, without democratic remedy. For example concerning the freezing order, the UK has only been issued four requests thus far, and executed only one - the other three were refused '*due to deficiencies in the requests received*' according to the Command Paper. Currently section 21(7) of the Crime (International Co-operation) Act 2003 allows a court to refuse an overseas freezing order, but under ECJ control, this could be struck down. Given that evidence freezing could and often is achieved worldwide through a simple letter of request, it need not become an exclusive EU domain. Similarly for confiscation orders, the UK already carries out all reasonable requests - many member states have not yet implemented the measure, with no ill effects. The only change in re-joining the measure, beyond giving the ECJ control, would be to suspend the 'dual criminality' principle in yet another respect. For asset recovery, given that SOCA's Finance Intelligence Unit already meets all the EU requirements, and that the Government memorandum shows opting out would have negligible ill effects, re-joining the law must again be seen only as a concession for the Liberal Democrat 'tally'.

3. Does the list of measures that the Government will seek to rejoin raise any coherence issues, i.e. are some of the measures on the list connected to other measures that are not included on the list?

10. Council Decision 2002/494/JHA on a network of contact points to monitor those suspected of genocide and crimes against humanity appears a sensible measure, but poses several threats. The substance of the decision is already included in the Rome Statute of the International Criminal Court (ICC), which all member states have signed, meaning the measure is a duplication with little effect beyond extending ECJ control. This is entirely unnecessary, as the government memorandum notes that meetings are currently attended by non-EU institutions including representatives from Canada, the USA, the ICC, the Red Cross and Amnesty International. Therefore participation could easily continue without re-joining the measure. However, there is a threat that submitting to ECJ control would tie the Government's hands when dealing with foreign diplomats and those seeking asylum in the UK. For example, in 2000 Jack Straw, then Home Secretary, was able to free Chilean dictator Augusto Pinochet from house arrest in the UK and allow him to return to Chile despite human rights charges pending from Spain, Belgium and France. Regardless of our evaluation of Straw's decision, we must bear in mind that, after re-joining the measures in question, a future Home Secretary may not be able to replicate it. The ECJ could well interpret surrender to CD 2002/494/JHA as the surrender of competence over general 'genocide and crimes against humanity' competences, and force the hand of the executive, further undermining the principle of parliamentary sovereignty. Moreover, we could read this measure as a potential 'back door' for Council Decision 2008/913/JHA concerning denial or gross trivialisation of genocide (currently not on Theresa May's opt-in list) which carries its own complications, conflicting with British Freedom of Speech tradition and threatening certain Foreign Office policies.[4]

11. There is also a coherence issue with the European Supervision Order (ESO, Council Framework Decision 2009/829/JHA), simply in that it would make no sense without the

[4] Jonathan Lindsell, 'We should opt out of the EU police and criminal justice measures', *Civitas - The Institute for Civil Society:* London, July 2012, p.2

European Arrest Warrant, so the UK should remain out of both. The order is designed to dull the excesses of the EAW in long pre-trail incarcerations in foreign jurisdictions, but may well exacerbate them - without the immediacy provoked by receiving an extradited suspect and keeping them in the appellant's prison system, member states may request ESOs then leave suspects in the UK under 'provisional detention' for inexcusable lengths of time, while the appellant court deals with other cases and organises its case at leisure. This would both cost the UK taxpayer more money, and pose a high threat to liberty as the suspect is detained without trial or *prima facie* evidence. Moreover, if the ESO *is* brought in and *does* dull some of the dangers posed by the EAW, impetus for the EAW's much-needed reform could be stalled and the two piecemeal measures continue for the foreseeable future in an ungainly compromise. UK freedoms are best served by remaining outside both measures, at least until they are reformed to the public's satisfaction.

4. Do the Government's explanatory memorandums raise any issues about particular measures on which you would wish to comment?

12. The Government explains its desire to retain Council Decision 2002/348/JHA and its amendment, Council Decision 2007/412/JHA, on the basis of the UK being a world leader in international football match security, and having helped design these measures. The memorandum fears '*reputational impact*' if the UK does not '*participate*'. However, opting out of the measures would not amount to non-participation. Domestic legislation (Spectators Act 1989, amended, Football [Disorder] Act 2000) is already in operation to maintain National Football Information Points and to curtail the movement of those subject to football banning orders. This could continue without EU oversight - the UK created it. Moreover, the fact that Russia and the Ukraine already cooperate along similar lines highlights how information sharing with other member states is very likely to continue without re-joining the measure; it would be in the interests of all host nations. Operating independently of ECJ control (through Interpol, a memorandum of understanding or wholly informally) would allow the UK to continue to be a 'world leader', going further than the EU in future if necessary, or adapting to changing circumstances without the need to go through the protracted EU amendment procedures.

13. Following revelations regarding the UK's part in internet surveillance through the 'Tempora' programme, all relevant EU information-sharing measures gain a new question: must the UK share intelligence gleaned through measures which are, if not illegal, then dependent on the Regulation of Investigatory Powers Act (2000) and Intelligence Powers Act (1994), both of which were written without the internet's current size and use in mind? If information (such as the suspicion that a football fan will be violent) arises from internet surveillance using a 'certificate' rather than a warrant (granting GCHQ to sweep huge volumes of data without ministerial oversight) then the accountability of such EU measures must be called into question. With respect to the ongoing debate raised by Edward Snowden's whistleblowing regarding personal privacy, this issue must be clarified before re-joining (if re-join we must).

6. Are the Government's proposed reforms to the European Arrest Warrant at the domestic level consistent with their desire to rejoin this measure, including the UK's obligations under the Framework Decision and the EU Treaties?

14. The Government has not communicated its intentions to reform the EAW in appropriate detail for full scrutiny. It is unclear, for example, whether the EU will accept proposed alterations to the Extradition Act (2003) via the proposed Anti-Social Behaviour, Crime and Policing Bill. Neither has the Government begun formal negotiations with the

Commission in pursuit of the Home Secretary's proposed reforms.

15. In proposing her reforms (see Hansard) the Home Secretary emphasised the importance of co-operation, often in informal circumstances, to ameliorate the EAW's excesses. An example of this is her suggestion that, rather than operate the EAW, '*I plan either to allow the temporary transfer of a consenting person so that they can be interviewed by the issuing state's authorities or to allow them to do this through means such as video-conferencing in the UK*'. This welcome innovation demonstrates the superiority of flexibility, of *ad hoc* cooperation, rather than centralised authority. The Home Secretary assured the House that this, and her other proposals, would not be challenged by the ECJ since other states (Germany, France and The Netherlands) all operate with greater safeguards than Britain does, without such challenge. However, the Home Secretary fails to appreciate the absolute and perpetual nature of ECJ control - whilst the current body of judges finds no fault in Dutch or German safeguards, a future 'test case' may well see them ruled illegal, and those states will have to follow ECJ rulings and strike down their own protections. It is imperative that all the Government's domestic reforms be passed before formally opting in, and if possible, that the Commission be consulted to promise to respect such safeguards.

16. Better, though, would be to operate and extradition system similar to the EAW without actually re-joining the measure, thus allowing parliament to design a system appropriate to the UK. For example, (conscious of the need for ECJ approval) the Home Secretary's reform proposals do not include full provision for dual criminality - her fourth proposal merely entails the ability of judges to reject EAWs if the charges therein relate to an act committed both in Britain and abroad, which is legal in Britain. Likewise, her proposals do not include augmented provision for British judges to test mistaken identity and/or *prima facie* evidence of guilt, meaning UK citizens could still be extradited for the flimsiest of cases. A 'UKAW' could solve such problems. Given the number of extraditions requested from the UK, it is highly likely that fellow member states will agree to a near-identical system, based on bilateral agreements, with minimal delay. This is reinforced by the detail of the Dutch system - the Dutch *Overleveringswet* (Surrender Act) treats extradition requests from any EU member state *as* an EAW, even if that member state has not yet created an EAW framework.[5] Even the pro-European group 'Centre for European Legal Studies', in their assessment of the EAW, conceded that it would continue to operate as normal if the UK failed to re-join the EU measure.[6] This would leave Parliament free to reform it at will, with appropriate judicial and executive oversight providing a remedy for the EAW's current threat to British freedoms.

10 September 2013

[5] T.M.C. Asser Instituut - Centre for International and European Law, 'Country Report for: The Netherlands - National law implementing the framework decision', part 2.4.2. Online at: http://www.asser.nl/EAW/countryreports.aspx?chap=2&country_ID=161 [Accessed 02/09/2013] Notably the Dutch system also has provision for a reversion to Interpol arrangements for states not participating in the EAW [4.2.1.5-6] and protections concerning double jeopardy and dual criminality [5.1.2-3]

[6] Alicia Hinarejos, J.R.Spencer and Steve Peers, 'Opting Out of EU Criminal Law: What is Actually Involved?', *Centre for European Legal Studies Working Paper*, New Series: 1, September 2012, paragraph 95. Online at: http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf [Accessed: 02/09/2013]

Lord Carlile of Berriew CBE QC—Written evidence

Abstract

The 13th EU Sub Committee report found there had been a 'clear and preponderant view among...witnesses from the legal, law enforcement and prosecutorial professions'[7] highlighting negative implications in opting out of one or more EC measures. The committee ruled that the Government had not made a convincing case for the opt-out and advised against it. It cited 'significant adverse negative repercussions for the internal security of the UK and the administration of criminal justice' as the reasons for its decision.[8]

Despite these findings, the Government recently announced its intentions to pursue the opt-out. A vote ensued and a fresh call for evidence was made.

I submit in this paper that the UK should not proceed with the opt-out. I do so by highlighting the key arguments in favour of it and contrasting them with the actual situation. I then state the repercussions likely to ensue if the opt out goes ahead.

1. **Assumption that the opt-out would completely remove the UK from the sphere of EU influence in matters of criminal justice.**

The opt-out is being promoted as a 'repatriation' of criminal justice. In this light, it suits political arguments made for the preservation of state sovereignty. The Home Secretary has described it as both taking 'a set of powers back from Brussels' and 'bringing powers back home'.[9]

Supporters argue that the opt-out would protect us from surrendering sovereign information such as fingerprint and DNA databases to the EC. It would also enable us to try criminals where EC provisions currently prevent us from doing so under double jeopardy rules[10]. In addition, the opt-out would mean that we no longer gave the same legal effect to rulings of courts in Member jurisdictions under Mutual Recognition Measures.

The Facts

'Liberation' via the opt-out is limited only to EU police and criminal justice measures adopted under the Maastricht Treaty prior to the coming into force of the Treaty of Lisbon in 2009. Measures adopted under Lisbon are far greater than those under Maastricht and are legally binding on the UK regardless of any opt-out. It is important to note here that the UK Government freely elected to opt into almost all of the Lisbon measures despite having the right to refuse. It did so because all those measures benefit the UK. Primarily, they allow the UK to trace, try and punish criminals who escape from the UK following a crime, and extradite criminals who are using the UK as a safe haven.

The opt-out would not remove the UK from the jurisdiction of the Court of Justice of the European Union ('CJEU') in matters relating to the police and criminal justice. All measures

[7] House of Lords EU Sub Committee report 2013, para 247 [Online: http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/159.pdf]
[8] *Ibid* Para 275
[9] Theresa May's speech at column 770, 15 July 2013, Parliamentary Hansard [Online: http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130715/debtext/130715-0001.htm#13071511000001]
[10] Article 54 of the Schengen Convention

that the Government has opted into come with an automatic submission to the CJEU's jurisdiction. The position will be the same for any future opt-ins and other measures to which the UK is automatically bound. The only way to change this is to amend the treaty.

With regard to sharing information with the EC such as fingerprint and DNA databases[11], all Member states provide the information via anonymous files. Further information is only given if, upon a search for a suspect, a hit is made against the anonymous data. The UK has invested a substantial amount of money in this measure as it is vital in searching for escaped suspects.

Cross border double jeopardy rules work in the same way as British double jeopardy laws. They exist to ensure that no person is punished twice for the same crime. If the UK did not recognise that the crime had already been punished by a Member state then it could try the person afresh. However, this is not in the interests of justice and goes against the legal principles of double jeopardy already applied in the UK for crimes punished under British laws. It is doubtful that the UK courts would accept so substantial a change to cross-border double jeopardy, especially if the ECHR continues to apply to the UK.

Giving mutual recognition to Member states ensures that criminals are not given more lenient sentences by courts if a similar crime has already been punished in one Member state. Without mutual recognition provisions the criminal would receive a first time offender's sentence rather than that of a repeat offender. This provision thus serves to ensure that sentences carried out in the UK are given due weight by other member states. It therefore benefits the UK.

Consequences

An opt-out would only give a nominal perception of increased sovereignty as the UK would still be bound by the majority of EC policing and criminal justice provisions. Further, by opting out, we could lose out on pan-European support for and assistance in upholding our criminal justice measures. We would also send out a message that we have a lax attitude to fighting trans-border crime; that we don't mind harbouring European criminals; and that we do not want the assistance of our neighbours when our criminals escape our borders.

Opting out of measures which govern the sharing of information would prevent us from accessing the databases of Member states, making it almost impossible in many cases to trace a fugitive suspect. We would have wasted the millions of pounds already[12] invested in the funding of such systems.

Similarly, opting out of measures which recognise convictions in other member states would leave our justice system vulnerable to either over or under punishing a criminal. This would undermine the principles on which our system of law enforcement is based.

2. **The opt-out could be exercised at no disadvantage ('cost-free').**

The Government seeks to opt back into Maastricht provisions it believes are beneficial to the UK, therefore exercising an apparently cost-free opt-out to the UK.

[11] DNA databases shared under the Prum Convention

[12] Section II (C) 'Police Co-operation measures', Alicia Hinarejos, JR Spencer and Steve Peers, 'Opting out of EU Criminal law: What is actually involved?', CELS Working Paper, New Series, No 1, Online [http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf]

The Facts

All Maastricht provisions are beneficial to the UK in some way or other and so opting out of any of them would come with a cost. In fact, EC measures primarily echo our methods of dealing with crime: The actions they regulate are considered criminal offences in the UK and no penalties are less severe than ours for the equivalent crime. Furthermore, an opt-out would still require us to criminalise the same activity under the Council of Europe, United Nations and OECD treaties which bind us.

In terms of maximum penalties, EC instruments echo the English definition of criminal liability though this is contrary to traditions of other Member states.

The only provision that differs significantly from English law is that requiring Member States to create an extra-territorial jurisdiction over certain offences committed by nationals. The UK can avoid compliance by giving notice to the General Secretariat of the Council and the Commission.
Therefore the opt-out is pointless and carries little benefit as we would still implement the same provisions under our own law.

Consequences

We are likely to incur some cost in regards to the measures we do not opt back into because all measures benefit us. If we then opt back into a large number of measures, what was the point of the opt-out?

Opting out of measures would create gaps in our criminal provisions currently covered by EC provisions. This would enable criminals to escape justice in the period following the opt-out. It would also cost us a lot of money to 'fill' those holes by creating new measures.

Furthermore, we do not have confirmation from the EC that it will accede to on-demand opt-back. Nor do we know whether European states will negotiate satisfactorily with us in regards to the repatriation of criminals without the EC provisions to govern this.

3. **The European Arrest Warrant, the European Investigation order, and the European Public Prosecutor are provisions that burden rather than benefit the UK. We must opt-out of these.**

Supporters argue that opting-out would result in an automatic withdrawal from these provisions, preventing us from having to answer to a European Public Prosecutor. There is also concern that under the European Arrest Warrant, we are required to extradite perpetrators of offences which may not be criminal in the UK. Further, we deport far more suspects than we receive, sometimes sending them to countries which contravene our laws provisions by holding them for excessive periods without trial.

The Facts

There is no European Public prosecutor. He or she does not exist yet. Furthermore, the UK has already removed itself from any obligation to comply with such a provision - were it to be created - by way of the European Union Act 2012.

The European Investigation Order is covered by Lisbon and not Maastricht and the UK Government has already willingly opted into it because it benefits the UK criminal justice system.

The European Arrest Warrant ('EAW') is the only provision of the three which is a Maastricht measure. However, it is so important in terms of practical law enforcement that following an opt-out, we would be driven inevitably and immediately to opt back into it.

It was designed to simplify cross-border extradition measures and has resulted in the UK being able both to extradite European criminals and repatriate British criminals within a few weeks. Hussein Osman, failed July 21st bomber who fled to France and then Italy, was extradited back to Britain within a few weeks to face trial following the issue of an EAW. Under the old provisions it may have taken several years to bring him back.

The UK to date has never ordered the extradition of someone wanted for a crime in Europe which is not considered a crime in the UK under the EAW. The provisions require the extradition of an alleged criminal for a crime committed in another country, not for their conduct whilst resident in the UK. Member States in return offer us the same courtesy. Furthermore, we can in limited circumstances refuse to extradite under Human Rights law.

States may well keep suspects imprisoned for months without trial but this would be the same were we to opt out of the EAW. The only difference would be that by opting out, we would have no power to seek an alteration to this conduct whereas our current position enables us to do so via the EC.

The UK has never treated nationality as a bar to extraditing British citizens who have committed crimes abroad. This is not a new development as a result of the EAW. It is therefore in our best interests to stay within the EAW framework and use our position to better the system. Leaving will not solve any of the identified problems unless we wish to try these suspects in the UK and increase our own costs.

Consequences

If we opt out of the EAW, we effectively increase the delays in extraditing criminals from the UK and repatriating British criminals by up to several years as we can no longer rely on the efficiency of the EAW.

Many criminals may escape justice if it is too burdensome for host countries to extradite them as these countries may not be willing to try them in their own jurisdictions as an alternative. Furthermore, we may not be able to remove criminals who are using the UK as a refuge and might have to try them here. This would be at great cost to the taxpayer with average contested extradition cases costing hundreds of thousands of pounds.

There are also potential knock-on effects for victims and witnesses. What would be the status of other instruments which are sometimes forgotten because their principles have been adopted without real challenge or criticism, but the dilution of which could undermine the integrity of the criminal justice progress?[13]

[13] Article 8 (4) of the 2001 Framework Decision on the Standing of Victims in Criminal Proceedings

Conclusion

For the reasons detailed above, opting-out of the EC provisions is a political exercise of no empirical benefit to the UK and would only serve to create a nominal perception of State sovereignty.

As a result, the UK would suffer the consequences of opting out of a well honed system which enables collaboration between Member states and the efficient extradition or repatriation of criminals. This in turn acts as a deterrent to criminal activity in the UK.

By opting out, we would find it far more difficult to negotiate extraditions with our European neighbours and would have to rebuild from scratch criminal justice measures once covered by EC provisions. This may lead to criminals escaping conviction altogether. Furthermore, opting back into measures we like may prove very difficult.

I would therefore strongly advise against exercising the opt-out as we have almost nothing to gain and much to lose.

17 August 2013

Torquil Dick-Erikson—Written evidence

"SERIOUS RISKS" – *EXECUTIVE SUMMARY*

INTRODUCTION - Commissioner Reding says it would be "crazy" for the UK to exercise the faculty granted by the Treaty to opt out of the 135 JHA measures. If that is their attitude, what will they say to Cameron's demand to repatriate powers where the Treaties offer no such option?

BACKGROUND

1. The importance of JHA.

Justice and Home Affairs comprise the power to use the coercive power of the police, and put people in prison. It is therefore a crucial area of government – the key to control of the State.

2. The deep differences between the JHA systems used in the UK and those of our EU partners.

Our systems of justice and theirs took separate paths 800 years ago (Magna Carta for us, the Inquisition for them). To this day Habeas Corpus and Trial by Independent Jury, to name two particular British safeguards, are enjoyed nowhere in continental Europe. Their criminal laws are administered entirely by a professional career judiciary, an unaccountable body with vast and fearsome powers, unknown to us.

3. The somewhat volatile political history of our EU partners.

The UK has been a stable democracy for over 350 years. Many if not most of our continental partners have known tyranny and violent upheaval within living memory. Is it wise to bind our destiny indissolubly to theirs, in a union where we are a minority? Or better for the UK to keep a free hand?

THE EU PROCESS OF JUDICIAL INTEGRATION

4. The Corpus Juris proposal.

In 1997 a single code, in embryo form, for all Europe is prepared and unveiled by the Commission. It will do away with Habeas Corpus and Trial by Jury, and our safeguard against double jeopardy. In 1999 it was rejected by the House of Lords.

