

HOUSE OF LORDS

European Union Committee

31st Report of Session 2006–07

European Supervision Order

Report with Evidence

Ordered to be printed 17 July 2007 and published 25 July 2007

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 145

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FOREWORD—what this Report is about

It is estimated that at any one time some 4,500 EU nationals are held in custody in EU countries other than their normal country of residence.

Persons resident in the Member State where they are suspected of having committed a crime may be granted bail while suspects resident in another Member State may be remanded in custody because they are perceived to be more likely to abscond.

In the absence of an international instrument specifically enabling the transfer of bail from one Member State to another, these “foreigners” may be detained for many months pending the outcome of the criminal investigation or trial.

The Commission’s proposal for a European supervision order (ESO) seeks to address this problem. It provides a mechanism under which a judicial authority in Member State A could impose a non-custodial supervision measure on the foreign suspect which would be recognised and enforced in Member State B where he is normally resident. The authorities in Member State B would supervise compliance with the order and would also be responsible for returning him for trial if he did not return on his own when summoned to do so by the trial State.

The ESO is a meritorious and welcome proposal. It addresses a serious issue affecting the liberty of the individual and has the potential to reduce hardship for some thousands of EU citizens.

However, a detailed examination of the draft Framework Decision shows that there are a number of places where the scheme as proposed by the Commission should be improved.

In this Report we examine the proposal in detail and consider how the ESO would work in practice. We propose a number of changes aimed at making the ESO sufficiently clear and secure as to command the confidence of prosecutors and judges in the trial State and to be workable in both States involved.

The proposal deserves prompt attention by Member States and it is regrettable that the Council of Ministers has yet to accord it any priority.

European Supervision Order

CHAPTER 1: INTRODUCTION

Unequal treatment

1. The Commission's proposal for a European supervision order¹ (ESO) seeks to address a situation of unequal treatment that currently exists in the criminal courts across the Union. Persons resident in the Member State where they are suspected of having committed a crime may be granted bail while suspects resident in another Member State may be remanded in custody. The "foreign" suspect is more likely to be detained because of the risk of flight while the local resident might be subject merely to bail conditions such as a reporting obligation or travel prohibition.

Bail/liberty denied to thousands

2. The Commission estimates that at any one time some 4,500 EU nationals (10,000 each year) are held in custody in EU countries other than their normal country of residence.² In the absence of an international instrument specifically enabling the transfer of bail or other pre-trial supervision measures from one Member State to another, these "foreigners" may be detained for many months pending the outcome of the criminal investigation or trial. A number of them would be unlikely to be granted bail in any event because of the serious nature of the crimes of which they are suspected (*e.g.* murder, rape and robbery). But the Commission believes that as many as 80 per cent of EU nationals held in pre-trial custody each year could be subject to an alternative pre-trial non-custodial measure.

The cost to the individual

3. The present situation has implications for both the individual concerned and Member States. A person kept in custody in a foreign State may be cut off from family and friends and, if the detention lasts for any substantial time, may lose his job. It is desirable, as the Council of Europe has recently recommended, for humanitarian and social reasons to restrict custody pending trial to the minimum compatible with the interests of justice.³ The Commission has also assessed the economic cost to the individual, if detained (for an average 5.5 months) and acquitted at trial, at €11,000 (€2,000 euros per month).⁴ Stephen Jakobi, founder and formerly director of Fair Trials Abroad and currently consultant, Cross-Border Justice, described the Commission's attempt to quantify the individual's experience in economic terms, by reference to compensation sums, as "risible". However he acknowledged the potential seriousness of refusal of bail for the individual concerned: "The psychological effect on the innocent is devastating, and

¹ Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, Brussels, 29.8.2006, COM(2006) 468 final.

² Commission Staff Working Document (SEC(2006) 1079), Impact Assessment, at section 3.2.

³ Recommendation of the Council of Europe, Rec (2006) 13, Art.2, para 2.

⁴ Impact Assessment, at section 3.4.

frequently long-term or permanent. Suicide on release, though rare, is not unknown” (p 1).

4. Businesses, and in particular small firms, may also be seriously affected. The Freight Transport Association (FTA) pointed out that many transport undertakings comprise sole traders with just one vehicle or are small businesses with no more than two or three lorries. Detention of what amounts to perhaps one third or one half of a small operator’s driver employees could therefore lead to serious difficulties for the continuing viability of that business (p 95).