5. Mutual recognition

At Tampere in 1999 it was decided that each member state should give recognition to the judicial decisions of other member states, considering them as just and as fair as their own. The main outcome of this approach has been the European Arrest Warrant.

6. Safeguards for basic rights?

The government appears to consider the European Convention, and the EU Charter as adequate yardsticks for measuring the respect for basic rights of the signatory states. It fails to consider that neither the Convention nor the Charter mention the practical safeguards of individual freedom which are basic for the people of Britain, such as Habeas Corpus and Trial by Independent Jury. They are therefore not fit for purpose for the UK.

7. The irreversible ratchet.

Once we accept the jurisdiction of the European Court of Justice and the enforcement powers of the European Commission in the crucial area of JHA, our sovereign right to withdraw unilaterally, hitherto upheld by our courts and governments, will have been abandoned.

8. The 135 JHA measures – opt-out, opt-back-in?

It will be far more sensible to follow policies of cooperation amongst equals with our neighbours than to hand control of our affairs over to them. It is impractical for us to lay down conditions for accepting the EAW, for that would mean in effect asking our partners to revolutionise their own internal systems, not just to change the terms of the EAW itself. The EAW must be replaced by returning to earlier extradition legislation, where UK courts retain the right to examine the prima facie evidence against the prisoner.

THE MERGING OF ENFORCEMENT AGENCIES

9. Eurojust, Europol, CEPOL

These are stepping-stones to a single unified pan-European system, as statements from the likes of Helmuth Kohl have made clear.

10. Our traditions of policing and theirs – the Eurogendarmerie

We have radically different concepts of policing from those of our neighbours. Unlike ours, their police forces are lethally-armed at all times, paramilitary, centrally recruited and controlled. The EU has set up a European Gendarmerie on that model. Our government must give an assurance that it will never ever give consent to their deployment on UK soil, or we will risk ending up under a paramilitary occupation controlled from Brussels.

CONCLUSION In conclusion I therefore urge the House of Lords Select Committee, and the House of Lords itself, to support the opt-out from the 135 JHA measures, already voted by the Commons, and the government and Parliament not to opt back in to any of them, in particular to repudiate the European Arrest Warrant, which the Conservative Party officially opposed at its inception in 2003. Otherwise it should trigger a referendum.

APPENDICES:

A1 & A2 –Article in New Law Journal, 22 June 1990 [not published here];

B1 & B2 – Seminar programme for Corpus Juris, April 1997 [not published here];

C – Hansard, extract debate on EAW, 21 Jan 2003 [available here.].

SERIOUS RISKS

INTRODUCTION

Ms Viviane Reding is the EU's Commissioner for Justice. She is opposed to the UK using the faculty granted to us under the Treaty of Lisbon to opt-out of 135 measures on criminal justice and policing.

In an interview with the Daily Telegraph (28/12/2012), she warned: "Do you want criminals and paedophiles running around freely on the streets? Is that really in the United Kingdom's interest? It is crazy."

Such dismissive and contemptuous language in the mouth of someone holding a position of such power and responsibility, when referring to the British government's stated policy, must have been intended to have a strong, indeed an intimidatory, effect on the debate being held on this issue in Britain. Nobody will want to have their mental health put in question by a personage of such authority. The general tenor of her statement and the use of the term "crazy" suggests a haughty disregard, not to say pre-conceived hostility, for any arguments that the British side may wish to produce, before they have even been heard.

I say "intended" for we must presume that her statement was not an emotional outburst but the fruit of a sober assessment and calculation.

However we are confident that the Members of Parliament elected by the British people, and the noble Lords in the Upper House, will not be swayed by the Commissioner for Justice's intemperate use of words, but will fearlessly consider the issue on its merits.

It might be said, in passing, that if the EU Commissioner says that we are "crazy" to use a faculty *already granted and provided* by the Treaty to repatriate powers, this does not bode well for any future negotiations with our partners to repatriate powers where no such faculty is granted by the existing Treaties, as the Prime Minister has said that he intends to do.

BACKGROUND

1. The importance of JHA.
2. The deep differences between the JHA systems used in the UK and those of our EU partners.
3. The somewhat volatile political history of our EU partners.

SECTION I

The crucial importance of the area of criminal justice and policing.

This area has a special significance, which sets it apart from others, such as health, education, taxation, transport, etc. It is in fact the heart of State power, for it comprises the *power of physical coercion over the bodies of the citizens.*

We are perhaps less aware of this than people on the continent are. Unlike most continental countries, Britain has had a history of continuous and peaceful constitutional development

going back hundreds of years. The last significant armed conflict in mainland Britain was the Jacobite rebellion of 1745. Disputes have been settled and power has passed from one government to another essentially by voting (with an ever-increasing franchise) ever since the end of the civil war and the restoration in 1660. The losers have accepted the verdict of the voters without recourse to violent protest and rebellion. The English revolution of 1688 was glorious and – uniquely – bloodless. This historical background may lead some British commentators to overlook the central role of physical force in the maintenance of state power.

It is with the apparatus of criminal justice and policing (or Justice and Home Affairs – JHA) that physical force – prisons and policemen – is applied to citizens by the State.

In normal times this power of coercion is used only to catch and neutralise murderers and robbers and other criminals. But it is the self-same apparatus which in times of emergency can be used to exercise control over the people, and which can be used to suppress opposition and dissent.

In fact in countries where they have had violent changes of government in modern times, the first thing the insurgents try to do after taking the Presidential palace and the radio/TV station, and after neutralising any loyalist armed forces, is to occupy the Ministry of the Interior (what we would call the Home Office). It has been centuries since we have had any experience of anything remotely like this, not since Cromwell's soldiers marched into Parliament and cleared out the members by main force.

In many, if not most, major European countries violent changes or attempted changes have happened within living memory.

The shift or drift towards "ever-closer union" over the last decades since we joined the European "project" in 1972 has seen many small steps, each one of apparently little significance, and we have always thought that they could, if necessary, be reversed.

We must remember however that the transfer of control over our JHA is not a small step, on a par say with health & safety or agriculture. JHA is the "control panel" which governs all the others. Once control over the powers of enforcement has been handed over to some other body, there is no guarantee that it will ever be handed back. It is in these powers that lies the essence of sovereignty. Once transferred, it cannot be regained, as King Lear discovered to his cost.

Whoever controls the machinery of criminal justice and policing in a country, controls that country, and can bend it into a new shape. Whoever controls the power of policing and imprisonment of a State can control its politics, and its economics.

Precisely because the machinery of criminal justice and policing has this power whereby a citizen may be stripped of his or her rights – essentially rights of property (with fines and judicial confiscations), freedom (with prison), not to mention life (in States where capital punishment is applied), and indeed physical integrity (judicial maimings as in sharia-law States even today), it can be, and over history it often has been, used as an intrument of pure power, to repress political opposition, and ultimately to oppress those who fall out of favour (for any reason) with those who wield this power.

SECTION II

The profound and persisting differences between our (Anglo-Saxon) systems of criminal justice and traditions of policing, vs their (continental) systems and traditions.

This is important because the 135 measures we are opting out of have been described as "stepping-stones" towards a harmonisation, and then an amalgamation of the different systems, resulting ultimately in a single system for the whole of Europe, under a single supreme court. This Court – the ECJ – already exists, and the stepping-stones will enlarge its areas of jurisidiction. Are we to stumble blindly into an irreversible embrace with other systems which may or may not be fair and just, but which are essentially *unknown* to us?

As far as I have been able to ascertain, there is no chair of comparative criminal procedure in any university in Britain, nor has the present nor any previous government undertaken any detailed research into the workings of the criminal law systems and procedures of our EU partners. And yet we have been signed up to a series of treaties that envisage "ever-closer union" with these foreign states.

Their criminal-law systems are radically different from ours, and the differences go back many centuries.

Eight hundred years ago in England there arose a movement to limit the overweening power of the State – at that time the King – and to ensure that the power to punish was only used for purposes of justice, and that justice itself should be administered with fairness.

In 1215 King John was prevailed upon by the assembled barons and others to give his assent to Magna Carta.

This established certain limits on the power of the King, later to develop into limits on the power of the State, vis-à-vis the rights of his subjects. What is perhaps not widely appreciated in England is that this happened nowhere else. At that time in fact there was an inverse tendency in Europe. In Rome Pope Innocent III was setting up the Holy Inquisition. I cite the late Professor Italo Mereu, who held the Chair of the History of Law at Ferrara University, and was a regular contributor to Il Sole 24 Ore (Italy's leading financial daily paper, equivalent of the Financial Times). In his detailed, monumental, history of the Inquisition from its beginnings to the present day, "Sospettare e Punire – Storia dell'Intolleranza in Europa" ("To suspect and to punish – a history of intolerance in Europe") (Milan 1979) , Mereu documented how that Pope wrote letters to the English prelates who had signed Magna Carta, telling them they had done something "abominable" and "illicit". And he describes how the Holy Inquisition was established throughout Europe, ravaging its countries and peoples for centuries, and only England escaped its grip.

In 1215 there began a dispute and an implicit conflict – or debate – which continues to this day, as the paths of criminal justice in the British Isles and in continental Europe diverged, never to meet again.

And indeed Magna Carta did create a dichotomy with the Inquisition, for the great innovation of the Inquisition, as analysed by Professor Mereu, was to take the role of prosecutor and that of judge and bundle them together, into the figure of the Inquisitor. The

suspect is suspected, investigated (interrogated, originally under torture), and accused, by a member of the judiciary, who then judges him, thus reversing in effect the burden of proof, and creating a system which to us seems lop-sided. This lop-sidedness lives on in the "inquisitorial" systems that are practised to this day all over continental Europe. Further details are given in an article I published in the New Law Journal ("Confessions in Evidence, a look at the inquisitorial system" – June 22, 1990, pp 884-885. Attached hereto as Appendix A1 and Appendix A2).

After the French Revolution of 1789 a new form of State emerged. This was stabilised by Napoleon, who based it on his codes of law, which still underpin the legal systems of most if not all continental European countries today. Essentially, Napoleon did not overturn the Inquisitional method of criminal justice to replace it with something else. Instead he adopted and adapted it. He reoriented it from serving the Church and made it into an instrument in the service of the State. He maintained the closeness between the prosecutor and the judge, who, even if today they are no longer the same person, are both salaried civil servants often working cheek by jowl, and separated them from the defender, who is a private professional working for a fee.

Hitherto each nation state in Europe has made its own laws and has had its own national system of criminal justice, with its own distinct features. However they can be grouped together into two large families of systems, each with its common tradition. The two families are sharply different from one other. They are the "common-law" jurisdictions, and the "civil-law" jurisdictions. As regards their criminal procedures, the "common-law" systems are called "adversarial" or "accusatorial", as against the "inquisitorial" systems.

Within the EU the only jurisdictions that can be said to belong to the common-law family are the "island jurisdictions" of the UK (including the English-and-Welsh, the Scottish and the Northern Irish), Ireland, Malta and to some extent Cyprus. All those on the mainland follow the civil-law tradition. The UK is the only country in Europe which preserves (somewhat) different jurisdictions within its borders; each of the others has only one uniform set of laws for all its inhabitants. Outside Europe our system is used in the USA and other English-speaking commonwealth countries, but as far as I have been able to ascertain, nowhere else.

Within the EU, we are in a minority. Under a system of QMV, we would have to accept the decisions of the majority of countries, who follow the Napoleonic-inquisitorial tradition.

Here are some notable differences between the two families of systems (over the last thirty years I have conducted studies in depth of the inquisitorial system as used in Italy; which is a fairly typical sample of the Napoleonic-inquisitorial systems):

Here are three significant differences between the two systems, regarding who decides what.

	British (English)	**Continental (Italian)**
Who decides on guilt or innocence?	In serious cases where the maximum penalty can be more than a few months, or in either-way cases, where the defendant opts for trial	*A professional career judge or judges* decide guilt or innocence as well as the sentence in case of a guilty verdict. Where ordinary citizens are involved in the judgement, as they

	at the Crown court, *the jury* has exclusive and sovereign power of decision over the verdict, or, for minor cases, this function has been carried out mostly by *lay magistrates* (more recently being replaced by District judges…?). The Crown court judge has no power over the verdict. He delivers his summing-up to the jury *in open court*, explaining to them the law applicable to the case, and summarising the facts as heard from the witnesses. If he gives his own opinion and it is an opinion of guilt, a subsequent guilty verdict from the jury can be overturned on appeal on grounds of "undue influence by the judge on the jury". The defence can appeal, or ask for leave to appeal, against a guilty verdict. The *prosecution cannot appeal against an acquittal*, under our doctrine of Ne bis in idem – that nobody shall be tried more than once for the same offence.	are occasionally, though only in the very most serious cases, they have to go into the jury-room with two professional judges. The "summing-up" by the judges to the jury is thus delivered *in private*. The verdict is decided by a majority vote of the two professional judges with the six jury-people (or lay assessors). A written motivation for the verdict must be produced. So if the six jury-people disagree with the two professionals and outvote them, the defendant will be acquitted there and then. But it is one of the professional judges who writes the motivation, and if s/he disagrees with the majority verdict as voted by the lay jury-people, they can write the motivation in such an illogical way as to give good grounds for the verdict to be overturned on appeal (in the trade, this is called a "suicide motivation"). The *prosecution can always appeal against an acquittal*, just as the defence can appeal against a conviction, right up to the final decision by the supreme Court of Cassation.
Who decides on imprisonment before trial? (Habeas Corpus)	Committal to trial on remand is decided by a *bench of lay magistrates in open court*, or by a sole, stipendiary magistrate (who has been a lawyer and as such has acted for the defence and for the prosecution), always *in*	"Precautionary custody" is decided and ordered by a *prosecutor and a "judge of the preliminary investigations"*. The prosecutor requests an arrest warrant which is then validated (or sometimes not) by this judge. The prosecutor, who like the judge is also a member of the career judiciary, conducts the

	open court. The same court will decide on bail, to which the defendant has a right, in the absence of reasons to the contrary brought by the police and argued by the prosecution. Habeas Corpus prevents anyone from being imprisoned without charge, since a suspect, if arrested, must be brought before the magistrates in open court within hours, and charged with an offence. The prosecution can be required to produce prima facie evidence of guilt there and then. This means that *the **evidence** has to have been collected beforehand*.	investigations while the role of the police is simply to carry out his instructions. One problem the Italians have is that the police may have the detective's specialist know-how, but they have no responsibility or power over the conduct of the investigation, while the prosecutor has that power, but is not trained in investigative techniques. He was given his post purely on the basis of his knowledge of the law. This may be why many cases are never solved satisfactorily. These two, judge and prosecutor, may work in tandem on several cases in succession. They are essentially colleagues, and during his career a member of the career judiciary may perfom judging functions, and then prosecution/investigatory functions, and then again judging functions. He or she will never be a defender, however. Very often the first step in a criminal investigation is to lock up the main suspect. He is then questioned in prison. *There is no requirement to find hard evidence of a prima facie case to answer before a suspect is arrested.* Italian law prescribes that there be serious and concordant "indizi" of guilt – indizi means "clues" – so that a warrant can be issued. After arrest the prisoner will be interrogated by the judge who ordered his arrest, and his defender may be present, but it is not in public. This is done in a special interrogation room in the prison. The prisoner is expected to "justify himself". The procedure is regarded as an "opportunity for the defence". His first appearance in a public hearing may take place months or even years later.

Can a person be tried more than once for the same charge? (Ne bis in idem)	*No.* A defendant may appeal against a conviction. However a verdict of acquittal by a jury in England is traditionally absolute. There have been some recent modifications in this, in particular a re-trial in a serious case may be allowed after an acquittal if "new and compelling evidence" has emerged subsequently.	*Yes.* Under the Italian constitution all parties – both prosecution and defence – have a right to appeal, from the court of first instance to the Appeal Court, and then up to the supreme court of Cassation. This right of appeal is standard in all cases, and grounded simply on arguments that the lower court gave the wrong answer. There is no requirement for "new and compelling evidence". The Appeal Court may hear the case all over again, with witnesses etc. The court of Cassation is supposed to only review the application of the law in the lower courts, as in our Court of Appeal. When I interviewed the late Giuliano Vassalli (at the time he was President of the Italian Senate's justice committee, later he became President of the Constitutional Court) for the Financial Times (a reduced form of the interview was published in 1986), he told me that Ne bis in idem is also true for Italy, except that the "trial process" there is viewed as including all three degrees of judgement. Once they have been completed, then a re-trial is not possible, unless serious new "proofs" (we would say "new and compelling evidence") has come to light. This shows that the Italian and the English systems have quite different ways of categorizing judicial reality.

There are many more differences between our system and the systems used on the continent. One major difference is that in Britain, the various functions of criminal investigations and trials are entrusted to different and separate bodies, viz:

- the ***police*** investigate, and have ample powers of investigation but comparatively limited powers of coercion on their own initiative;

- (traditionally) ***lay magistrates***, who are not trained lawyers and who work part-time, as unpaid volunteers, hear and decide minor cases and decide committals and bail for more serious charges;

- the ***prosecution*** in court is conducted traditionally by a ***lawyer*** (a barrister or sometimes a solicitor), who is a free professional working for a fee, just like the ***defender***; they are on an equal footing, even though some of the rules are tilted in favour of the defence, to compensate for the advantage of the prosecution which has the investigative powers of the State at its disposal;

- the ***judge*** is a former barrister (or nowadays in some cases solicitor), who in his career will have acted as prosecutor in some cases and as defender in others, so is expected to have a balanced and impartial view. He regulates the conduct of the case in court, arbitrates in procedural disputes between prosecutor and defender, sums up the facts and the law for the benefit of the jury, and hands down the sentence when the verdict is Guilty. The judges in the appeal courts are promoted from the lower courts, and they may go on to the supreme court, and become Law Lords.

- the ***jury*** gives the verdict, over which it has complete and sovereign control. It can even defy the law, if it thinks
  that to apply it in the case before it would be unfair or oppressive.

In Italy and in continental jurisdictions in general, it is ***salaried career judges*** who carry out **all** of the functions mentioned above. The first chapter of the Italian criminal code deals with "Crimes against the personality of the State". They therefore tend to see their mission as being primarily to uphold the supremacy of the State over the citizens.

There is a difference in emphasis, reflected in common legal maxims. An English maxim is that "Justice must not only be done but be seen to be done" ie not only seen but understood, and understood and approved by ordinary people – so much so that we call on ordinary people to say the decisive word with the verdict. A significant legal maxim used in Italy is, in contrast, "Dura lex sed lex", meaning "It may be a harsh law, it may even seem unfair to ordinary people, but it is the law". Since the State is deemed to be democratic (with free elections to Parliament, which writes the laws) this is considered to be fair and just.

Members of the career judiciary **also** supervise the execution of sentences and the treatment of prisoners in the prisons, and they occupy the top staff positions in the Ministry of Justice, surrounding the Minister of Justice, and conditioning his actions (rather like Sir Humphrey Appleby in "Yes Minister"), as the late Senator Vassalli explained to me in an interview, shortly before he himself became Minister of Justice.

The Italian constitution says "The judiciary are subject only to the law". And as I pointed out in an article published in the Financial Times during the attempts by the Italian Parliament in the 1980s to reform their criminal procedure, they are the only ones who can give coercive interpretations of the law. So in practice they are a "law unto themselves". They are also protected by specific laws that punish "vilification of the judiciary". They say "criticism is acceptable, but not vilification". Yet in any particular case, the distinction between the two is decided by…. a judge.

The reform of Italy's code of criminal procedure, enacted in 1989, did nothing to reduce the vast collective powers of the career judiciary. When I asked Senator Vassalli why this had not been attempted by Parliament, he said "They wouldn't let us". I said "Who wouldn't let you?" He replied "The career judiciary wouldn't let us". I asked, "What about the sovereignty of Parliament?" He then sighed and said, "Well, we have a sort of 'limited sovereignty' here, limited by the power of the career judiciary". (This, said in 1986, was a clear, partly ironic, reference to the "Brezhnev doctrine", with which the Soviet leader had justified the invasion of Czechoslovakia in 1968). This part of the interview was published in the Financial Times.

Indeed a few years later, in the early 1990s, the career judiciary of Italy, with its famous"clean hands" campaign against political corruption, decimated the entire governing political class, destroying the Christian Democrat and Socialist parties who had governed the country up until then, and forcing Bettino Craxi, the longest continually serving Prime Minister since Mussolini, to flee the country in order to avoid jail. Very recently they have convicted Silvio Berlusconi with a definitive sentence, and maybe more to come. He could then face prison. He is the leader of the centre-right grouping in Parliament, which received 10 million votes in the last election.

It can well be argued that the career judiciary in Italy did the right thing on both occasions. But in any case, the Italian career judiciary hold a monpoly of the use of coercive force over the citizens, and, whether they use this power for good or for ill is entirely up to their consciences. They cannot be dismissed, nor punished save by other members of the same brotherhood. They are unaccountable to the people (they are selected by competitive examination amongst law graduates), and there is no countervailing force to check their actions.

In contrast, the British system, by having juries and lay magistrates say a decisive word before a person's rights are removed and he is put in prison, involves the ordinary people directly, so we do not have this loose cannon aboard the ship of state. The wisdom of our arrangements goes all the way back to Magna Carta.

A career judiciary concentrates what to us seems a fearsome amount of power in its collective hands. Their CVs never (save quite exceptionally) include a period when they might have acted as attorneys for the defence, for their career path starts straight after a university law degree. If a law graduate wishes to enter this career, they sit a competitive state exam, and if passed, they are attached to a tribunal where they follow an established professional judge for about a year as "uditore" (a sort of apprenticeship). Then they may be appointed as a prosecutor, or a judge sitting in a lower court (pretura) and deciding guilt or innocence, and sending people to prison, in the lowest courts of first instance, for as much as eight years. One may be incarcerated on the orders of a 25-year old.

There are a number of other radical differences, some of which I discussed in an article published in the Italian law journal "La Difesa Penale" (Year IV, April-September 1986, pp 139-158). I wrote it in Italian, under the title "Processo inquisitorio, processo accusatorio e legge delega", comparing the proposed reform of Italian criminal procedure to the English system of criminal justice, as expounded by Dr David A. Thomas of Trinity Hall, Cambridge, author of "Principles of Sentencing", in a talk at the Palace of Justice in Rome which I had been asked to arrange by the Rome Bar Association in October 1985. My article has never to my knowledge been translated into English. It was quoted in a debate in the Italian Senate

by Senator Franco Corleone, a member of the Radical party, who later became the Parliamentary under-secretary at the Ministry of Justice.

SECTION III

The **political volatility** of the continental states in recent history, compared to ours.

We are accustomed to thinking of the continental states which are members of the EU as democracies. Yet it has not always or long been thus for most of them, even within living memory.

Moreover it could be argued, and is argued here, that their systems of criminal justice are not democratic even now. Our system is not content to let the ordinary people decide only who shall write the laws, by electing the lawmakers in elections to parliament. The British system also insists that at the point where the laws impinge most violently on the life of a citizen, by putting him or her on trial, the ordinary citizens should again have a decisive word – serving as they do as lay magistrates and on juries. We have what I call a "two-legged" democracy. Our continental cousins have only a "one-legged" democracy, they vote for the lawmakers, but are not allowed to participate (save very occasionally and under tutelage) in the application of the laws.

Our political histories are very different. When we were developing Parliamentary democracy in the seventeenth and eighteenth centuries, they were establishing absolute monarchies, typified by France's Sun King - "I am the State". However, after the French revoluton, more than a few had some form of democratic government in the 19th and early 20th centuries. Then as the twentieth century went forward, movements arose in some of them – starting with Italy, then Germany and then Spain – that swept away their young and evidently fragile democracies, replacing them with dictatorships, and even totalitarian dictatorships. After WWII the Western European states, having been conquered by the Anglo-American armies, returned to democracy, but those in the East were subjected to new dictatorships. In fact, were it not for the Anglo-American victories in WWII and later in the cold war, it is fairly likely that few of them would be democratic even today.

As we have seen, criminal justice is the ultimate "control panel" of power in a State. The amalgamation of our systems of criminal justice is therefore an irreversible process. So is it wise to tie our destiny *indissolubly* to theirs? Or would it not be wiser for the UK to maintain friendly relations, but keep a free hand?

THE EU PROCESS OF JUDICIAL INTEGRATION

4. The Corpus Juris proposal
5. Mutual recognition
6. Safeguards for basic rights?
7. The irreversible ratchet.
8. The 135 JHA measures – opt-out, opt-back-in?

SECTION IV

The Corpus Juris proposal

When Jacques Delors announced in 1989 the intention of creating a single currency, it became apparent that the aim of the "Common Market" or EEC was to transform itself into a sovereign state, as, since time immemorial, only sovereigns have the right to mint their own coin. To lose,or to give up, this right is to lose sovereignty. From being a mere pious aspiration (as it was often dismissed in the UK) , it was now clear that the goal of "ever-closer union" would now be an operational objective. As an important step in this process, the single currency was agreed at Maastricht, albeit without British participation.

After the Maastricht Treaty was passed, I also predicted, in an article published in the European Journal (November 1993, pp. 14-15), that "If, as is very likely, there is then a move to unify the legal systems, and create a European legal system, a real risk will arise of our system, with Habeas Corpus and Trial by Jury, being done away with". Being familiar with the Napoleonic mindset underlying the continental conceptions and doctrines of the State, I thought it was obvious that the new European State would want to have its own criminal laws and procedures, and its own apparatus for applying and enforcing them, and would not tolerate the continuation of different and contrasting systems within its borders.

I was therefore not too surprised when I was invited, as a guest of the Commission, to a seminar in Spain in April 1997, where the "Corpus Juris" project, promoted by the XX Directorate General of the Commission, was unveiled. It is in the form of a book, published by Editions Economica in Paris in 1997 (ISBN 2-7178-3344-7), with English and French texts on facing pages. It consists of a draft criminal code of substantive law, and a code of criminal procedure, valid for the entire territory of the EU.

On the face of it, its scope is limited to dealing with crimes of fraud against the financial interests of the EU. However it establishes a mighty apparatus – with an EU Public Prosecutor (EPP) in Brussels who is to have delegates in every member state. National Prosecutors are to be "under a duty to assist the EPP" (article 18.5), ie to carry out the EPP's instructions, in a relationship of hierarchical subordination. The laws of the Corpus are also to override the national laws, which continue to operate only in the lacunae not covered by the Corpus laws. .

Although Corpus Juris has not been mentioned much in more recent years, the proposal has never been officially withdrawn by the Commission, and it gives us very revealing evidence of the *intentions* of the architects of the ever-closer union of Europe.

And although its promoters, in Britain – including, surprisingly, a recent edition of Private Eye attacking opponents of the establishment of a European Public Prosecutor – attempt to present it as limited to matters of fraud against the EU, the programme distributed at the seminar (attached in Appendix as B1 and B2) states clearly that it "has been conceived as an embryo European criminal code". A message to the seminar from the then President of the EU Parliament, Don José Maria Gil Robles, was even more explicit, spelling out how it was hoped and expected that the Corpus Juris method would be extended to deal with all sectors of criminal activity, which were listed, including homicide, robbery, drug dealing, arms trafficking etc etc and even religious "sects" (it was explained to me that some sects, such as Scientology, were actually illegal and banned, for instance in Germany).

And as I had predicted four years before, Trial by Jury (and Lay Magistrates) and Habeas Corpus are specifically done away with in the Corpus Juris proposal.

Article 26.1 of the draft Corpus Juris code says "the courts must consist of professional judges… and not simple jurors or lay magistrates". These courts can hand down sentences of many years in prison. So juries and lay magistrates are ruled out.

Our Habeas Corpus vouchsafes the right not to be imprisoned even provisionally without prima facie evidence to support a charge having been potentially exhibited in a public hearing. This right is also removed by Corpus Juris in article 20.3.g , which grants the EPP the power to order that a *suspect* be imprisoned "for a period of up to 6 months, renewable for 3 months" (without even specifying any limit on the number of renewals allowed). The mere suspicion by the EPP, with the approval of another member of this proposed EU judiciary, a so-called "judge of freedoms", is enough to order this incarceration, *before* any hard evidence has been gathered against the person, as is typically the case in France, Italy, and other Napoleonic-inquisitorial jurisdictions, which are prevalent in Europe. Article 24.1.b furthermore gives the EPP the power to "instruct"a national judge to issue a European Arrest Warrant against anyone anywhere in the EU, who may then be transported to any other State "where he is required to be". Article 25.2 says that the "judge of freedoms", appointed by each member state, must check the legality of the acts of the EPP. However nowhere does it say that this must be done in a public hearing, and nowhere is there any reference to any need to look at prima facie evidence.

A third British safeguard which will be swept away with Corpus Juris is the right of the accused not to be tried again for the same offence. In other words in Britain (unlike on the continent), the prosecution may not traditionally appeal against an acquittal, and even since recent reforms "new and compelling evidence" is required to order a re-trial. Yet article 27.2 of Corpus Juris says "In the case of total or partial acquittal, appeal is also open to the EPP as prosecuting party". There is no mention of any need for "new and compelling evidence".

I published two articles about Corpus Juris and what I saw and heard at the seminar, in the European Journal (April and June editions 1997). The Foreign Office had not been informed, and I was told they were "gobsmacked" when I told the British Embassy in Rome about it on my return from Spain. In November 1998 the Daily Telegraph started a week of articles denouncing the threat of Corpus Juris, which was followed by Parliamentary Questions tabled by Patrick Nicholls MP and James Clappison MP. Kate Hoey, Home Office Minister at the time, promised Parliament that the government would veto it if it were ever formally presented.

In 1999 the House of Lords Select Committee produced a weighty Report (HL Paper 62) on Corpus Juris, rejecting it. Two witnesses, members of the EU Parliament, Frau Theato and Signor Bontempi, gave oral evidence to the Committee in which they said that the "protection of the financial interests" was "a point of departure", which "may also open a way to the fight against crime". And they intended to bring it in under article 280 of the Amsterdam Treaty which provided for measures against fraud to be introduced by QMV. (op.cit. pp. 82-91) A second part of article 280 appears to give a safeguard to the "national administration of justice", although Frau Theato in the European Parliament said this would not affect the introduction of Corpus Juris by QMV. However Kate Hoey maintained that it would, and there was clearly going to be a furious row if the EU side had persisted.

Corpus Juris, though ostensibly limited to offences of fraud against the EU, is thus clearly intended as the thin end of a broad wedge, ultimately to bring all criminal justice under the jurisdiction of the EU's organs.

Further details about Corpus Juris may be learnt from the video of the debate I held against its British co-author Professor John Spencer Q.C., of Selwyn College, Cambridge. The video is in four parts and can be viewed on Youtube:
http://www.youtube.com/watch?v=5-HzMDO58MQ
http://www.youtube.com/watch?v=AX0znWdpPjg
http://www.youtube.com/watch?v=xxloF2yxiVo
http://www.youtube.com/watch?v=A0_i6iaA6LE

The debate took place in February 1999, in Churchill College, Cambridge, on a motion that "Corpus Juris is a threat to our civil liberties". I spoke in favour of the motion and Professor Spencer spoke against it. The motion was passed with 39 votes in favour and 4 votes against. Since then Professor Spencer has named me twice as the person chiefly responsible for having influenced the media and the government against Corpus Juris and having thus blocked its introduction ("The Corpus Juris project – has it a future?", Cambridge Yearbook of European Legal Studies,vol.2, Hart Publishing 1999, & "The EU policy founded on a myth", Parliamentary Brief, 17 January 2011).

The Corpus Juris proposal has not been mentioned much in recent times, but it is by no means off the table as far as the EU Commission is concerned. Its centrepiece, the establishment of a European Public Prosecutor's Office (EPPO), has been put forward more than once. Likewise the reinforcement and extension of the powers of Eurojust, which is one of the measures being discussed, and is seen as a stepping stone to setting up a EPPO. Once the principle of the EPPO has been accepted, the next step is necessarily to give him a procedural rule-book, and there we have Corpus Juris, made specifically to measure for that purpose.

SECTION V

Mutual recognition

Since however it did appear that the imposition of a single criminal code on all Europe would meet with serious opposition in the UK, a new route towards harmonisation was suggested, at Tampere in 1999, which was to be the "mutual recognition" of judicial decisions in one EU state by the judicial authorities in other EU states. The most visible fruit of this approach has been the European Arrest Warrant.

The **European Arrest Warrant** is one of the 135 measures that the government wishes to opt out of, but it is also one that the present government proposes to opt back into.

When it was first put forward in 2002, the Conservative Party in Parliament was opposed to it. A young MP called David Cameron was particularly active. I even had a brief exchange of emails with him on the subject. Another Conservative MP, Nick Hawkins, read aloud a 5-page briefing paper which I had prepared, during the debate on the Extradition Bill in Standing committee D in the House of Commons, in January 2003, on aspects of Italian criminal procedure. The government's reaction showed that at that time they had not conducted any research in any depth on the very different – indeed alien to us – criminal law

systems of the continent that British citizens in Britain were now being exposed to. For instance, the government stated that people would be extradited for prosecution purposes, but not for investigative purposes i.e. not for "fishing expeditions". My briefing showed that Italian criminal procedure makes no distinction, for an investigation is always *against* a suspect, who in serious cases is imprisoned from the outset, before enough evidence to prosecute has been gathered (see Hansard: http://www.publications.parliament.uk/pa/cm200203/cmstand/d/st030121/am/30121s03.htm) also in Appendix C.

Therefore if the EAW form asks "Is this arrest being sought for a prosecution against this person?" the Italian judicial officer will translate "prosecution" as "azione penale" (=literally "penal action") which includes both investigative and prosecutorial activities without distinction, and will tick the box marked "Yes". In that debate in Committee, the government spokesman Bob Ainsworth remarked merely that "The Italian justice system is very different from ours", but no notice was taken of the probable consequences and the Bill was passed regardless, thus rendering vain the government's stated intention.

The concept of *mutual recognition* has to be based on *mutual trust and confidence* in the fairness and justness of each other's judicial systems. This is clearly possible within the United Kingdom, where the differences between the English-and-Welsh system, and those of Scotland and Northern Ireland, are so slight as to be negligible when it comes to having confidence that they will not be oppressive or unjust. It could even be arguably possible to posit the existence of a basis for mutual trust and confidence between the jurisdictions of the UK and those of Australia, Canada and New Zealand, which after all are based on ours and share our traditions and values.

However I think I have shown that the differences between our system and those used on the European mainland are so profound and radical that we cannot take it for granted that a prisoner extradited to one of them will receive the same safeguards of his rights as he would in the UK itself, or that he will not be subjected to treatment that we would regard as oppressive and unjust.

Previous legislation governing extradition provided amongst other safeguards that the UK court could demand to see the prima facie **evidence** against a prisoner that the requesting state had already collected. This safeguard has now gone, on the grounds that the examination of evidence is now up to the (presumably trustworthy) foreign jurisdiction.

What is not appreciated is that whereas in the UK pretty hard evidence must be collected *before* a person can be arrested (and then may have to be exhibited in open court *within hours of arrest*), on the continent this is not so. The authorities there can attempt to build a case against a suspect *after* he has been locked up. This can take months. This is why there are time limits of several months (extensible) during which a suspect may languish in jail before any evidence has been marshalled against him – enough evidence to commit him to trial. NB the time limit is not for "remand in custody" which occurs in the UK *after* a prisoner has been committed to trial, ie after it has been established in court that there is a reasonably solid case to answer. This time limit, "pending investigation", refers to the period of imprisonment *before* the

committal hearing. In Corpus Juris it is 6 months, renewable for 3 months at a time, which is fairly typical of continental jurisdictions. Then *more* months may be spent on remand before the prisoner is actually brought to the trial proper. The reformed Italian code of criminal procedure provides that the maximum time a person may be lawfully detained before their final verdict of guilt or innocence is two-thirds of the maximum sentence for the crime charged. Very serious crimes carry a maximum penalty of 30 years, so in theory a person may lawfully spend twenty years in prison before his innocence is finally acknowledged, and this cannot be called a "miscarriage of justice".

As was explained in my briefing paper, read aloud by Nick Hawkins MP to Standing committee D in 2003, Italian legal parlance does not even have a specific word for "evidence". English has three words covering three areas of meaning: clue, evidence, and proof. Italian has only "indizio" (=clue) and "prova" (=proof). When trying to convey the idea of "evidence", the Italian language has to make do with a phrase like "elementi di prova" (= elements of proof), or perhaps "testimonianza" (=witness statement), but this is not really very satisfactory, at least not to our way of thinking.

Italian law lays down that a person may be arrested and put in prison when there are "indizi gravi e concordanti" (=serious and concordant clues) pointing to guilt. We would consider that quite insufficient, and would say that they imprison people on very flimsy evidence. Italian jurists say that "La prova si forma nel dibattimento", which means that "proof" (or it could be evidence) is formed during the open-court debating phase of the trial-process. This can take place many long months or even years after the suspect's arrest and incarceration.

It is well known that very large percentages of the inmates of many continental jails, especially in Southern Europe, consist of prisoners awaiting the outcome of investigations or awaiting trial and in any case awaiting the definitive result of the proceedings regarding them.

SECTION VI

What safeguards are offered for the protection of fundamental human rights?

Looking at the list of the 35 measures that the government has announced it intends to opt back into, it can be seen that Command paper 8671 considers the "**fundamental rights**" of persons concerned for each of the measures in question.
It must be asked – what is the yardstick used to determine what these fundamental rights are? And it can be seen that the government has used the yardstick laid down by the European Charter of Fundamental Rights (ECFR); it also refers often to the European Convention on Human Rights (ECHR). The implication is that all the member states involved are signed up to both, and so that solves the problem.

I would contend that it certainly does not solve the problem.

Our traditional British conception of our civil liberties, rights and, most importantly, their *safeguards* (trial by independent jury, Habeas Corpus, etc) is different from that of our continental partners, who do not recognise these safeguards in their own laws. What is more, they are not contemplated by the ECHR nor by the ECFR (European Charter).

Taking article 47 of the ECFR, which repeats practically art 6 of the ECHR:

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

This begs the question of what is a "fair" hearing and what constitutes an "impartial" tribunal. For us in Britain an impartial tribunal has to be a *jury* of the defendant's peers, chosen by lot, who have no axe to grind and who know nothing about the case except what they learn in court (hence our restrictions on pre-trial media reporting), and who are not professional brethren and colleagues of the prosecutor. In Napoleonic-inquisitorial jurisdictions it is considered to be "fair" to be tried by case-hardened professional judges who will have been prosecutors but have never been defenders, and who may try case after case with the same prosecutor but always different defenders. These arrangements have never been contested in the name of "impartiality" for it is assumed that the judiciary are somehow impartial by nature… after all, they have become judges by passing a law exam.

A fair hearing for Britons also includes the right not to have previous convictions mentioned before the verdict. Previous convictions are always mentioned and considered by Italian courts when reaching a verdict. We also consider it fair to have hearsay testimony excluded, for the reported statement can become the testimony of an absent witness who cannot be cross-examined. On the matter of hearsay testimony, Italian procedure distinguishes between "sentito dire" testimony (= literally "hearsay", but in Italian judicial parlance it refers to when a witness reports an unattributable rumour), and "de relato" testimony, when a witness says "Mr So-and-so [not present in court] told me that….". The testimony of unattributable rumours is not admissible, the testimony of reported statements by a named third party is admissible. The impossibility of cross-examining the absent "witness" is not considered important. Until the reform of 1989 defence lawyers were not even empowered to call, examine and cross-examine witnesses at all, but could only respectfully suggest the names of witnesses to the judge, and then when witnesses were called, suggest questions to be put to them. The judge alone had to power to decide which witnesses to call and then actually to put questions to them. They can now call their witnesses and examine them and cross-examine those of the other side, although the judge still has the power to veto witnesses and any of the questions, and to put his own questions to them.

Lastly the "reasonable time" after which an arrested person can expect a public hearing is not specified by either the Charter or the Convention. For us in Britain is is within *hours*, whereas in Italy, and other continental jurisdictions, and in the Corpus Juris proposal which presumably is the collective distillation of the continental systems, it is considered "reasonable" to spend *six months* and more in prison before appearing in a public hearing.

It can be seen from this that the ECHR and the ECFR are very thin blankets which have to cover both our system and theirs, and can only do so by being very vague and indeterminate. Above all, these two documents merely state general principles, which it is then hoped will be applied by the judicial powers-that-be in each signatory state. Our British safeguards such as Trial by Jury and Habeas Corpus provide practical remedies to ensure that the rights of personal freedom and a fair trial etc will be effectively protected, without having to wait for a long time and then appeal to a distant European court against the judicial institutions of one's own country.