The cost to the State

5. Keeping persons in pre-trial detention has significant cost implications for the public authorities concerned. Such costs vary between Member States, and in the UK are not insignificant. The Commission quotes the cost per person per year in the UK as €36,473 (€3,039 per person per month) which is just below the average (€36,996 and €3,079 respectively) across the Union.
6. The Commission also notes that the excessive or unnecessary use and length of pre-trial detention contribute to prison overcrowding, which may impact on conditions of detention and the effectiveness of a State’s penal policy.

Present position unacceptable

7. In the English courts bail may be refused where there is a risk of re-offending, of interference with evidence or witnesses, or of flight. The Law Society of England and Wales (the Law Society) recognised that the risk of flight may be perceived as greater for a non-resident and that conditions, such as a fixed address and community ties, might be more problematic for a non-resident. But, the Law Society said: “the near-automatic denial of bail is unacceptable” (p 55, QQ 229–31). **We agree. It concerns us acutely that people are not being given bail in the trial State at the moment on the basis that, as non-residents, they are likely to abscond and go back to their State of residence, or for more technical reasons, such as a lack of fixed address in the trial State. The numbers (quoted above) are not huge but they are substantial.**

How the European supervision order could help

8. The Commission’s proposal is aimed at enhancing the right to liberty (a fundamental right set out in the European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 5), reinforcing the presumption of innocence (Article 6, ECHR) and removing any discrimination against non-residents. The ESO would do this by providing a mechanism under which a judicial authority in Member State A could impose a non-custodial supervision measure on the foreign suspect which would be recognised and enforced in Member State B where he is normally resident. The authorities in Member State B would supervise compliance with the order and would also be responsible for returning him for trial were he not to return on his own when summoned to do so by the trial State.
9. The ESO would not just deal with the case of the non-resident denied bail. At present, persons made subject to a pre-trial non-custodial order may have to remain in the trial State because there is currently no mechanism for that order to be policed in the home State and the person concerned to be

returned for trial. Stephen Jakobi referred to such persons as the “marooned” (Q 10). The ESO would help them too.

The European arrest warrant

10. It might be thought that with the introduction of the European arrest warrant (EAW) courts would be more willing to grant bail to persons normally resident in another Member State. In theory the EAW provides a simple mechanism to ensure their return.⁵ However, EAW cases are dealt with at the City of Westminster Magistrates’ Court and, the Law Society commented, other judges and legal practitioners are therefore not necessarily familiar with the EAW scheme. Even where they are they may still be concerned that there are grounds for non-execution of an EAW (QQ 233–7). It is not automatic that a suspect will be returned under an EAW, so the court may have a residual concern that it will not be able to secure the return of a suspect who does abscond. Further, the EAW only applies in the case of offences punishable by a minimum of one year’s imprisonment whereas it is envisaged that the ESO would also be available for less serious offences (including, for example, road traffic offences).

ESO—a welcome measure

11. Response from our witnesses to the ESO has been positive. There is general agreement that there is a real problem which the ESO could, with some amendment, address. The Government themselves “welcome the general idea in principle”: Baroness Scotland of Asthal QC, then Minister of State, Home Office, acknowledged that the ESO could bring “real benefits”. Their approach is, however, a cautious one: “safeguards would need to be in place to protect our national law and our policies” (QQ 421, 446).

Attitudes/level of support in the Council

12. The Hague Programme was adopted by the European Council on 4–5 November 2004 and sets out a work programme for 2005–2009 in the field of justice and home affairs. It makes no reference to the ESO, a silence to which we drew attention in our 2005 Report on the Hague Programme.⁶ The only specific mention in the Hague Programme of protection of the rights of the defendant was in relation to the proposed Framework Decision on procedural rights in criminal proceedings. This measure was to be agreed by the end of 2005. As we have noted elsewhere,⁷ the proposal has proved to be controversial and only recently have Member States moved towards the possible adoption of a much restricted measure.⁸ However, despite the priority given to agreement of the Framework Decision by the German

⁵ Senior District Judge Workman told the Committee that the EAW is working and has in many cases speeded up the extradition process (Q 312). However, his experience is not universally shared. Lady Justice Smith recently commented: “anyone who is familiar with the jurisprudence which has developed under Part 1 of the Extradition Act 2003 [which implements the EAW] would be bound to observe that it has not succeeded in providing a simple and speedy process”, *Farid Hilali v Governor of HMP Whitemoor and Central Court of Committal Proceedings No 5, the High Court, Madrid*. Judgment of the Administrative Court, 25 April 2007, at para 33.