It has been noted that the ECHR was drawn up in 1950 largely by British lawyers to provide some sort of barrier against any future repetition of the horrors of the thirties and forties in

Europe. Presumably they must have faced the question of whether to include matters like Habeas Corpus and Trial by Independent Jury amongst the basic human rights, but then realised that the countries where these rights were to be applied had completely different traditions that did not contemplate these safeguards which in Britain are taken for granted. For continental countries in the Napoleonic-inquisitorial tradition, the ECHR is, or should be, a step up. For Britain, if this became the sole arbiter of our rights, it would be a step down.

The incompatibility between the two systems can be seen if we consider the European Arrest Warrant: it is true that Section 21 of the Extradition Act 2003 requires the judge at the extradition hearing to discharge the person if the judge is of the view that execution of the EAW would result in the person's Human Rights as defined by the European Convention being breached. The reason why this has so far never been successfully used to stop an EAW extradition is that all the EU countries are signed up to the ECHR, and so are "presumed" to respect the rights therein defined. The trouble is that these systems do not respect what Britons have for centuries considered to be their rights – to trial by an independent jury, to no detention without a charge backed by evidence exhibited in open court, etc. And the ECHR makes no provision for them either. If Section 21 were to read "… if the judge is of the view that execution of the EAW would result in the person's basic rights, as defined by British law, being breached…" then it would be unacceptable to our continental partners. Likewise if we were to demand, as we should, that the ECHR be amended to include Habeas Corpus, Trial by Independent Jury, etc. there would be an outcry from our partners, for it would force them to adopt a profound and revolutionary transformation of their whole system.

The government's intention therefore, as stated in Command Paper 8671, to use the ECFR or the ECHR as a yardstick to see whether a particular measure is in conformity with *our* fundamental rights and civic liberties, as these have been established over hundreds of years of British constitutional development, is therefore totally inadequate and inappropriate.

SECTION VII

The irreversible ratchet.

If we fail to opt out of, or opt out but then opt back into, any of the 135 JHA measures, we will become **subject to the jurisdiction of the ECJ and the enforcement powers of the European Commission**. This will be a position from which, however uncomfortable it may become, the only retreat will be a complete British exit from the EU itself, with a unilateral repeal of the ECA1972.

At present the "enforcement powers" of the Commission consist in the imposition of fines on non-compliant member states. However it could well be that more stringent and coercive powers will be acquired in future (see below). Enforcement powers, as the word itself implies, include the application of force –even brute force – against those who do not comply.

When a key personage in the Commission which is to wield enforcement powers over us says, as the Commissioner for Justice has said, that we would be "crazy" (not "ill-advised", mind you, but "crazy") to want to opt out of any of the JHA measures, even though this option be specifically provided and allowed by the treaty, it may be reasonably anticipated

that our position under the rule of her enforcement powers could well become uncomfortable.

That a unilateral withdrawal by Act of our sovereign Parliament is legally possible and legitimate has always been maintained, not just by anti-EU activists, but by the likes of Lord Denning, and even by Lords Laws and Crane in their judgement against the Metric Martyrs, as well as by Baroness Vernham Deane speaking for the government when, rejecting a motion by Lord Stoddart to include a codicil to the Treaties spelling out that the UK did retain the right to unilateral withdrawal, she said that it was obvious and did not need re-stating.

It has been said, drawing on the evidence of recent opinion polls, that a majority of the people of Britain would be quite happy to withraw from the EU. Indeed the present government has felt it necessary to promise a referendum to put precisely that question to the people, at some stage in the future.

However the majority of members of the Lords' Select Committee are clearly of a different opinion, since they are asking the government not even to proceed with the opt-out.

I would invite them to ponder whether it be advisable to force the issue by accepting all 135 JHA measures? The present government's prospect of repatriating any powers at all after the next election would certainly be blocked if the JHA measures are accepted. Indeed it can and should be argued that opting-in to any of the powers is a transfer of competence from London to Brussels which must trigger a referendum under the vaunted "referendum lock" instituted by the present government.

As "ever-closer union" proceeds, a point comes when our institutions have to somehow merge with those of our partners. The 135 JHA measures are steps in this ongoing process. I think I have shown, after some thirty years of research "in the field", that our system (or systems) of criminal justice is incompatible with that of our continental partners.

If ours is a round hole, theirs is a square peg. The two simply do not fit together.

Ever-closer union can therefore only go ahead if their peg becomes round, so as to fit into our round hole, or our hole becomes square so that their square peg can fit inside it.

Could we persuade our continental partners to adopt the central features of our system of criminal justice? Twenty years ago I wrote to the then Lord Chancellor, Lord Mackay of Clashfern, suggesting that the UK should raise this issue with our European partners. He did not reply. I asked Lord Peter Taylor the Lord Chief Justice, whom I had the honour and the pleasure to meet when we spoke from the platform of a conference in Florence in 1993, to remind him to reply, and he did so, but I still never received a reply. The British political class as a whole seems to have preferred to ignore this vast discrepancy between our and their judicial systems and the problems arising from it for the EU project.

Returning to the specific example of the European Arrest Warrant, since coming into effect it has been heavily criticised for having caused extraditions with no-questions-asked to jurisdictions where some innocent British citizens had to wait long months in terrible jail conditions with no public hearing before then being discharged as having no case to answer,

there being no hard, safe evidence against them at all (the case of Andrew Symeou springs to mind).

When the EAW was being debated in the European Parliament in 2002, the late Neil McCormick MEP, QC, foresaw such a potential outcome, and proposed as a remedy a "Euro-Habeas Corpus" provision. This is the only official attempt I am aware of to introduce some element of basic British justice into continental procedures. It failed miserably, for his motion was voted down by a crushing majority of MEPs. The reality is that Habeas Corpus is not provided in any European Charter or Convention of Rights and is not thought to be necessary or desirable by our continental partners. The **serious risk**, or indeed **likelihood**, is that if we allow ourselves to be carried forward in this general process to merge our systems together with theirs, we will be required to give it up.

During the 1980s the Italian Parliament, after some judicial scandals including one colossal miscarriage (the Tortora case) which was likened to the Dreyfus case, was attempting to reform their code of criminal procedure which was the one inherited directly from Mussolini and still being used. There was talk of introducing the "Perry Mason mode of trial" into Italy (Italians were all familiar with the TV series).

If this had happened it would have been a momentous event, for the homeland of the Holy Inquisition to adopt the principles and practices of the Magna Carta tradition. But it did not happen, the reform turned out to be mild and timid. Some of the rules of procedure were changed, but the powers and the composition of the career judiciary were left intact, as explained to me by Senator Vassalli in the interview for the Financial Times which I cited above.

In fact the career judiciary has an Association, it commands a majority in the Supreme Council of the Judiciary by which it is regulated, so it is a very powerful lobby at the national level, and, together with similar bodies in other countries, at a European level. There have been calls in Italy to at least separate the career of prosecutors from that of judges (they form a single body with one career path), so as to obtain a greater degree of independence of the judicial from the prosecutorial function. These calls, even supported by the Berlusconi government when he and his allies commanded a clear majority, have never met with success.

What is more, the countries that follow the Napoleonic-inquisitorial tradition are the majority in Europe, so under any QMV decision-making we could find ourselves forced to face the alternative of either accept their decision, however unpalatable it might be to us, or simply to pull out of the EU by repealing the ECA72.

SECTION VIII

The 135 JHA measures we are being asked not to opt out of, and the 35 measures we are being asked to keep.

We are being asked not to opt out of all 135 JHA measures, by Commissioner Reding and by the House of Lords' Committee. We also being asked by the government to accept opting-back-in to 35 of them.

They cover many areas of judicial and police activity, and they all increase the areas of jurisdiction of the European Court of Justice and subject us to the enforcement powers of the European Commission.

In neither of these bodies will the UK have a veto. Nor, even if we combined with the other two or three states who share something of our legal traditions (Ireland, Malta and Cyprus), will we be able to form a blocking minority. We shall therefore be obliged to accept the rulings of judges who grew up and were trained and educated in a tradition, or traditions, that do not share our values.

What is more, the ECJ has a mission statement, which is to favour the "ever-closer union of the peoples" of Europe. Its decisions must tend towards that aim. Some criticise it for this, and say it is not a true court of law, if it has to favour one pre-set side in any argument.

We have seen with the Corpus Juris proposal that the general aspiration of the architects of the European project in this field is to arrive eventually at a single system valid for the entire EU territory. Many of the 135 JHA measures have been described as "stepping-stones" towards a single system. In view of the UK's negative reaction to the Corpus Juris proposal (in particular by the Select Committee chaired in 1999 by Lord Hope of Craighead), it has been soft-pedalled, the alternative of "mutual recognition" has been put forward instead for the time being, as the original proponents have bided their time.

Others, in particular Dominic Raab MP, writing for Open Europe, have been through the list of 135 measures one by one. In each case Mr Raab sees no practical need to accept the jurisdiction of the ECJ and the enforcement powers of the EU Commission. He suggests bilateral or multi-lateral agreements or Memoranda of Understanding between States, where each retains its sovereign power of decision. He suggests "cooperation, not control" and this seems eminently sensible.
There is surely cooperation in trans-border law enforcement between the United States and Canada, but nobody has suggested that both should subject themselves to the over-arching jurisdiction of a common supreme court in order for this to be possible or in order for it to work. Nor indeed for both governments to be subjected to its enforcement powers, renouncing their national sovereignty.

Mr Raab suggests opting back in to the EAW but for us to put conditions to be met before we do. Three of the conditions he suggests however do not pertain to the EAW itself, as he appears to think, but to the very nature of the Napoleonic-inquisitorial systems used on the continent. They are:

- "Stronger preliminary evidence to be required" from the requesting State. This would mean that each of the other States in the EU would have to adopt our requirement that some solid prima facie evidence be assembled *before* an arrest is made. In many or perhaps most of these states there is no such requirement, neither for arrests made within their borders nor for arrests requested elsewhere. They are simply not geared to operating their detective work in the way we are. Their career judiciaries are more accustomed to arresting a suspect as the *first* step in an investigation, and only then acquiring evidence, or "proofs", of his or her guilt. And as discussed above, our demand for them to produce "evidence" would easily get "lost in translation".

- "No double jeopardy." This would require the Italians, for one, to change their very constitution, which provides that any party (prosecution or defence) has a right to appeal against a verdict.

- "Extradition for prosecution but not for investigation purposes". As discussed above, this would be meaningless in jurisdictions like the Italian, where there is no conceptual distinction made between an investigation and a prosecution, both being subsumed under the general concept of "azione penale" against someone.

Mr Raab also touches on the matter of **convictions in absentia**. Should we extradite persons to serve sentences when their trial or trials and definitive convictions were conducted in their absence ? Should we extradite these persons to jurisdictions where they will have no right to any hearing in a court of law, where they may state their case and offer a defence?

There was a test case before the ECHR a number of years ago, Colozza vs Italy, where the person was convicted in his absence, never having been notified that there were proceedings underway against him. He was later traced by the authorities, arrested, and sent to serve his sentence, with no possibility of defending himself in any court. He died in prison but his widow won the case, and a small sum of money, and the European Court ordered Italy to tighten up its notification procedures.

What has not been tested, to my knowledge, is a case where a defendant was notified of the proceedings, but chose to abscond. It is generally assumed that if the defendant is then convicted in absentia, that is his own choice and his own fault, and so he deserves to serve his sentence without being heard in a court of law. Now this argument may have some validity in a jurisdiction like Britain's.

But in jurisdictions where there is no Habeas Corpus, and where court proceedings can drag on for many years, is this fair? In one case, a man was extradited to serve a sentence of 26 years on a conviction which he always maintained was wrong, for a crime that he did not commit. At the beginning of the penal proceedings against him, he sought refuge in another country. The proceedings dragged on for seven years, passing from the preliminary judicial investigation to the court of first instance, the court of appeal, and the final court of Cassation which confirmed his conviction. In his absence his lawyers did not conduct his defence as well as they might have done if he had been present. After his definitive conviction the State that had tried and convicted him demanded and obtained his extradition. He was then just bundled into jail to serve his sentence, with no right nor chance of any hearing in a court of law. His own lawyer (a new one) told him "Ah, if only you had returned to face your trial you would probably be a free man today". However, the reason he did not return to "face the music" was that under the rules on "precautionary custody" if he had returned, he would most certainly have been imprisoned at the start of the proceedings against him, and only released, as was quite possible, after seven years when and if the court of cassation declared him to be innocent. He faced a cruel wager: to return meant putting seven years of his life on the table, with the certainty that he would lose them, or at least some of them if he were cleared perhaps on appeal (as happened with Amanda Knox and Raffaele Sollecito in a well-known case in Perugia). That was the price he would have had to pay in order to have a chance of avoiding the 26 years' sentence he is currently serving, without ever having been heard in any court of the country that convicted him. Is that fair? As far as I know, this argument has never been put to any court, e.g. the European

Court of Human Rights. It is another instance of the incompatibility between their system and ours, for we do not hold trials in absentia at all.

THE MERGING OF ENFORCEMENT AGENCIES

9. Eurojust, Europol, CEPOL,
10. Our traditions of policing and theirs – the Eurogendarmerie

SECTION IX

Eurojust, Europol, CEPOL, harmonisation etc.

A fair number of the 135 provisions, including those 35 that the government wishes to opt back into, concern Eurojust, Europol, CEPOL (the European Police College). It is important to consider that not only are our judicial systems quite different from those of our European partners, but also our concepts, traditions, and methods of policing.

First, are Eurojust and Europol merely coordination offices, like say Interpol? At present this seems to be the case. The House of Lords' Committee denies that "harmonisation means that these are building blocks for a pan-EU justice system".

However as regards Europol, some 16 years ago, as I wrote in an article in the European Journal (February 1997), quoted in the House of Lords by Lord Stoddart, the German Chancellor Helmuth Kohl said that he expected Europol to develop into a European F.B.I. with operational powers. We may note that Kohl was the mentor of the present German Chancellor Angela Merkel. That was, and surely still is, the ultimate intention of these powerful Eurocrats.

If it is said "But Europol has no operational powers" we reply "Today no. But if we are to submit to an overarching decision-making authority, we must look to the intentions of those most likely to have a decisive influence on that authority, for once we have submitted we must accept whatever decisions it hands down."

Likewise Eurojust has been seen as a stepping-stone to the establishment of a European Public Prosecutor. Once we have accepted the jurisdiction of the ECJ and the enforcement powers of the EU commission over us in these matters, our destiny will lie in the lap of these bodies, over which we have little or no influence. And whose systems and concepts of criminal justice, as I have endeavoured to show, have little in common with ours.

The mere existence of a "European Police College" is surely hard evidence of the intention of creating a homogenous European police culture and set of values, and what is the point of that if not to then establish a unified European Police Force?

SECTION X

Our traditions of policing and theirs – the Eurogendarmerie

And here too we face a major difficulty, for the traditions of policing in the UK are very, very different from those in continental Europe.

As I wrote in a pamphlet, “The Coming Tsunami”, published in 2010:

In Britain the police is normally *unarmed, civilian, locally recruited and locally accountable, and its priority task is to detect and prevent crime.* The maintenance of public order is a secondary task. The concept of “policing by consent” is considered paramount.

In continental nations, the police are *lethally armed at all times, paramilitary, nationally recruited and controlled by central government, and redeployed all over the national territory, and its priority task is to keep public order*, which means maintaining the supremacy of the State over the people. When it investigates crime it usually does so under the strict supervision of the investigative judiciary. The idea of “policing by consent” is alien to the value-systems prevailing on the continent, and would cause puzzlement. People there would say “but the police are necessary precisely when there is no consent to government policies.”

As part of the transformation of the EU into “one country”, as the German Chancellor Helmuth Kohl put it, the European Commission has set up not only Europol, with its head office in the Hague, but also an embryo European riot-police force, called the European Gendarmerie Force, explicitly in the service of the EU (though there have been attempts to mask this), stationed in barracks in Vicenza, N. Italy, for the time being. There are at present six participating states which each contribute their own Napoleonic-style armed paramilitary anti-riot gendarmerie force – the French their Gendarmerie, the Spaniards their Guardia Civil, the Italians their Carabinieri, etc. It has its own official website, www.eurogendfor.eu , with a lot of photographs which show exactly what it looks like.

Now since the EU has set up its own armed paramilitary police force, we must conclude that it is obviously intending to grow it and to expand it, and at some stage, to deploy it and to *use* it. So far six States are participating, and Britain is not one of them. Will we ever see the Eurogendarmerie on our High Streets?

At present this depends on the Treaty of Velsen, which gives the legal basis of the EGF. See http://www.eurogendfor.org/eurogendfor-library/download-area/official-texts/establishing-the-eurogendfor-treaty

Art. 6.3 of this treaty says the EGF may be deployed in any state with the “agreement” i.e. the consent of that state. UKIP asked the previous government in both Houses of Parliament for an assurance that our government would never give any such consent. That assurance was denied. This can only mean that that government intended to give its consent.

Moreover with the failure to exercise the opt-out, or opting in to the relevant measures, matters of Justice & Home Affairs now come within the EU’s remit, so they can be decided by majority voting.

One measure of particular interest, which HMG has declared it intends to opt into, is Council Decision 2008/617/JHA on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations. “Special intervention units” are obviously going to be units of the Gendarmerie, the Guardia Civil, the Carabinieri – ie the very components of the Euro Gendarmerie Force.

Whereas the previous government refused to answer the Parliamentary questions as to whether it would give consent to the deployment of the Eurogendarmerie on British soil, the present government received a similar question as follows:

Criminal Proceedings: EU Law

(Hansard, written answers for 11/06/2012)

Mr Raab: To ask the Secretary of State for the Home Department with reference to EU Council Framework Decision 2008/675/JHA, in what circumstances she envisages that the **UK would request special intervention units from other EU member states** to operate on UK soil. [110125]

James Brokenshire: The United Kingdom's response to any incident will be individually tailored to the nature and scale of that incident. Should we identify the need to seek the support of our allies in managing a crisis situation, **we would of course do so**. [emphases added]

The government should be warned that with this attitude it is recklessly playing with fire. The "special intervention units from other EU member states" that "of course" they would ask to intervene on British soil would be the very self-same units that make up the European Gendarmerie Force.

Unless we exercise the opt-outs now, and keep them, we will be subject to the jurisdiction of the European Court of Justice, and the enforcement powers of the Commission. These powers could at some stage go beyong the power of fining non-compliant states, and could include command of the Eurogendarmerie, at present reporting to the Council of the Ministers of the participating states (CIMIN). The Commission could see an increase in the array of enforcement powers at its disposal, to include Europol and the Eurogendarmerie.

The point is that once the armed, paramilitary, Eurogendarmerie are inside the country, no British government can ever order them to leave, for they will only obey orders from their masters in Brussels. For the people of Britain it will feel like being under military occupation by a foreign power, imposing alien laws on us.

At that point British participation in the EU project will no longer be voluntary. Our sovereign right to withdraw, never denied by any British participants in the debate, will have gone.

CONCLUSION

In conclusion I therefore urge the House of Lords Select Committee, and the House of Lords itself, to support the opt-out from the 135 JHA measures already voted by the Commons, and the government and Parliament not to opt back in to any of them, in particular to repudiate the European Arrest Warrant, which the Conservative Party officially opposed at its inception in 2003.

Otherwise this will undoubtedly constitute a transfer of significant further powers from Britain to Brussels, that must surely trigger a referendum under the existing legislation.

11 September 2013

Europol—Written evidence

1. Introduction

1. Europol submitted two sets of written evidence to the initial inquiry into this issue, on 18 December 2012 and 14 February 2013. The Europol Director Rob Wainwright gave evidence to the Committee in person on 29 January 2013. The report resulting from that inquiry gave a thorough analysis of the issue and took due account of Europol's evidence. Accordingly, and as requested in the call for evidence for the follow-up inquiry, the evidence provided hereunder is limited to developments since the first inquiry was published in April, most obviously the Government's announcement of its intention to opt out and of the measures it would seek to rejoin.

2. Although the future Europol Regulation is outside the scope of the opt-out decision and therefore the scope of this inquiry, it is important to state from the outset that opting in to the Europol Regulation is by far the most important decision facing the Government, from a Europol perspective. It is of course important that the UK will seek to rejoin the Europol Council Decision, but this measure will cease to apply upon the entry into force of the Europol Regulation. Europol therefore welcomes the Government's announcement of its intention to opt in to the Regulation, provided its key concerns with the draft are addressed. This sends a positive signal to law enforcement partners throughout the EU and demonstrates the UK's long-term commitment to EU police cooperation and its most important support and coordination mechanism.

3. The numbering of the headings below is based on the questions in the most recent call for evidence. No evidence is submitted for questions 1 and 6.

2. What is your view on the list of 35 measures that the Government will seek to rejoin if the opt-out is exercised? Are there in your view any measures that are not on the list that ought to be; or that are on the list but should not be?

4. From a Europol perspective the most important aspect of the Government's July announcement is that it will seek to rejoin the *Council Decision 2009/371/JHA establishing the European Police Office (Europol)* (hereafter referred to as the Europol Council Decision (ECD)), Europol's founding act. Europol welcomes this decision, which shows that the ECD is viewed as one of the key Justice and Home Affairs (JHA) measures and sends a clear message about how strongly the UK values Europol's work in the fight against international crime and terrorism.

5. The other 34 measures selected by the Government broadly reflect the most important instruments of law enforcement cooperation, based on Europol's assessment.

6. In its previous evidence to the Committee, Europol had also mentioned further measures assessed as important from a practitioner perspective. Not all of these measures are included in the list of 35. Although Europol stands by its earlier assessment of the importance of these measures, failing to rejoin these measures is unlikely to create an immediate operational risk for the UK.

7. Many of the JHA measures which the Government does not intend to rejoin concern minimum standards of various kinds which require all Member States to harmonise their legislation and/or working practices (for example, criminalisation of certain substances or activities, minimum penalties, designation of contact points, etc.). Individually, measures of

this nature have been classified as 'harmless' by commentators opposing the opt-out and 'obsolete' or 'superfluous' by those in favour of opting out.

8. However, it is important to see such measures from a wider perspective. Collectively, they contribute to harmonising legislation and law enforcement practices across the EU, levelling the playing field for practitioners and eliminating arbitrary differences between jurisdictions, which establish vulnerabilities capable of being exploited by criminals.

9. Throughout the Government's assessment of the policy implications of the opt-out, it expresses the intention to remain compliant with the majority of these measures, meaning that there is no operational impact in the short term. In the longer term, however, the opt-out will remove the legal certainty about the UK's legislation and activities upon which other Member States have so far relied.

10. Whatever the reality of British practice in this field in the future, the formal exclusion of the UK from these measures is bound to create a perception among law enforcement practitioners – and indeed criminals – that the UK is outside the zone of cooperation in the specific areas covered by such measures, be it counter-terrorism, psychoactive substances or counterfeit currency.

11. There is also a risk that, in the longer term, the UK's ability to influence and participate in law enforcement cooperation will be diminished by its position as an observer rather than a partner (or indeed leader, as it has often been in the past).

12. Specific comments regarding some of the individual measures covered by the opt-out decision are provided under question 5.

3. Does the list of measures that the Government will seek to rejoin raise any coherence issues, i.e. are some of the measures on the list connected to other measures that are not included on the list?

13. As noted under the previous question, the Government has expressed its intention to rejoin the ECD.

14. Several other JHA measures are of direct relevance to the functioning of Europol, and can be considered as implementing measures for the founding act itself. A full list of these measures is provided in part (A) of Europol's supplementary evidence to the initial inquiry, dated 14 February 2013.

15. In its explanatory memorandum (Command Paper 8671), the Government asserts "that it should not be necessary to rejoin any of the associated measures in order to participate in Europol."

16. Should the Government confirm its stated intention to opt in to the Europol Regulation, our understanding is that the Regulation will replace not only the ECD but also associated measures such as those on confidentiality and the analysis work files (AWFs). Should the Government decide not to opt in to the Regulation, the question of coherence would no longer be relevant because, in any case, the ECD would become obsolete upon the entry into force of the Regulation.

17. However, it is now almost certain that the Europol Regulation will not enter into force before December 2014, when the UK opt-out will take effect. This means that, even if the UK does choose to join the Europol Regulation, there will be a legislative 'gap' in transition between the opt out, when the UK will continue to be part of the ECD but not

the various implementing measures, and the entry into force of the Regulation, which is designed to replace those measures as well as the ECD itself.

18. Focusing on membership of Europol based on the ECD, the Government's assertion that the associated measures are unnecessary seems difficult to establish with any legal certainty. It is true, however, that most of these measures create legal obligations for Europol rather than for the Member States, meaning that the risk of opting out of them seems limited.

19. The only such measure for which applicability to the UK would have to be considered more carefully is *Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol*. This is the only 'implementing measure' which contains new aspects not found in the ECD itself, including the establishment of the Europol Security Committee. It also entails obligations for Member States, in particular to adhere to the use of the agreed classification levels, to ensure protection of the information and to provide information about security breaches.

20. It remains unclear what the legal basis would be for the UK to be part of the Europol Security Committee, if the UK has opted out of the Council Decision establishing that Committee.

21. There is no precedent for such questions. It is therefore important that such issues are carefully addressed when the UK does seek to rejoin the ECD, at which point the UK and the Commission will be required to arrange for transitional measures, which must then be approved by Council. Such measures could, for example, contain a reference to the applicability of the "associated measures". It must be hoped that that there is willingness on the part of the Government, the EU institutions and the other EU Member States to navigate a workable solution.

22. Miscellaneous comments regarding some of the other individual measures covered by the opt-out decision are provided under question 5.

4. Do the Government's explanatory memorandums raise any issues about particular measures on which you wish to comment?

23. See question 5.

5. What are your views of the Government's explanatory memorandums and their assessment of the policy implications and fundamental rights analysis conducted on each measure?

24. Certain issues have been identified which, while not of crucial importance for the national interest, merit consideration and remedial action through the transitional measures to be agreed with the EU when the UK seeks to rejoin certain JHA measures.

25. The Government will not rejoin the *Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union* on the grounds that Joint Investigation Teams (JITs) can be set-up under *Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams*, which the UK will seek to rejoin. However, the JIT Decision of 13 June 2002 only has temporary validity, and will cease to have effect when the 2000 Convention on Mutual Assistance in Criminal matters is ratified by all Member States (Article 5). This suggests that rejoining the Council Act of 29 May 2000 would be essential to safeguard the UK's future use of JITs.

26. The Government argues that *Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting* has virtually no impact for the UK. However, from the perspective of Europol and indeed the other EU Member States, it contains an obligation to inform Europol of the outcome of analysis performed on counterfeit coins. This obligation would no longer exist for the UK if it opted out of this measure. Of course, this would not prevent the UK from providing such analyses to Europol, but there will no longer be an explicit obligation to provide this from the UK. This is one among several examples (e.g. *Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances* and related measures) where the current measures provide legal certainty as well as useful information to practitioners across the EU. While the Government's Command Paper expresses the intention to remain compliant with such measures, even in the absence of an obligation to do so, in the longer term this is likely to result in less awareness elsewhere in the EU about legislation and enforcement practices in the UK. Such knowledge can of course be useful to Europol and other Member States, both for individual cross-border investigations and for strategic analysis of threats and trends.

27. The Government will not rejoin *Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences*. This decision requires each Member State to designate a specialised service which will have access to information concerning criminal investigations on terrorist offences conducted by its law enforcement authorities. This decision also provides that any such information (e.g. suspects' personal data, the activity under investigation, the type of offence) is transmitted to Europol. It goes without saying that Europol's ability to assist Member States in preventing and fighting crimes very much relies on the timely provision of information by Member States. Some reassurance can be found in the Government's policy assessment which states that "In most instances information would be exchanged regardless of UK participation in this measure, especially where it was deemed to be operationally important." However, as mentioned above in respect of psychoactive substances and Euro counterfeiting, opting out of this measure reduces clarity and certainty for practitioners and may also create undesirable perceptions of the UK's ability and willingness to cooperate with other Member States and EU bodies in the field of counter-terrorism.

28. A technical clarification is also called for in relation to the Government's policy assessment of this measure, which states that information classified above "restricted" level cannot be exchanged with Europol. This is incorrect. It is currently true that Europol's Secure Information Exchange Network Application (SIENA) is only accredited up to "restricted" level, but this does not prevent information being shared by other means (which happens regularly). Furthermore, work is underway to raise the accreditation level of SIENA to "confidential" within the next three years, which will significantly increase the proportion of British counter-terrorism intelligence capable of being electronically transmitted to Europol.

29. The UK will not seek to rejoin the *Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees* or the *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*. The majority of Europol's staff moved from a specific staff regime under the Europol Convention to the general EU staff regime in 2010, following the entry into force of the ECD. Both of these measures refer to the pre-ECD staff regime. Although there will soon no longer be any active staff under the regime covered by these measures, pensions and other benefits will still be paid to former employees for many years to come.

The UK opt-out may therefore cause some legal uncertainty in terms of decision-making processes and financial obligations.

11 September 2013

Fair Trials International—Written evidence

I write further to the call for evidence circulated by the House of Lords EU Committee. Fair Trials International ("**FTI**") welcomes the opportunity to comment further on the United Kingdom's opt-out decision under Protocol 36 of the Treaty on the Functioning of the European Union.

Please find attached a copy [available here] of the written evidence previously submitted to this Committee under the initial inquiry into the UK's 2014 Opt-out Decision, which continues to reflect our position. As evidenced by our previous briefing, FTI's primary focus throughout the debates on the opt-out decision has been on the operation of the European Arrest Warrant ("**EAW**"). Given our experience of numerous cases of injustice under the EAW, we could not support an opt-in to the EAW without a prior commitment to reform of the EAW at both the domestic and EU levels.

FTI has raised concerns regarding the disproportionate and premature use of the EAW system, which in turn have resulted in people being extradited for minor crimes and being subjected to prolonged periods of pre-trial detention. Further, our casework has demonstrated the failure of the EAW regime to ensure adequate protection of the fundamental rights of those whose swift removal from one Member State to another it effects.

The Government has stated in its Command Paper that the EAW Framework Decision – implicitly – allows refusal of EAWs on human rights grounds, as provided for under UK law, suggesting that opting into the EAW raises no concerns from a human rights perspective. However, whilst it may be true that EAW scheme implicitly allows refusal of an EAW on human rights grounds, this has proved to be of limited practical use: in practice, the courts apply principles elaborated by the European Court of Human Rights which impose virtually unachievable evidential and legal hurdles. FTI believes that the current approach to human rights protection needs redefining at both EU and national level so as to provide more realistic tests. As such, FTI has long called for reform of both the EAW Framework Decision and the UK Extradition Act with the objective of addressing the identified flaws.

We were, of course, encouraged by the Home Secretary's announcement that the Government would, in line with our recommendations, use the 2014 opt-out decision as an opportunity to raise the need for reform with the EU institutions and other Member States. While this has not yet produced concrete commitments to reform at the EU level, we greatly welcome the steps which the Government has now taken to seek reforms to the Extradition Act 2003, particularly the proportionality assessment, the mechanisms through which premature extradition might be avoided and the amendments to the appeal process. These go a long way towards addressing our concerns and justifying the decision to opt back in to the EAW Framework Decision. Our view is that certain of the proposed amendments to the Extradition Act 2003 could go further, particularly to ensure the adequate protection of fundamental rights, and we hope that the Government will be receptive to the amendments which we hope are tabled in Parliament during the progress of the Anti-social Behaviour, Crime and Policing ('ASBCP') Bill. We are producing a briefing on these amendments and will happily provide the Committee with a copy in due course. We also welcome the Home Secretary's announcement that the Government will opt into, and seek

to implement, the Framework Decision on the European Supervision Order, which FTI has consistently called for as a means of avoiding the pre-trial detention of some of those extradited under the EAW.

However, we also note that improvements to the EAW scheme are, to some extent, dependent on reforms to the EAW Framework Decision. We therefore maintain that the Government should seek a commitment from the EU Institutions and Member States to reform of the EU legislation. In this regard, we have been encouraged to see that the European Parliament has decided to produce a legislative initiative report, and wait to see whether it proposes reforms capable of addressing the major flaws in the EAW's operation and whether the Member States support its recommendations.

11 September 2013

Justice Across Borders—Written evidence

Question 1: If you gave evidence in the first inquiry, do you have any supplementary comments in the light of our Report and the Government's latest announcements?

1. We welcome the Government's decision to seek to rejoin the 35 measures specified in Command Paper 8671, although – as we argue below – we believe that there is a good case for adding to this list.

2. We believe that the Government should be clearer about its proposed handling of the remaining process, in particular:

(a) The submission to the EU institutions of a final list of measures which the Government will seek to rejoin and which has been authorised by both Houses of Parliament; and
(b) The negotiation, conclusion and content of the transitional measures.

(a) The submission to the EU institutions of the final list

3. The debate in the House of Lords on 23 July left the question of when a final list of measures (which the Government will seek to rejoin) would be approved by both Houses and submitted to the EU institutions in confusion.

4. Lord Taylor of Holbeach, winding up for the Government, initially said:

> "After 31 May [2014], not only will impact assessments be generated for each of the measures to which we are opting back in but there will be a second vote on the 2014 opt-ins…There will be a second vote on the whole package after 31 May… There will be a deadline of 31 May. The Government will make the decision but it will be up to Parliament to endorse it in a vote after 31 May. This is a matter where the Government and Parliament will be in constant dialogue. As I have said, there will be a debate in this House, I hope, in November. I hope that noble Lords will be furnished with arguments by the committee of this House that will enable us to discuss this issue properly at that time." (Cols.1282-1283)

5. He later corrected this by saying:

> "The brief I had that said that the vote would be after 31 May was incorrect. It has now been corrected. The vote will be before 31 May, which I am sure reassures noble Lords. It certainly makes my life a little easier, if I may say so."

6. The Government should clarify what process it intends to follow. The date of 31 May is only relevant as the date by which the United Kingdom has to file its formal notice of the opt-out. Yet on 24 July the Prime Minister wrote to the President of Lithuania (as the Presidency of the Council of the European Union) formally giving notice of the opt-out under Article 10(4) of Protocol 36.[14]

[14] Council Document 12750/13 of 26 July 2013, JAI 670.

7. In light of the fact that the opt-out notice has now been filed, we do not understand the Minister's statements in the Lords with respect to the 31st May, nor the reference to further "impact assessments", nor the reference to presenting "a proper case for renegotiation in respect of those bodies that we want to opt in to". It should be possible for Parliament to authorise a final list of measures without further impact assessments at such time as the remaining Commons scrutiny processes have been completed. And it should be possible, if not necessary, to opt back in to the measures without any "renegotiation".

8. The filing of the formal opt-out notice was, in our view, premature in that the Government of the United Kingdom does not yet appear to have any reassurance from the EU institutions or the Member States about what it would be able to opt back into. Nor does it have the firm approval of Parliament of the final list of measures which the Government will seek to rejoin.

(b) <u>Transitional Measures</u>

9. Article 10 (5) of Protocol 36, first sentence, states:

> "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."

10. Without the words "have ceased to apply", the word "afterwards" might mean either "after the original notification opting-out of the measures" or "after the date of the expiry of the transitional period" – in other words, either after the notification given prior to 1 June 2014, or after 1 December 2014.

11. But the phrase "have ceased to apply" implies that the notice to opt back in can only be given in respect of acts which have indeed ceased to apply, as and when they have ceased to apply, which cannot be the case until 1 December 2014. On this reading, the notice to opt back in cannot be given until after 1 December 2014, until there are in fact acts which "have ceased to apply".

12. It appears that the interpretation of this provision will be one aspect of discussions between the UK Government and the EU institutions. The Government's intention is to seek to eliminate or minimise any operational gap between the opt-out taking effect and the UK rejoining individual measures. We consider that the best outcome would be to avoid any gap, and the need for transitional measures, if this could be achieved. We would encourage the Government to press for this outcome.

13. The Government appears, however, to acknowledge that transitional measures will be required to cover the gap between the date the opt-out takes effect, 1st December 2014, and such time as the opt-back in takes effect.[15] This presents several challenges.

[15] Lord Taylor of Holbeach, 23 July 2013 Hansard Col.1282: "The timetable is that the actual opt-out does not occur until 1 December 2014, so there is a period for negotiations, which we believe will include transitional arrangements. We do not see a gap as being a serious obstacle for us in presenting to our European colleagues a proper case for renegotiation in respect of those bodies that we want to opt in to."

14. First, such transitional measures will need to be negotiated, approved by the Member States (and possibly their Parliaments), and enter into force before 1st December 2014. The result otherwise would be potentially catastrophic for the UK, which could be left temporarily without effective law enforcement arrangements with EU countries.

15. Second, such arrangements need to be drafted so that criminals and suspected criminals cannot exploit any loopholes or legal uncertainty arising out of the transition.

16. Third, the Government should clarify as soon as possible the content of such measures to ensure that this is consistent with the mandate given by Parliament. "Transitional measures" should not become a basket for measures which the Government wants or needs to be party to, at least in the short term, but has not included in the list of 35. It has been suggested, for example, that various measures – including those relating to Europol – could be omitted from the list of 35 on the basis that they will be included in the transitional measures, an approach which we reject.[16]

Question 2: What is your view on the list of 35 measures that the Government will seek to rejoin? Are there in your view any measures that are not on the list that ought to be; or that are on the list but should not be?

17. In answering this question, we also deal with Questions 3-5 on coherence issues and on issues arising from the explanatory memorandums.

18. As we stated at the start of this submission, we welcome the list of 35 measures but believe this should not be the end of the story.

The Command Paper: A Narrow Approach

19. In our view, Command Paper 8671 adopts too narrow an approach to the 133 measures. It is based on a single line of analysis: "Can we get away with not being a party to this measure?" The idea that a State with the standing of the UK is a party to an international instrument because of what other countries commit themselves to do, or because of what it might do for the rule of law in Europe, is completely absent. Since the driving force for the Government in opting out of the measures is fear of the CJEU's jurisdiction, we would have expected more analysis of the perceived risks in respect of each measure. But this case is not made out.

Other Measures which should be on the list

20. There appears to be a misconception that the 133 measures fall into two broad categories: the 35 on the Government's list, and defunct or obsolete measures, with only a small number in between.[17] The Command Paper shows this is not true. While the list of

[16] See the evidence of Rob Wainwright, Director General of Europol, to the Home Affairs Committee, House of Commons, on 3 September 2013, at Q90: "As I said, in the case of Europol there will be a gap, according to my expectations, because the new Europol regulation will not be ready in time. As for the wider packages, similar risks apply, so this is a very important part of the process that the UK Government makes sure that the transitional arrangements are in place and agreed in time with the European Commission. As I understand it, the UK Government officials are well aware of that and are working on it with some priority."

[17] See, for example, Lord McNally, House of Lords, 23 July 2013, Hansard, Col. 1234: "That commitment is reflected in the 35 measures listed in the Command Paper that we ask the House to endorse today. As a package, they enable co-operation

35 represents those with the strongest case for inclusion, there is a good case for including a large number of other measures, for the following reasons:

(a) Coherence
(b) The risk of an operational gap
(c) Reputational risk to the UK and Benefit to the EU by raising standards.

Coherence

21. This issue mainly arises in respect of Europol and to a lesser extent Schengen measures. While the Government has included in the list of 35 Council Decision 2009/371/JHA establishing the European Police Office (Europol), it has not included:

(19) Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees
(21) Council Decision of 2 December 1999 amending the Council Act of 3 December 1998
(64) 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
(104) 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
(105) Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements
(106) Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files
(108) Council Decision 2009/968/JHA of 30 November 2009 adopting the rules of confidentiality of Europol information.

22. The Command Paper rejects the case for being party to these measures on the basis that no UK legislative measures have been required for their implementation. We suggest that this reasoning is flawed. Being party to these measures gives the UK's authority for Europol to act, and to be associated with other parties, in accordance with these measures. If the UK is to continue to be fully part of Europol, even pending the adoption of a further Europol Decision, it ought for reasons of both coherence and authority to remain party to these instruments.

23. We have argued in paragraph 16 above that it is not sufficient to leave such questions to "transitional measures". First, this could create legal uncertainty. Second, it could raise doubts about what Parliament was actually approving. If measures do not feature in the Government's list, there is at least a presumption that they will cease to apply on 1st December 2014 and not be reintroduced through "the back door" of transitional measures. If measures are to continue to apply, if only for a short period pending entry into force of another measure, it is better to include them in the list with Parliament's clear approval.

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over invaluable practical measures to aid our police forces and criminal justice system. These measures are a crucial tool in the fight against international crime and terrorism.
However, other measures in the original 130 are not so useful: they may be obsolete, defunct or simply unused. That is why the Government's thinking on this issue has focused on the practical use of measures…"

24. The same applies to a lesser extent to the following Schengen measures, under each of which we have briefly stated why we believe the UK should remain a party. There is no suggestion that the CJEU poses a risk to the UK in respect of any of them.