⁶ *The Hague Programme: a five year agenda for EU justice and home affairs* (10th Report 2004–05 HL Paper 84), para 43.

⁷ *Breaking the deadlock: what future for EU procedural rights?* (2nd Report 2006–07 HL Paper 20).

⁸ See Conclusions of the Justice and Home Affairs Council 19–20 April 2007, at page 26.

Presidency and the apparent progress towards an acceptable solution, Member States failed to reach a consensus on the proposal at the 12–13 June Justice and Home Affairs Council meeting.⁹ The European Council has subsequently called on Member States to continue work on the Framework Decision.¹⁰

Competing priorities

13. The Council of Ministers has yet to accord any priority to the ESO. The proposal was adopted by the Commission in August last year (2006) but to date there has been very little consideration of the proposal in the Council. There has been one meeting in a Council working group (officials) and the Government told us that the current Portuguese Presidency “have indicated a wish to have an orientation debate to establish whether Member States support the general principle of EU action in this area and whether it should be taken forward or not” (Q 421). The Government’s own work on the proposal is at an early stage and the Minister indicated that there was still much to do in considering the detail and the possible costs implications (Q 456).
14. We were told that there is no evidence of general will for the ESO on the part of Member States to date (Q 430). Baroness Scotland spoke of “a plethora of other competing important work upon which we also have to deliver which is very, very pressing” (Q 466). But, as the then Minister also said, the fact that so much time, energy and commitment has been devoted to the ESO by the Commission is a clear indication that they believe that this is a pressing European issue that the Council should grip (Q 431).

Engaging Member States’ attention

15. The significant problems encountered in the Council in relation to rights-based instruments such as the Framework Decision on procedural rights was remarked upon by some of our witnesses. JUSTICE said: “We are very concerned that while greater judicial co-operation is taking place between EU Member States, sufficient provision for common standards for suspects and defendants’ rights has not been made” (p 96). The Commission acknowledged the political difficulties which the Framework Decision had faced but it retained the hope that it would be adopted because, although the Commission’s text has been considerably watered down, the Framework Decision would bring some added value to the rights provided in the ECHR, in particular with regard to legal assistance and the right to interpretation and to translation (Q 214).
16. It would be regrettable if the ESO proposal were to meet a similar fate to that of the Framework Decision on procedural rights. It therefore seems necessary to engage Member States’ attention to the practical benefits of the ESO. Baroness Scotland said: “What we have seen taking place more and more is that countries are seeking to concentrate, actually in a very British way, in a pragmatic way, on what works, what will deliver real benefits, how we can get a practical outcome out of this, and it very much depends, I think, on whether it is perceived to be a Europe-wide issue” (Q 427).

⁹ See Conclusions of the Justice and Home Affairs Council 12–13 June 2007, at page 37.

¹⁰ Conclusions of the European Council, 21–22 June 2007.

17. The ESO would have the result of releasing on bail people who should be granted bail rather than being detained on remand and who might well eventually be acquitted and would therefore have spent time in custody when they should not have. As mentioned it is the Commission's case (and we have seen no evidence to dispute their analysis) that at any one time some 4,500 foreign nationals may be being held in custody, 80 per cent of whom might be suitable for pre-trial supervision. This is a substantial number which Member States should be slow to neglect. In addition, there are the potential savings resulting from freeing up prison places. Although, as we accept, the executing State will bear the costs of executing the ESO, a substantial part of which burden is likely to fall on local police forces, it would be extremely regrettable if Member States, with more people detained abroad than other country nationals held at home, were to determine their approach to the ESO on the basis of the numbers, as Baroness Scotland suggested could be the case (Q 446).
18. **To date EU action in criminal law has focussed primarily on enforcement measures at the expense of human rights and civil liberties—a fact which is entirely understandable given the pressing need for States to cooperate in attacking terrorism and organised crime. Progress on measures, such as the Framework Decision on procedural rights, primarily addressed at safeguarding and strengthening the rights of the individual, has in contrast been slow and disappointing.**
19. **The ESO, whose aim is to enhance the right to liberty and the presumption of innocence, is therefore a welcome measure. The Commission's proposal addresses a serious issue affecting the liberty of the individual. It has the potential to reduce hardship for some thousands of EU citizens and is a proposal which, we believe, deserves prompt attention by Member States. However, as we explain in Chapters 3 to 5, there are a number of places where the ESO needs to be improved if it is to be workable.**

Other parliaments

20. We are aware that a number of other parliaments have the ESO under scrutiny. We have had the benefit of seeing the opinion and recommendations of the German *Bundesrat* and await the reactions of other national parliaments with interest. The European Parliament's LIBE Committee has appointed a *rapporteur* and discussion in the Committee of a draft report on the proposal is currently scheduled for September 2007. Copies of this Report will be provided to the European Parliament and other national parliaments as is our regular practice.