(111) Accession Protocols
(122) Council Decision 2004/849/EC of 25 October 2004 relating to Switzerland
(132) Council Decision 2008/149/EC of 28 January 2008 relating to Switzerland

25. The reason given for not being party to these measures is that the new level of participation would be set out in the Council Decision on the opt-back in.[18] As stated in our previous paragraph, the procedure of not including measures in the list and of re-applying them through other Decisions or through the transitional measures carries risk of misunderstanding.

(112) SCH/Com-ex (93) 14 on improving practical judicial cooperation for combating drug trafficking

26. The reason given for not being party is that, in respect of EU Member States, this measure has been largely superseded by the EU MLA Convention[19] and will be superseded by the European Investigation Order (EIO), and otherwise through the 1959 Council of Europe Convention (and its Protocols) or the separate agreement implementing parts of the MLA Convention with Iceland and Norway. But the UK does not propose to opt back into the MLA Convention; not all Member States will be party to the EIO; and the Council of Europe Convention does not fill all the gaps.[20]

(114) SCH/Com-ex (98) 26 def setting up a Standing Committee on the evaluation and implementation of Schengen
(116) SCH/Com-ex (99) 6 on the Schengen acquis relating to telecommunications
(127) Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for SIS II
(129) Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation SIS

27. While we accept that it may be technically possible to continue cooperation related to these instruments without being party to them, the Command Paper acknowledges the interest which the UK has in them, not least through participation in relevant committees and sub-groups or the establishment of technical standards. So there is an argument based on coherence for remaining party to them.

<u>The risk of an operational gap</u>

28. We consider that the Command Paper analysis shows the risk of an operational gap in respect of the following measures:

[18] Paragraph 30, Cm 8671.
[19] Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union, (25), Council Act of 29 May 2000
[20] See further our paragraph 28 below on (25) the MLA Convention.

(2) Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates

29. The Command Paper states "We judge that non-participation in the network may diminish the ability of the UK to coordinate complex investigations and prosecutions in international cases involving Spain, Italy and France."[21]

(25) Council Act of 29 May 2000 establishing the Convention on Mutual Legal Assistance in criminal matters between the Member States of the European Union
(32) Council Act of 16 October 2001 establishing the Protocol to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union

30. At paragraph 120 of the Command Paper, the Government acknowledges that there will be gaps. Its judgment in the case of Denmark that "overall the Government expects the 1959 Council of Europe Convention and its Additional Protocols to be a viable alternative for the majority of forms of MLA" is not convincing. The coverage of interception of communications and banking information in paragraph 121 is similarly weak. Why jeopardise such an important area of cooperation for no good reason?

(30) Council Decision 2001/419/JHA of 28 May 2001 on the transmission of samples of controlled substances

31. At paragraph 142, the Government states: "We judge that the ability to share information and potentially samples for the purposes of securing a prosecution would not be compromised by a decision not to participate in this measure as that is likely to be covered by the EIO". In our view, this assurance should be stronger.

(66) Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences

32. Paragraph 137 states: "Continuing to share information is therefore important both operationally and in reputational terms". It adds in paragraph 139 that "in most instances information would be exchanged regardless of UK participation in this measure, especially where it was deemed to be operationally important". But that indicates a potential gap. Leaving this to "administrative means" (paragraph 140) is not as solid a basis as the measure.

(88) 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

33. Although the UK has not implemented this Decision, we believe that it would be useful in allowing EU citizens, including British citizens, subject to sanctions such as supervision orders, to move freely between EU Member States.

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[21] Paragraph 10. It continues: "It would be more difficult for prosecutors and investigators to make contact with their foreign counterparts, to set up co-ordination and case planning meetings, to resolve jurisdictional issues, to understand how to obtain evidence from those States, and also their ability to do so in a timely manner."

Reputational Risk to the UK and Benefit to the EU by raising standards

34. There remain a series of measures which, if the UK is not party to them, may not leave operational gaps but may cause reputational damage to the UK and loss of influence.[22] We have included in this section those measures which clearly benefit other Member States and the EU as a whole by raising standards. By not affirming these measures, the UK is abandoning one of the main avenues for building the rule of law in these important areas. These include terrorism, confiscation of assets, fraud and corruption where for many years the UK has encouraged other EU Member States and accession countries to adopt precisely these measures.

35. The titles of the measures are self-explanatory of their scope and therefore of the argument:

(4) Joint Action 96/698/JHA on cooperation between customs authorities and business organizations in combating drug trafficking

(5) 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

(17) Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime

(18) Council Framework Decision 2001/500/JHA of 26 June 2001 on the same subject

(54) 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

(58) Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

(33) Council Decision 2001/887/JHA of 6 December 2001 on the protection of the euro against counterfeiting

(39) (87) Council Framework Decisions 2002/475/JHA of 13 June 2002 and 2008/919/JHA of 28 November 2008 on combating terrorism

(43) 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

[22] In some cases, this is expressly acknowledged in the Command Paper, for example, at paragraph 90 in respect of (43), 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.

(45) 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

(84) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime

(98) Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network

(9) (49) Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States, and its application to Gibraltar

(47) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

(29) Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment

(1) (8) (12) Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, and the Council Acts drawing up the First and Second Protocols.

11 September 2013

Law Societies of England and Wales and of Scotland—Written evidence

1. The Law Society of England and Wales is the independent professional body, established for solicitors in England and Wales in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

2. The Law Society of Scotland is the professional body of the Scottish solicitors' profession. Not only does it act in the interests of its solicitor members, but it also has a clear responsibility to work in the public interest. That is why it actively engages and seeks to assist in the legislative and public policy decision making processes.

3. The Law Societies welcome this opportunity to provide evidence to the Justice, Institutions and Consumer Protection Sub-Committee and the Home Affairs, Health and Education Sub-Committee of the European Union Select Committee.

Question 1: If you gave evidence in the first inquiry, do you have any supplementary comments in the light of our Report and the Government's latest announcements?

4. The Law Societies support the main findings of the European Union Select Committee's initial report. Our position has not changed. We start 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 suspects and victims. Exercising the opt-out is likely to cause significant difficulties for cross-border criminal investigations and to increase the complexity of advising suspects and victims. It may also give rise to significant unnecessary costs (at a time when many reductions, not least in the field of legal aid, are being made to domestic criminal justice funding). The opt-out could also diminish the ability of the UK to influence future developments in this field of law at EU-level.

5. The Law Societies welcome that the Government has recognised the value of 35 of the EU police and criminal justice (PCJ) measures. These measures generally correspond to those that the Law Societies identified as of particular value to legal practice in the UK in cross-border cases (though below we highlight further measures that could be added). The Law Societies are also willing to provide additional input on the measures if this would assist policymakers.

6. It remains the case that we do not view any of the measures as harmful. The Law Societies are concerned that it may not be possible for the UK to opt back in to all of the measures that are proposed in the forthcoming negotiations and that this is an inherent risk in exercising the opt-out.

7. As the Law Societies have previously explained, accepting the jurisdiction of the Court of Justice of the European Union (CJEU) for such measures is unlikely to pose any practical difficulties for the UK,[23] and the UK has chosen to accept the CJEU's jurisdiction for PCJ

[23] Bar Council of England and Wales; Law Society of England and Wales—Supplementary written evidence to the original inquiry.

measures opted into following the Treaty of Lisbon and all other areas of EU law. If EU law is to function, then there must be a court able to provide interpretation on its meaning (through preliminary rulings to national courts) and to consider whether the EU institutions or Member States have infringed that law. Domestic courts already take account of CJEU case-law, even in relation to measures where the UK is not yet subject to the CJEU's jurisdiction.[24]

Question 2: What is your view on the list of 35 measures that the Government will seek to rejoin if the opt-out is exercised? Are there in your view any measures that are not on the lists that ought to be; or that are on the list but should not be?

8. If the opt-out is exercised the Law Societies welcome the provisional list of the 35 PCJ measures that the Government intends to request to rejoin.[25] The following measures on the list are viewed as particularly valuable:

- *Framework Decision on the European Arrest Warrant (EAW)*[26]
  The Law Societies believe that the EAW is extremely important. It could be improved but offers a better and more efficient system than previous arrangements.[27]

- *Framework Decision on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty*[28]
  This provides for a prisoner transfer scheme, which the Law Societies view as helpful in enabling nationals to serve sentences in their own Member States.

- *Framework Decision on taking account of convictions in the Member States of the EU in the course of new criminal proceedings;*[29] *Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States;*[30] *Framework Decision on the establishment of the European Criminal Records Information System (ECRIS);*[31] *and Framework Decision on joint investigation teams.*[32]
  Prosecutors regard these measures as particularly valuable.

- *Framework Decision enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*[33]

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[24] Assange (Appellant) v The Swedish Prosecution Authority (Respondent), [2012] UKSC 22.

[25] Command Paper 8671 - 9 July 2013, Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union, pages 8 to 12.

[26] Council Framework Decision 2002/348/JHA on the European arrest warrant and surrender procedures between Member States.

[27] See further our response to Question 6.

[28] 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.

[29] 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.

[30] 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.

[31] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

[32] Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams.

[33] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and

This measure can improve the procedural rights of the accused, for example, in EAW cases.

- *Framework Decision on the application of mutual recognition to decisions on supervision measures as an alternative to provisional detention (the European Supervision Order)*[34] This will be beneficial to many defendants resident in a Member State other than where they are due to stand trial.

- The various information and data sharing measures, and data protection measures. In particular, the *Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters* is important from the perspective of data protection.[35]

- The existing Eurojust and Europol measures (not all of which are on the list).

Comments on PCJ measures omitted from the Government's list

European judicial network

9. The Law Societies believe that the UK should seek to opt back into the European Judicial Network (EJN) instrument relating to criminal matters.[36] This aims to promote cross-border judicial co-operation in criminal matters. One of the key difficulties for legal practitioners when encountering EU PCJ instruments is a lack of training and awareness. Legal practitioners are also reliant on judges having sufficient training, in order that any relevant EU law is applied fairly and accurately in the case of their client. In addition, many practising solicitors are part-time judges, who could in principle also benefit from the EJN in the latter capacity.

10. It is vitally important that, as EU law develops, lawyers and judges applying EU law in the UK have access to adequate training and are able to access contacts in other Member States. It is for this reason that the Law Societies are also concerned that the UK has not yet opted in to the *Regulation establishing for the period 2014 to 2020 the Justice Programme*,[37] which aims to encourage a more consistent application of EU legislation in the field of judicial cooperation in civil and criminal matters.[38]

Convention on mutual assistance in criminal matters

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fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

[34] 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.

[35] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.

[36] Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

[37] Proposal for a Regulation establishing for the period 2014 to 2020 the Justice Programme (COM(2011) 759 final, 2011/0369 (COD)).

[38] Review of the Balance of Competences between the United Kingdom and the European Union, Civil Judicial Co-operation. Written response by the Law Society of England and Wales, August 2013, pages 18 to 19: http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-civil-judicial-cooperation/

11. The Law Societies note that negotiations concerning the European Investigation Order (EIO) have not concluded and it is not yet clear when this will take place.[39] Once concluded, there is likely to be an implementation period for Member States, perhaps of two or three years.[40] It may therefore be helpful to request to opt back into the measures currently in use that the EIO is intended to supersede, e.g. the *Convention on mutual assistance in criminal matters between the Member States of the EU* (the EU MLA Convention 2000).[41]

12. The Command Paper states that "…if the EIO is not adopted and entered into force before 1 December 2014 and the Government did not opt back in to the EU MLA Convention 2000, we believe that most forms of cooperation would continue on the basis of the *1959 Council of Europe Convention on Mutual Assistance in Criminal Matters* (and its Protocols). Indeed, as not all Member States have implemented EU MLA Convention 2000 the impact on our MLA relations with those States would be largely negligible".[42] We understand from the Command Paper that, in June 2013, only Greece, Italy and Ireland had not fully implemented the EU MLA Convention 2000.[43] The Law Society of England and Wales would again raise the general concern that there is a risk that it may not be straightforward for some Member States to revert to Council of Europe Conventions in the case that these have been superseded domestically. The 1959 Convention is also narrower in scope than the EU MLA Convention 2000.[44] We therefore think that it would be helpful for the UK to apply to re-join the EU MLA Convention 2000.

Mutual recognition to judgments and probation decisions

13. A review of extradition arrangements in the UK produced for the Home Office (otherwise known as the 'Scott Baker Review') highlights the potential value of the *Framework Decision 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.*[45] As the report explains, this would enable other Member States to "…[transfer] probation or non-custodial measures to the United Kingdom for execution rather than issuing a European arrest warrant for a sentence imposed in default…", thus potentially reducing the number of EAWs issued.[46]

Conflicts of jurisdiction in criminal matters

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[39] Proposal for a Directive regarding the European Investigation Order in criminal matters, 29 April 2010, 9145/10, 2010/0817 (COD).

[40] This is not clear in the latest published text from the negotiations. See Article 31 on transposition in the latest *Comparative table* of drafting: http://register.consilium.europa.eu/pdf/en/13/st07/st07805.en13.pdf

[41] Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the EU.

[42] Command Paper 8671, op. cit., page 80.

[43] *Ibid*, page 53. (We are not aware of the status of Croatia, which joined the EU on 1 July 2013.)

[44] CELS Working Paper Series, Opting out of EU Criminal law: What is actually involved? Alicia Hinarejos, J.R. Spencer and Steve Peers, paragraphs 65, 78 and appendix no. 25.

[45] 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.

[46] 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, paragraph 11.22. (This is also referred to as the 'Scott Baker Review'.)

14. From a practical perspective, when considering the *Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters,*[47] practitioners note that the instrument, which aims to prevent parallel proceedings in different Member States, could be helpful. Were the UK not to opt back in, as the Command Paper notes, other Member States would not be required to try to resolve a conflict of jurisdiction with the UK, which could be to the detriment of the accused.

15. It is also clear that withdrawing from this instrument could be to the detriment of the UK's own interests; for example, if the UK would like to prosecute a particular case and another Member State decides to go ahead before proceedings can begin in the UK. In this case, double jeopardy rules would then preclude the UK from prosecuting.

16. It is noted that Eurojust, acting as a College, provides non-binding opinions in the case that two or more members have not been able to resolve a conflict of jurisdiction. The sanction is to name non-compliant Member States in the Eurojust annual report. On the assumption that the UK would remain a member of the College there would remain some incentive for Member States to avoid parallel proceedings with the UK - although the potential for a decline in mutual understanding and cooperation would increase.

Question 3: Does the list of measures that the Government will seek to rejoin raise any coherence issues, i.e. are some of the measures on the list connected to other measures that are not included on the list?

17. There are groups of instruments which clearly go together (for example, the present measures relating to Eurojust and to Europol, not all of which are included in the current list); however, such measures are in a continual state of change, as measures are amended or new measures proposed.

18. The European Commission and Member States in the Council may have different interpretations of the Protocol 36 wording that the EU institutions and the 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 outcome of the negotiations is likely to be highly political.

19. On a broader level, the Law Societies have previously commented that many of the measures are intrinsically linked and may 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 team, etc. The more measures that are opted back into (excluding those that are obsolete), the less difficulty that is likely to arise from the UK not being subject to a measure which could be useful for an important cross-border investigation/prosecution.

Question 4: Do the Government's explanatory memorandums raise any issues about particular measures on which you would wish to comment?
AND

[47] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal matters.

Question 5: What are your views of the Government's explanatory memorandums and their assessment of the policy implications and fundamental rights analysis conducted on each measure?

20. The Law Societies recognise that a significant effort has been made to explain each of the measures in the explanatory memorandums. There is an analysis of the policy implications and the fundamental rights relevant to each instrument. As a general comment, the Law Societies believe that it is also important to consider the impact of the instruments from the perspective of the defendant in practical terms. For example, if the European Supervision Order is made available this would benefit many defendants and his/her family members who would be able to spend a pre-trial period in their Member State of residency prior to the defendant facing trial elsewhere.

Potential cost of opt-out

21. Article 10(4) of Protocol 36 provides that: "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."

22. The Command Paper explains that "the Government considers this to be a high threshold to meet; it would only cover those direct costs incurred as a result of the UK not opting back into a measure".[48] However, the Law Societies take the view that different legal interpretations of the treaty wording are possible and equally valid; including the possibility of a lower threshold being applied (and more costs therefore arising for the UK). For example, we understand that it is possible that the financial consequences could incorporate not only costs to the EU institutions but also the costs to the other Member States of instituting changes, which could be substantial. We further anticipate that this matter could become political in the negotiations. It is unclear how the Council will choose to interpret Article 10(4).

23. The Law Societies encourage the Government to carry out a thorough impact assessment taking account of the different possible interpretations of Article 10(4).

24. In addition, the costs of exercising the block opt out may include not only the costs imposed by the Council but also any domestic costs (including those of any transitional arrangements) and, if the UK is unsuccessful in rejoining the measures that it wishes to, the costs of putting into place alternative arrangements (where this proves possible).

25. Moreover, both prosecutors and defence practitioners involved in cross-border cases (from the UK and in other Member States) would require training to understand which measures the UK is still subject to, any transitional measures and any new framework.

European arrest warrant

26. The Law Societies support the Government's analysis that "the European Arrest Warrant has been successful in streamlining extradition processes and returning serious criminals".[49] We would add that, in general, the EAW has also benefitted the accused

[48] Command Paper 8671, op. cit., page 4.
[49] *Ibid,* page 94.

because extradition proceedings are more efficient and pre-trial detention periods tend to be significantly shorter than under the previous *1957 Council of Europe Convention on Extradition* (or ECE).

27. The Command Paper explains that "if the UK were to decide not to participate in this measure, we believe the UK would revert to the ECE and its additional Protocols. All Member States have ratified the ECE. Some barriers to extradition exist under the ECE that do not exist under the EAW, including the nationality of those sought and the statute of limitations (where the extradition offence would be time-barred under the law of the requested state). In order to remove these barriers work would need to be taken bilaterally, but there is no guarantee this would be possible where Constitutional barriers exist".[50] The Law Society of England and Wales is not convinced that an approach of reverting back to the ECE would work. Firstly, there is a risk that in some Member States the ECE would not be able to apply due to superseding legislation.[51] Secondly, some Member States never brought the ECE into force, e.g. Ireland in relation to the UK. The 'backing of warrants' legislation, which was used instead, has also been repealed. In the case of Ireland, the UK would require a bilateral arrangement.

European judicial network

28. While the memorandum detailing the *Council Decision on the European Judicial Network* correctly sets out the nature of the organisation, we are concerned that some of the underlying value of entities such as the EJN is being overlooked in the analysis. From a practitioner perspective, more rather than less training and contact with colleagues from other Member States is needed to ensure a greater knowledge of the EU instruments in this field and how to apply them.

29. If the UK does not continue to play an active role in bodies such as the EJN, this can only be to the detriment of those who find themselves subject to EU law instruments in the domestic courts. While some informal contact and networking would of course continue, the Law Societies doubt that all the relevant UK judges/practitioners required to apply EU law in criminal matters "…know the names and numbers of people they need to speak to regularly".[52] This depends on how much experience and training they have had of EU measures. While practitioners established in applying EU law may well have good contacts, this does not apply to all.

30. The Law Societies also believe that any assessment of the value of the EJN and the UK's involvement should also take into account the interconnection between civil and criminal matters.[53] The Government's assessment of EU civil judicial co-operation, as part of the Review of the Balance of Competences between the UK and the EU, is also relevant to the decision whether or not to stay within the EJN instrument.[54]

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[50] *Ibid*, page 95.

[51] The UK's 2014 Opt-out Decision (Protocol 36), Response of the Bar Council of England and Wales, written evidence to the original inquiry, paragraph 56.

[52] Command Paper 8671, op. cit., page 74.

[53] For example, an assault under criminal law and a civil action for assault can apply to the same circumstances. In the same way, there are levels of criminal and civil judicial co-operation.

[54] Review of the Balance of Competences, Civil Judicial Co-operation:
- Written response of the Law Society of England and Wales: http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-civil-judicial-cooperation/
- Written response of the Law Society of Scotland:

Question 6: Are the Government's proposed reforms to the European Arrest Warrant at the domestic level consistent with their desire to rejoin this measure, including the UK's obligations under the Framework Decision and the EU Treaties?[55]

31. The Law Societies support the Government's proposal to request to opt back into the EAW. 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 time that a suspect could be held in pre-trial detention.

32. The Law Societies note that the changes proposed to the Extradition Act 2003 with regards to the EAW are intended "...to strengthen further the operation of the EAW...".[56] While we do not express a view on the accuracy of the Government's assessment, the proposals to amend domestic law are clearly intended to be compatible with the UK's continued participation in the EAW regime.

33. We set out initial comments on the reforms proposed below.

i) Amend the Anti-Social Behaviour, Crime and Policing Bill to ensure that an EAW could be refused for minor crimes.

34. The Law Societies have previously called for the introduction of a principle of proportionality in the application of the EAW. In principle, we support measures contributing to the application of such a principle and note its incorporation in the amendments to the Anti-Social Behaviour, Crime and Policing Bill.[57]

35. However, we do have some concerns regarding legal certainty and whether this proposal would be in accordance with the underlying Framework Decision.[58] As the Law Society of England and Wales stated in its response to the Government's review of extradition arrangements in 2011, "there are clearly shortcomings in the EAW scheme, such as the lack of a proportionality test, which cannot be addressed by UK implementing legislation alone but only by amendments to the EAW scheme itself".[59]

36. The Law Society of England and Wales has further taken the view that "to the extent that legislative amendments to the EAW scheme are considered necessary, these should, as a matter of principle, be adopted at EU level and not by individual Member States".[60] While domestic improvements are therefore welcome, the Law Societies believe that it

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https://www.lawscot.org.uk/media/649594/lawref%20_civil_judicial_cooperation.pdf

55 We have considered the reforms proposed as presented in the Home Secretary's Oral Statement on the 2014 decision, 9 July 2013: https://www.gov.uk/government/speeches/home-secretary-oral-statement

56 Anti-Social Behaviour, Crime and Policing Bill, Written evidence from the Home Office, Rt Hon Damian Green MP, 12 July 2013.

57 Anti-social Behaviour, Crime and Policing Bill (HC Bill 93), as amended 17 July 2013.

58 For example, in the recent *Radu* case, the CJEU gave a narrow ruling and declined to follow the Advocate-General's opinion, which recommended that in EAW cases consideration should be given to whether detention is proportionate. (See *Ministerul Public - Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu*, Case C-396/11.)

59 Law Society of England and Wales Response to the Home Office Extradition Review, March 2011, page 9: http://www.parliament.uk/documents/joint-committees/human-rights/Law_Society_Response_to_Home_Office_Review_of_Extradition.pdf

60 *Ibid,* page 11.

is crucial that the UK engages with its European partners to change certain aspects of the application of the EAW (particularly in view of the possibility that the EAW Framework Decision could in the future be replaced by another instrument). We are aware that the Government has made some efforts in this regard already and encourage it to continue.[61]

Further practical measures

37. As has been previously stated: "Whilst the Law Society continues to call for a proportionality test to be introduced, the UK's continued participation in the EAW scheme should not be jeopardised by proportionality concerns… there may be other ways to address the absence of a proportionality test and other shortcomings identified in the operation of the regime. To this extent the Law Society would welcome urgent consideration, at both Member State and EU levels, of practical rather than legislative measures that could be adopted to address the problems caused by differing Member State practices in relation to de minimis thresholds for prosecutions and requests; not limited to producing a Handbook of good practice and sharing information on national practices. Specifically in relation to the predicted increase in EAWs as a result of the UK's connection to the SIS II the Law Society urges urgent consideration of the human rights and data protection issues raised by potential errors in alerts, and calls for the introduction of a mechanism for rectifying erroneous alerts."[62]

ii) Work with other States to enforce their fines and ensure that in future, where possible, a European Investigation Order is used instead of a European Arrest Warrant.

38. The Law Societies support this approach. We were pleased that a proportionality principle was included in the proposal for a Directive regarding the European Investigation Order in criminal matters. We note that negotiations concerning that instrument have not yet been concluded.

iii) Amend the Extradition Act 2003 to ensure that people in the UK can only be extradited under the EAW when the requesting Member State has already made a decision to charge and try them, unless that person's presence is required in that jurisdiction for those decisions to be made.

39. In principle, the Law Societies note that this could be a helpful approach and clearly aims to prevent abuse of the EAW.

iv) Implement the European Supervision Order

40. The Law Societies fully support this proposal and believe that it will make a significant difference for many British defendants eligible for bail awaiting trial in another Member State.

v) Amend our law to make clear that in cases where part of the conduct took place in the UK, and is not criminal in the UK, the judge must refuse extradition for that conduct.

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[61] The Civil Liberties, Justice and Home Affairs Committee of the European Parliament has decided to prepare an own-initiative report, 'Review of the European Arrest Warrant', and has appointed Baroness Sarah Ludford MEP as its rapporteur. This report is potentially very important as it will be produced as the negotiations on the successor to the Stockholm Programme on Justice and Home Affairs commence for the period 2015-2019.

[62] Law Society response to Extradition Review, op. cit., page 11.

41. In principle, the Law Societies believe that this might be a helpful approach.[63] It may be useful to consider whether corresponding amendments could, at a later stage, also be made to the EAW Framework Decision or alternative future EU instrument in the interests of legal certainty.

vi) Ensure that people who consent to extradition do not lose their right not to be prosecuted for other offences, reducing costs and delays. Propose that the Prisoner Transfer Framework Decision should be used to its fullest extent so that UK citizens extradited and convicted can be returned to serve their sentence in the UK.

42. In principle, the Law Societies are supportive of this proposal. We also support the use of the Prisoner Transfer Framework Decision.

vii) Where a UK national has been convicted and sentenced in another Member State, for example in their absence, and is now the subject of a EAW, the Government will ask, with their permission, for the EAW to be withdrawn and will use the Prisoner Transfer Agreements instead.

43. The Law Societies fully support this proposal.

viii) To prevent other extraditions occurring at all, there is the intention either to allow the temporary transfer of a consenting person so that they can be interviewed by the issuing Member State's authorities or to allow them to do this through means such as video-conferencing whilst in the UK.

44. The Law Societies fully support this proposal.

Procedural rights roadmap

45. As the Law Society of England and Wales has previously stated, it "…is hopeful that the protection of defence rights in the operation of the EAW scheme will be further strengthened by the existing and pending instruments adopted in furtherance of the 'Roadmap'. The Law Society has called on the EU to introduce binding minimum procedural rights throughout the EU for suspects and defendants at all stages of the criminal process from investigation onwards…".[64]

46. The third measure of the Roadmap, the soon-to-be-approved *Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest,*[65] to which the UK has not yet opted in, also offers further protection, applying from the moment that the suspect/accused is arrested in the executing Member State. It provides that, in addition to the right of access to a lawyer in the executing Member State, the competent authority in the executing Member State must also inform the relevant person of his/her right to appoint a lawyer in the issuing Member State. If he or she wishes to exercise this right, then the competent authority in the executing Member State much inform their counterpart in the issuing Member State, who must provide information to the person concerned to facilitate the appointment. Whilst not a full

63 The Scott Baker Review, op. cit., from paragraph C.29 onwards, analysed the current content of the Extradition Act 2003 on the definition of an 'extradition offence' in detail.
64 Law Society response to Extradition Review, op. cit., page 9.
65 Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] - Approval of the final compromise text (10190/13, 2011/0154 (COD)): http://register.consilium.europa.eu/pdf/en/13/st10/st10190.en13.pdf

right to representation, this is a significant step forward and the Law Societies would urge the UK Government to opt in to this Directive.

47. The Law Societies wish to highlight the importance of the following statement in the Scott Baker Review: "We note that the Joint Committee on Human Rights recommended that the United Kingdom Government should 'take the lead in ensuring there is equal protection of rights, in practice as well as in law, across the EU'. We recommend that the UK Government work with the European Union and other Member States through the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and other measures to improve standards."[66]

48. A further example of the wish to improve procedural rights across the UK's jurisdictions, and be seen to do so, is reflected in the Criminal Justice (Scotland) Bill currently before the Scottish Parliament.[67]

Access to justice

49. Another important element is access to justice. The Law Society of England and Wales has previously highlighted that "anecdotal evidence suggests that the introduction of means testing in the Magistrates' Courts effectively denies access to legal aid for defendants in extradition proceedings, where the time taken to process applications exceeds the length of those proceedings".[68] The Scott Baker Review has since called for the reintroduction of non means-tested legal aid for extradition proceedings in England or an alternative solution.[69] As suggested by Fair Trials International, the abolition of means testing for legal aid in extradition cases could be included in amendments to the Anti-Social Behaviour, Crime and Policing Bill.[70]

19 September 2013

[66] The Scott Baker Review, op. cit., paragraph 1.14.
[67] This specifically provides for the rights of suspects in Chapters 4 and 5.
[68] Law Society response to Extradition Review, op. cit., page 2.
[69] The Scott Baker Review, op. cit., paragraphs 1.37-1.39.
[70] Anti-Social Behaviour, Crime and Policing Bill, Written evidence from Fair Trials International, 2 July 2013.

Helen Malcolm QC—Written evidence

1. This is the response of Helen Malcolm QC, Chair of the Criminal Law sub-committee of the EU Law Committee of the Bar of England and Wales (the Bar Council) to the House of Lords' supplementary Call for Evidence on the UK's 2014 Opt out decision (Protocol 36), for response in September 2013. It is submitted on a personal basis, although the EU Law Committee is fully aware of the views expressed herein, and of the evidence previously given on behalf of the Bar Council.

2. I refer to the previous evidence for full background and explanation of the Bar Council's views, which remain as stated therein.

3. In order to assist their Lordships with their consideration of the debate as it has developed in the intervening months, I have provided brief comments on just a few of the questions now posed. I remain available to assist further.

4. *Response to question 2*

- The list of potential 'opt-back-in' measures seems fairly sensible. I have heard a lot of concern expressed about the European Arrest Warrant (EAW), and whether it should remain on the list of potential opt-ins. It remains my view that it is the most important measure of all (see below, and by reference to our earlier evidence).
- There might be legitimate comment to be made about the fact that the UK is not opting back into any of the measures on substantive offences and penalties. Whilst it is correct that we already have domestic law to cover them, it sends an insular message to the other Member States.
- It is also the case that the Government's Explanatory Memoranda in Command Paper 8671 suffer from a lack of clarity as to the source of the evidence to support comments made. For instance, para 233 contains the following comment on the EJN: "Practical experience has shown that the contacts are not always the right people to speak to; often the contact points have a coordinating role. We judge that practitioners will know the names and numbers of people they need to speak to regularly. " It is not clear what the reference to 'practical experience' means; nor whose experience has been tapped; nor on what basis it is 'judged'. Similar comment can be made in relation to the passage on the EAW (eg at para 80 "particular concerns have been raised" – by whom? What is their practical experience?) The comments are not necessarily wrong, but as a result of the opacity as to sources, it is difficult for any reader to reach a fully informed judgment on the basis of the memoranda.
- As for the remaining measures, we would favour adding to the list of measures into which to opt-back, the **Framework Decision (FD) on mutual recognition of probation and alternative sanctions**. That would:
  (i) Show consistency with the desire to opt into the FD on custodial measures;
  (ii) Send the right message, promoting non-custodial measures where possible/appropriate; and

(iii) Underline the fact that it is more important from a rehabilitation point of view that defendants serve non-custodial sentences in their home countries, than custodial.

- **European Judicial Network –** I would expect the judiciary to have more to say about this, but in my view it is a useful network and training tool.
- **Convention on Mutual Assistance in Criminal Matters -** The European Investigation Order (EIO) is not yet up and running. However, if do not opt into this Convention and the EIO is not ready for use, we will fall back on the 1959 Convention. That would bring with it the same problems of falling back onto the 1957 European Convention on Extradition, that we have previously and fully explained.

4. Response to question 6:

- As stated, the EAW is in my view the most important measure of those with which we are concerned. The Government's proposed changes, especially regarding a proportionality test, are to be welcomed – but may have the effect of putting us in breach of the Framework Decision and thus, for the first time in reality, at some risk of adverse judgment from the CJEU. It is well known that those opposed to the pre-Lisbon measures argued that the UK should be concerned about the 'encroaching' of the CJEU. To date, our evidence and that of many other experts has been that this fear is unfounded. It would be ironic and frustrating if the UK now intends to place itself in breach of a FD.

5. Response to question 1:

- My principal concern now is that, whatever decision the Government reaches about opting back in, they need to make haste. Time is running very short already and it will be absolutely vital to ensure that the transitional provisions are agreed, in place, and (most importantly) widely publicised both in this country and in the other Member States, if the UK wants to try and mitigate the damage to the efficient administration of justice.
- I have heard real concern expressed in influential quarters in Brussels recently about the UK's opt-out decision, in particular that the UK will become the hole in the EU's security perimeter – and of course a haven for criminals.
- I also note that the Government seems optimistic that Article 10(4) on financial consequences will be narrowly interpreted (if invoked). I hope that that optimism is well founded.

2 October 2013

Claude Moraes MEP—Written evidence

1. I welcome the opportunity to again submit evidence to this Committee that has been so integral to the process of properly scrutinising the Government's decision to opt out of over 130 Justice and Home Affairs measures, as announced last October.

2. I previously gave oral evidence to the House of Lords delegation that visited Brussels earlier this year, who heard from myself and a number of my fellow colleagues at the European Parliament, both from the UK and from concerned member states, such as Germany. I am pleased now that I will be able to set out in writing some thoughts on the Government's opt out decision, from my perspective as the Socialists & Democrats Coordinator for Civil Liberties, Justice and Home Affairs.

3. Firstly, I particularly welcome the decision to opt back into the European Arrest Warrant. A reformed Arrest Warrant, particularly around the issue of proportionality, is something which is broadly positive for the UK's cross border justice system.

4. In my previous evidence, I spoke very broadly about the issues surrounding the opt out, general negative consequences, and the view from our EU colleagues' point of view. I was, like everyone else, very much in the dark as to what measures the government might opt back into, and how this would affect the debate. I would like to take this opportunity now, having finally seen a list of the 35 reopt-in measures the Government has chosen, to discuss the coherence of the decision and some specifics about the opt-in choices the Government has made. The measures chosen have not changed the nature of the debate at all, as the confusing message they send out, over what the Government is trying to achieve with this, simply goes to demonstrate more strongly the value of the 133 Justice and Home Affairs measures, and what opting out puts at stake for our policing and justice capabilities.

COHERENCE

5. At the time of the first inquiry the Government had given no indication as to what it would opt back into. I would now argue that the choices the Government has made are not consistent with the reasoning for the opt out Theresa May gave in October last year, and that the measures selected would present a serious if unworkable incoherence in the application of crime fighting and justice in the UK.

6. In evidence along with other colleagues I have reiterated that any negotiations regarding the re-opt-in would depend heavily on the good will of other Member States. Indeed, as noted in the House of Commons Library's own Standard Note on this issue published in July, "the Commission may impose conditions on the UK's re-participation."[71] So here I wish to re-emphasise briefly something which I dealt with during the last inquiry, which is that the Government may be jeopardising the cross-border crime fighting capabilities of UK police with this uncertainty.

[71] Vaughne Miller, "In brief: the 2014 bloc opt-out and selective opt-back-ins", *House of Commons Library,* (2013) p. 6 http://www.parliament.uk/briefing-papers/SN06684.pdf

7. The Government has argued that one of its motivating factors for choosing to opt out of the majority of these pre-Lisbon measures is that a significant portion are not useful or "are now entirely defunct."[72] It logically follows that those 35 measures the Government intends to opt back into are ones the Government considers useful. Many high profile figures in the area of cross-border crime fighting and policing have been clear that the 133 measures are vital to effective policing and justice. So the Government's intention, and now official announcement, that there are measures into which it would like to re-opt, confirms this reality behind the Government's rhetoric.

8. However, having now taken the opportunity to examine the proposed list of opt-ins, it is clear to me that within the Government there may be a lack of coherence as to which measures are useful, which are not, and which should be re-opted into, on the basis of this questionable reasoning.

9. I will give one example to illustrate. In the list of 35 opt-in measures, the Government have chosen to opt back into the measure establishing Europol. I do not think that anyone could argue over the usefulness of Europol and the central role it has to play in cross border crime fighting. It is clear the Government recognises its usefulness and wishes to remain part of its work.

10. However, in addition to the Decision establishing Europol there are seven further measures related to its establishment and functioning, over which the Government will continue to exercise the opt out. Significantly, amongst these measures are rules on the exchange of data with police forces and other crime fighting agencies, rules for Europol's 'analysis work files', the Council decision on third country cooperation, and the confidentiality of Europol information. Without these measures, Europol simply could not do its work in the UK. Britain would become, in effect, a blind spot for the EU's foremost cross border crime fighting institution.

11. The Government will therefore opt-out of vital information sharing capabilities with Europol. However, it has said that it does favour rejoining the measure on "exchanging certain data with Interpol." If the Government is willing to opt into information sharing with Interpol, what this demonstrates to me is that it is not a question of cooperation on cross border policing that troubles the Government, but that the collaborator happens to be 'Europe'. This choice of politics over policy will inhibit our police forces' ability to do their jobs. If the Government consents to the EU information sharing with Interpol, but refuses in the first instance to share national policing information with Europol, then this presents a significant coherence issue, and effectively renders redundant the UK's decision to reopt into the Interpol measure.

12. In the coalition Government's own review of the UK's extradition arrangements, it discusses how,

[72] http://www.bbc.co.uk/news/uk-politics-19944072

a. *Europol staff have no operational or coercive powers although they may be invited by Member States' law enforcement authorities to assist and support investigations into serious and organised international crime.*[73]

13. Without these pre-Lisbon measures on cooperation with Member State police forces, exchange of data and classified information, confidentiality of data, and relations with non EU police and investigation forces, the Government proposes new *ad hoc* arrangements or bilateral agreements. This would require new agreements with each of the 27 other Member States, or a renegotiation of terms with the EU as whole. Either way, we already have the tools in place to combat cross border crime using these measures. The Government's proposal simply seems to be to redo the same thing, but at greater cost, with greater difficulty, and with uncertain results.

14. The Government, by choosing to re-opt into Europol and the European Arrest Warrant, has clearly stated that it wishes to remain a part of at least some elements of cross border policing in the EU, but their choices for opt outs and reopt-ins do not bear this out. To give another example, the Government has chosen not to reopt into two counter-terrorism measures. The first of these measures relates to the establishment and maintenance of a skills and expertise 'Directory' to facilitate cooperation on counter-terrorism between Member States, and the second measure relates to the streamlining of the exchange of information on terrorist offenses between national police forces. The Government's actions are inconsistent with its rhetoric, where it claims to make counter-terrorism a top priority, but removes international cooperation, the best and most effective tool at their disposal.

15. Indeed, of the 40 measures on cooperation between police and other national authorities, the Government has said it will opt back into only 14. Among those measures, the Government has said it will opt back into a "Convention on the mutual assistance and cooperation between customs administrations", but it will not opt into the Joint Action "for the refining of targeting criteria, selection methods, et. and collection of customs and police information." Moreover it will seek to rejoin a Council decision "on simplifying the exchange of information and intelligence between law enforcement authorities", but will not rejoin the previously mentioned "exchange of information and cooperation concerning terrorist offences", the Joint Action on a "directory of specialized competences, skills and expertise in the fight against international organised crime," or the measure on "cross-border cooperation, particularly in combating terrorism and cross-border crime."

16. What we see here with these decisions is even greater incoherence on what the Government wants to achieve from these opt outs. On the one hand it seems to wish to reinforce Britain's cross border policing cooperation, yet on the other it refuses to be part of most cooperation measures with the rest of the EU. It claims to have counter-terrorism as a top priority, yet will opt out of almost all counter-terrorism measures that will make information sharing and rapid response times for police forces across the EU easier. In all of these cases, there appears to be an incoherence on how UK would operate within an EU cross-border policing context,

[73] Scott Baker *et al. A Review of the United Kingdom's Extradition Arrangements*, 30th September 2011, p. 115. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

when it has dispensed with a majority of the legal or institutional tools which would facilitate the most basic functioning of this process.

17. What is clear here then, is that the Government have claimed to want to dispense with any pre-Lisbon measures save ones it is "in the national interest" to rejoin, and that they very much wish to stay part of EU cross border policing.[74] However, what is also clear is that the choices they have made over the opt-back-ins show little understanding of the measures themselves in my opinion and their value in cross border policing and criminal justice. Either that, or the Government has realised that is has overpromised on what seemed an easy anti-EU issue, and is now trying to find a way of remaining part of many important Council Decisions, whilst attempting to save face by dispensing with all these related measures which support the functioning of cross border policing in the UK. Unfortunately, as the Europol example illustrates, it should not work like that. These ancillary pre-Lisbon measures, in my view, are essential, and those vital cross border policing measures which the Government wishes to remain an integral part of will just not be able to function in the UK as a result of the Government's opt out/reopt-in incoherence.

18. In conclusion the UK Government's approach to their 2014 opt out decision, on the evidence, has been too weighted towards political and internal party considerations, rather than the important UK cross border policing crime and justice requirements for the coming period.

11 September 2013

[74] http://www.bbc.co.uk/news/uk-politics-23224306

Frank Mulholland QC, Lord Advocate—Written evidence

In the initial COPFS response, it was outlined why Scottish prosecutorial interests are best served by the UK remaining fully in the "3rd pillar". I remain of this view notwithstanding the UK Government's intimation to the Council of the European Union of its intention to withdraw from the JHA measures and to seek to rejoin 35 measures. That said, I welcome the stated intention of the UK Government to seek to rejoin the 35 measures that are listed at pages 8 to 12 of Command Paper 8671.

I welcome the opportunity to provide supplementary comments in light of the Government's latest announcements, the focus of these comments is largely in relation to the measures relating to the EAW and identifying the risks involved should the UK Government not be able to rejoin. I have therefore restricted the response to answering questions 2, 4 and 6 and how they relate to prosecution interests in Scotland. Should you wish any further written or oral evidence from me I will be more than happy to contribute.

I should perhaps intimate however that I will be unavailable to give any further evidence during the first two weeks in October due to other long standing commitments.

Question 2

It is my view that all of the 35 measures listed in Command paper 8671 ought to be there. The only measure not on that list which in my view ought to be included is Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial network.

The European Judicial Network (EJN) is frequently used by the International Cooperation Unit (ICU) of Crown Office to seek assistance in execution of EAWs abroad. In one very urgent case, the EAW was issued through the EJN and was on the Greek police system within very short timescales. Such co-operation allows the urgent requests to be expedited. The EJN has also provided Scottish prosecutors with a rich source of advice on national law in member states within very short timescales which has been used to good effect in a number of cases considered by the United Kingdom Supreme Court. Thus, it is the experience of COPFS that this is a valuable tool in the armoury of prosecutors and that it should be included.

Question 4

I am generally supportive of the decision of the UK Government to seek to rejoin the 35 measures listed and recognise that the EAW is one of those measures included on the list. However, it is only right to bring to the attention of the House of Lords Committee that it is my view that there is a danger in the approach of opting out en masse and seeking to rejoin some measures. This danger is perhaps most acute in respect of the EAW measure, particularly where for any reason the UK is unable to rejoin. The extent of that danger will be determined and assessed by what mechanism the UK Government seeks to provide a legal base in place of the EAW. The UK Government has thus far not shared its view on what legal base will replace the EAW either as an interim measure or in the event of complete exclusion from the EAW scheme.

However, from evidence given to the House of Lords Select Committee and from what is said in the explanatory memorandum, it is believed the UK Government's position is that extradition will be achieved through the European Convention on Extradition. This however must be predicated on the basis that member states which have transposed the EAW framework decision into their national law can transfer a member state out of that scheme and recommence on another legal base.

It might be helpful to highlight the issues that would arise, should the UK not be able to rejoin the EAW scheme, for incoming and outgoing requests separately:

Incoming Requests

For requests into the UK, the Government could redesignate member states as part 2 territories, placing them in the same position as, for example, the United States.

This would have the effect of moving the decision on extradition back to ministerial level where the Cabinet Secretary for Justice in Scotland would be required to certify all incoming requests, the ICU would crave and issue a warrant to arrest and thereafter the procedure would be similar to the present system, except, rather than the court make the decision on extradition, the court would refer the case back to the Minister who would then decide if extradition was to be ordered. The statutory time frames would be different and extradition would take considerably longer than is presently the case. It would also open up two areas of appeal, the decision of the court and that of the Minister and involve considerably greater work for colleagues abroad as the request needs to be in a more stringent and detailed form. Importantly, double criminality would require to be applied to offences and the current benefit of the framework list of offences would be lost.

Outgoing requests

The anxiety would be reputational damage caused by the UK Opt out. Currently member states operate and execute the EAW efficiently. In future, it would not be unreasonable to assume that executing authorities who would be required to undertake considerably more work on execution of requests from the UK in the old Convention form, involving as it does affidavit evidence and issue through the Home Office, would be less able to execute UK requests as quickly as they do currently. The fact that affidavit evidence is required where these have to be drafted, sworn before the court, translated and then issued will inevitably involve more preparation time.

In addition, the speed with which arrests can be affected through the use of the EAW would be diminished.

It is envisaged that the UK enter the SIS II (Schengen information system) in 2014. This will enable the UK authorities to place on the system an alert which will be available to police forces in around 20 Member States. That however is predicated on the use of the EAW. Red notices which are the equivalent for convention based requests are issued through Interpol channels.

The greatest danger is that some member states would no longer be able to accept requests from the UK based on the convention as under their national law some states have taken the view that the EAW as a matter of EU law, replaces the convention base and they cannot

revert back to the convention as a legal base for extradition. This would result in not only in the UK requiring to take steps to provide interim measures such as a bilateral treaty or new legislation but also the national parliaments of those other states. Under the Lisbon Treaty the UK would be required to meet the cost of any financial implications in member states.

Putting in place bilateral treaties or new legislation would require time and agreement within member states' own systems which would be beyond the control of the UK. This may lead to interim periods where the UK and some member states would have no legal base at all upon which to seek extradition of fugitive offenders.

This would be most keenly felt with the Republic of Ireland.

It is understood that the current UK Government thinking is that they will seek to discuss the opt in with the EU Commission and member states within timescales that would secure the UK being admitted back into the operation of the EAW before the expiry date under the Lisbon treaty of 1st December 2014.

In other words, the UK Government does not anticipate any break in practice of the EAW. However, consideration does not appear to have been given to the situation where there is a gap between the UK Government opting out and being able to rejoin, other than reliance on the European Convention on Extradition which for the reasons already stated above cannot be relied on in respect of all member states, particularly the Republic of Ireland.

Question 6

The UK Government has proposed a number of amendments to the Extradition Act to reflect how it sees the EAW scheme ought to operate.

The most significant of the amendments are:

- That an EAW could be refused if the Member state's domestic proceedings are not "trial ready". This is designed to overcome the perception of lengthy per trial detention in member states prisons.
- That the EAW could be refused if found to be disproportionate. This has already been deemed in the Radu case not to be a competent ground of refusal falling as it does outwith the grounds of refusal provided in the EAW framework decision
- The UK could take over the sentence imposed abroad for which the EAW has been issued. This would apply only where the person sought to serve the sentence is a UK National. Currently the person would be subject to extradition proceedings and if extradited would be able to make application to serve their sentence in the UK through the Council of
- Europe Convention on the Transfer of Sentenced Persons. This amendment would obviate that. In Scotland we have had very few cases (one or two at most) where the EAW has been issued seeking a Scot serve a sentence abroad. This implements one of the articles of the EAWFD and as such brings the UK into line with the practice of many other states.

- To require member states to undertake that a UK national convicted, once extradited, be returned to the UK to serve that sentence. This too would be an implementation of one of the articles of the EAWFD
- Repeal of section 45(3) of the Extradition Act 2003 which provides that if an individual consents to extradition then they are deemed to have waived the protection of the right of speciality. This has resulted in many "walk through" hearings in England where the person does not consent to extradition to ensure they are protected on return from prosecution for other offences. This amendment may reduce the number of such hearings in both England and Scotland although the benefit may be more substantial in England where the amount of hearings are far greater.

The first two amendments will potentially lead the UK to be subject to infraction proceedings, as the amendments seek to introduce bars to extradition outwith the scope of the EAW framework decision and as such contrary to the decision of the European Court of Justice in Radu CJEU - C – 396/11 and more recently the case of Melloni CJEU - C – 399/11. Therefore, to introduce these reforms might be seen to be inconsistent with a stated intention to rejoin the EAW scheme.

It might be worth highlighting in relation to the first amendment that the issue of proceedings being “trial ready” which arose in the case of Corinna Reid, who was extradited to face trial in Tenerife in respect of charges of culpable homicide of her young son and who was separated from her other child for a significant period of time awaiting trial, would in the future be overcome by the introduction of the European Supervision Order. I welcome that this measure is included in the list of 35 measures the UK Government would seek to rejoin.

In relation to the second amendment the issue of proportionality is dealt with by the Scottish courts in a more robust way than the English courts. Scottish courts have yet to refuse a request simply on the basis of proportionality but they will be mindful of a person’s Article 8 rights and take into account Strasbourg case law on the relevant articles of the European Convention on Human Rights.

Accordingly, Scottish courts will adopt a more pragmatic approach when the nature of the offence is less serious, the person has a connection to Scotland and there has been a passage of time prior to the request by the foreign authority.

Therefore, it might be that the UK Government’s proposed amendments may have little practical impact in Scotland, however, I would highlight that there are differences between the Scottish and English approaches and therefore it is important that before the UK Government introduces UK wide legislation that full and proper consultation takes place.

12 September 2013

Northern Ireland Executive—Written evidence

I welcome the opportunity to submit evidence to the Committee on its follow-up inquiry into the United Kingdom's 2014 opt-out decision (Protocol 36).

As noted in my response to the earlier Inquiry, I am concerned about the impact of any loss of cooperation or mutual recognition of individual measures across the Irish border. I would reiterate that relations between criminal justice agencies in Northern Ireland and the Republic of Ireland are good and this is often facilitated by the use of European Union measures that allow for the cooperation and mutual recognition of instruments without the need for separate bi-lateral arrangements.

While I cautioned against the opt-out being exercised I realise that the decision has now been made and communicated to the EU Commission. While this has removed some of the uncertainly, I remain concerned about the work that must now be done within a relatively short timescale available - including the possibility that legislative change may be required in the Northern Ireland Assembly. This will not be known until the outcome of the Government's negotiations with Europe: my officials have asked for early sight of the Government's analysis of the legislative impact of the opt-out decision.

I would suggest that the Explanatory Memorandum provided by the Government to support its decision is helpful but often short on detail. The list of 35 measures that the Government would hope to rejoin is narrowly drawn and it would have been helpful to have had a clearer understanding of the rationale behind the decision to opt-in or opt-out of individual measures.

I very much welcome the inclusion of the European Arrest Warrant (EAW) in the list of measures that the United Kingdom will seek to rejoin, but remain concerned about the potential for an operational gap. I understand that the Home Secretary's decision to bring forward amendments to the Extradition Act will not now lead to the Government seeking to reform aspects of the EAW before rejoining it. If so, this is a welcome shift in policy which removes a possible impediment to rejoining this key measure. As I have previously stated, the EAW is now essential to the extradition process between the UK and Ireland.

I had asked that the UK should join the measure to allow the mutual recognition of judgments and probation decision (Council Framework Decision 2008/947/JHA of 27 November 2008) and I am disappointed that this measure does not feature on the list of 35. I would still wish to see this measure included as it would be helpful in terms of offender management and public safety between Northern Ireland and the Republic of Ireland in particular. It appears that the unique nature of the relationship between the two states has not been taken into account in this area.

Finally, I should note that communication between the UK Government and my Department on the opt-out decision has improved at both Ministerial and official level. I welcome this, but have made it clear that this should continue and that the devolved administrations must be aware of the negotiation process as it unfolds and not be presented with the outcome when decisions have been made.

Your Committee's report published in April 2013 was a helpful analysis of the 2014 opt-out decision and I look forward to receiving the second report following this latest call for evidence.

I would of course be happy to provide the Committee with any further information or clarification that may be required

David Ford MLA
Minister of Justice

18 September 2013

The Police Foundation—Written evidence

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.

The Police Foundation submitted evidence to the initial EU Committee Inquiry in which we opposed the opt-out. We note the House has now approved the block opt-out and expressed the intention to re-join 35 measures, including the European Arrest Warrant (EAW), and the Eurojust and Europol measures. We fully support the re-joining of these measures, although we have concerns over the negotiating process.

Question 1. If you gave evidence in the first inquiry, do you have any supplementary comments in the light of our Report and the Government's latest announcements?

1. We consider the Eurojust and Europol measures and the EAW to be a package which has significantly benefitted cross-border policing, 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. Membership of Europol and Eurojust is also required to allow access to a number of linked services such as joint investigation teams, the Schengen Information System and the European Cyber-crime Centre. In light of increasing cross-border criminality, the increasing political and media profile on migration and the increasing prevalence of cyber-crime, we see these as essential resources/networks to which the police service must have access if it is to maximise its responsibilities to protect and serve the British public.

2. As the House of Lords heard,[75] since 2009, the EAW has been used to extradite from the United Kingdom 57 suspects for child sex offences, 86 for rape and 105 for murder, and the EAW has transformed the extradition process within the EU from one that typically took years to a system that now takes a matter of weeks.

3. The EU Committee Report recognised the EAW to be the single most important pre-Lisbon police and criminal justice measure. The Committee stated that if the UK were to leave the EAW and rely upon alternative extradition arrangements, the extradition process would become more protracted and cumbersome, potentially undermining public safety. The Home Office has also recognised[76] the EAW to be a valuable and essential tool and we are pleased to see that the Government intends to re-join the EAW as well as Europol/Eurojust.

[75] Lord McNally Lords Hansard 23 July 2013 column 1234

[76] Oral Ministerial Statement regarding the opt-out decision by the Home Secretary, Commons Hansard, 9 July 2013, cols. 177-193

4. We support the reform of the EAW to improve its efficacy and fairness and we understand the Home Office has begun a process of negotiation with other member states to this end. However, we remain concerned about the potential dangers of the process of opting out and then back in. The process of opting back in is certainly not automatic and we have concerns as to whether the government has the necessary support from other member states. There may also be hefty cost implications. By many accounts, the agreement on the EAW itself was not plain sailing and re-opening negotiations now may be difficult. Others have expressed scepticism over the likelihood of negotiations being successful, believing that many European officials may be unimpressed with the strategy of opting out and then 'cherry-picking' ones to re-join.[77] The EU Committee report similarly raised concerns that negotiations might be time-consuming and uncertain. Some have expressed the view that in seeking consent to re-join, the UK could find itself pressurised to re-join some measures it disagreed with, or accept certain conditions imposed by other member states.[78]

5. Given the recognised importance of the EAW we would stress that the Home Office should not make re-joining the EAW contingent upon securing the reforms it desires and, should the negotiations over reform fail or become overly protracted, we would strongly advise re-joining the EAW irrespective of whether such reforms are likely to be forthcoming.

6. We have concerns that the period between opting out and opting back in might leave gaps in transitional arrangements. It has not been made clear how long negotiations are expected to take, and we would like to understand more about the transition measures, if any have been put in place. Due consideration needs to be given to a range of circumstances, including a case where an EAW was issued before the opt-out, but failed to be executed until after. We would advise the utmost diligence to ensure negotiations are conducted as swiftly as possible so that we do not encounter gaps in operation.

7. Finally, we would also strongly urge a study be put in place to monitor the impact of the decision to opt-out, including the cost, and to publish the findings. This would enable Parliament and the public to review the costs and benefits of the decision at a subsequent date.

10 September 2013

[77] Brady, H (2013), *Cameron's European 'own goal'* CER
[78] David Anderson, Independent Reviewer of Terrorism Legislation in response to EU Committee Inquiry

UK Government—Written evidence

Are the Government's proposed reforms to the European Arrest Warrant at the domestic level consistent with their desire to rejoin this measure, including the UK's obligations under the Framework Decision and the EU Treaties?

The Government believes that the domestic reforms announced to Parliament on 9 July are fully consistent with the UK's desire to rejoin the European Arrest Warrant ('the EAW') Framework Decision, including our obligations under that Framework Decision and the EU Treaties. The necessary changes to the Extradition Act 2003 ('the Act') are being made by way of amendments to the Anti-social Behaviour, Crime and Policing Bill.

Proportionality

The use of the EAW for relatively minor offences has long been identified as a problem, not only by the UK. We are clear that resources that could be directed at dealing with more serious cross-border crime are often being diverted to matters which should be tackled in a different way (for example, by way of a fine or a court summons). This is consistent with the European Council's handbook on how to issue an EAW, which is clear that issuing States should consider alternative punitive measures prior to issuing an EAW, where it would be more appropriate to do so.

New clause 23 will require the judge to consider – in addition to whether extradition would be compatible with the Convention rights – whether extradition would be disproportionate, taking into account (so far as the judge thinks it appropriate to do so) the seriousness of the conduct, the likely penalty and the possibility of less coercive measures being taken. This will apply in all cases where the EAW has been issued in order to prosecute the person.

We believe this is consistent with the UK's obligations under EU law. Proportionality is a cornerstone of EU law. Its origins lie in the case law of the Court of Justice of the European Union and it is specifically enshrined in Article 5(4) of the Treaty on the European Union (TEU). Moreover, and bearing in mind that in many cases proportionality issues are inextricably linked with fundamental rights, Article 1(3) of the EAW Framework Decision is clear that the Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles. In addition, Article 52(1) of the Charter of Fundamental Rights makes clear that limitations on rights enshrined in the Charter are "subject to the principle of proportionality".

Absence of prosecution decision

Parliament has expressed concerns about lengthy and avoidable pre-trial detention, and it is important that these situations are avoided.

We know that in some cases an EAW has been issued at a time when the issuing State is still investigating the alleged offence. This leads to the person spending potentially long periods in pre-trial detention following extradition while the issuing State continues to investigate the offence. New clause 24 will address this. Where it appears to the judge that there are reasonable grounds for believing that a decision to charge and a decision to try have not

both been taken in the issuing State (and that the person's absence from that State is not the only reason for that), this clause will mean that extradition will be barred unless the issuing State can prove that those decisions have been made (or that the person's absence from that State is the only reason for the failure to take those decisions).

We believe that this new clause is consistent with the UK's obligations under EU law. Article 1(1) of the EAW Framework Decision is clear that an EAW is "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".

Request for temporary transfer etc.

New clause 26 will allow the requested person and the issuing State to speak to one another, if they both consent, before extradition takes place. It will allow for the temporary transfer of the person to the issuing State and also for the person to speak with the authorities in that State whilst he or she remains in the UK (e.g. by video link).

In some cases, it is to be expected that the result of this will be the withdrawal of the EAW. For example in cases where, having spoken with the person, the issuing State decides that he or she is not the person they are seeking or that he or she did not in fact commit the offence in question. In other cases, where extradition goes ahead it is to be expected that in some cases the person will spend less time in pre-trial detention, as some of the questions which need to be asked and the processes which need to happen ahead of the trial could take place during or as a result of the temporary transfer or videoconference.

This amendment simply transposes Articles 18 and 19 of the EAW Framework Decision, which allow for temporary transfer and for the person to be heard ahead of extradition. As such, the change is consistent with EU law.

Amendments to the definitions of "extradition offence"

Parliament has also expressed concern about people being extradited for conduct which is not criminal in British law. To help address these concerns, the changes we are making to the definitions of "extradition offence" in the Act – clause 29 – will make clear that, in all EAW cases, in cases where part of the conduct took place in the UK, and is not criminal here, the judge must refuse extradition for that conduct.

We believe these are consistent with the terms of the Framework Decision, Article 4(7)(a) of which is clear that the executing judicial authority may refuse to execute the EAW where it relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State.

The amendments to the definitions of "extradition offence" also correct a transposition error, in that they make clear that in cases where the conduct took place outside the requesting State, there is no requirement for the offence to be punishable with imprisonment for a term of 12 months or a greater punishment.

Consent to extradition not to be taken as waiver of specialty rights

Clause 28 ensures that a person who consents to his or her extradition does not lose the benefit of any "specialty protection" he or she would otherwise have. Specialty protection ensures a person is, in general, only proceeded against for the offence or offences listed in the extradition request. At present, the Act states that a person waives specialty protection when he or she consents to extradition. This leads in practice to very few people consenting to extradition, even where they may otherwise have no objections. Removing this waiver will enable those who wish to be extradited to be surrendered quickly without risking being tried for any other alleged offences.

This is consistent with the EAW Framework Decision, nothing in which requires that a person who consents to his or her surrender must lose the benefit of specialty

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