Conduct of inquiry

21. The inquiry into the European Supervision Order was undertaken by Sub-Committee E (Law and Institutions) under the Chairmanship of Lord Brown of Eaton-under-Heywood. The membership of the Sub-Committee is listed in Appendix 1. The witnesses are listed in Appendix 2. All the evidence, written and oral, is printed with this Report. We would like to thank all those who assisted in the inquiry. We are particularly grateful for the assistance we received from Mr Peter-Jozsef Csonka and Mr Thomas Ljungquist

(Directorate-General Justice, Freedom and Security, EC Commission) who travelled from Brussels to meet the Sub-Committee.

22. **We make this Report to the House for debate.**

CHAPTER 2: THE PROPOSAL IN OUTLINE

23. Whether the ESO will encourage criminal judges to grant bail to non-residents where they would not do so at present is uncertain and to some degree contentious. As we explain in Chapters 3 to 5, there will, we believe, need to be a number of changes if the scheme proposed by the Commission is to be sufficiently clear and secure as to command the confidence of prosecutors and judges in the trial State and to be workable in both the issuing and executing States. In this Chapter we look at the ESO in outline and at the principle of mutual recognition on which it is based. Eurobail, a rival proposal, is briefly compared. Finally we consider how the burden of the ESO would be born in the UK and the important question of costs.

The question of need

24. There was general support from our witnesses for the introduction of measures allowing pre-trial supervision of non-resident defendants in their country of residence in the EU—there was a problem which the ESO, perhaps with suitable adaptation, could address. As the Crown Prosecution Service (CPS) pointed out, there are no international instruments that specifically allow the transfer of pre-trial supervision measures from one Member State to another (p 26). Mrs Bowring, for the CPS, said: “There seems to be a stark choice for prosecutors that when a non-UK resident appears in court, they are faced with either having to request a remand in custody to cover the lack of community ties or request bail with conditions that ensure the person stays within the country because clearly conditions that go beyond this jurisdiction are unenforceable. Lodging of a surety is the most common condition but of course that is not foolproof.” Mrs Bowring said that the courts had adopted some innovative solutions to the problem, including using fast track procedures and imposing “imaginative” bail conditions (Q 67).
25. The numbers, as mentioned, are substantial. As stated, the Commission reckons that there are, at any one time, at least 4,500 EU nationals held in custody in EU countries other than their normal country of residence. The CPS supplied some figures in relation to the UK. At 31 March 2007 there were 580 EU nationals in UK prisons, of whom 405 were untried and 175 were convicted but unsentenced (p 37). Mrs Bowring concluded: “We are not talking about huge numbers here but clearly there is a need” (Q 69).
26. When we examined the proposed Framework Decision on procedural rights, the potential implications for individuals detained in relation to road traffic offences committed outside their State of residence was thought to be substantial.¹¹ But as regards the ESO, neither the Automobile Association nor the Freight Transport Association (FTA) thought that there were large numbers of UK nationals involved. The FTA said: “Those who are detained by foreign authorities tend, in the main, to have fallen foul of traffic regulations or the rules relating to driving and rest times, as well as the use of the tachograph recording instrument”. Drivers detained abroad simply because of their lack of knowledge of local traffic regulations and those with no previous record of an infringement of the driving times and tachograph

¹¹ *Procedural Rights in Criminal Proceedings* (1st Report 2004–05 HL Paper 28), para 21.

rules in the particular Member State concerned should, in the FTA's view, be released "at the earliest opportunity" (p 95).

The Commission proposal

27. In the explanatory memorandum to the draft Framework Decision, the Commission summarises its proposal as follows:¹²

"The European supervision order is a decision issued by a judicial authority (*i.e.* a court, a judge, an investigating magistrate or a public prosecutor) in one Member State that must be recognised by a competent authority in another Member State. The aim is to let the suspect benefit from a pre-trial supervision measure in his or her natural environment (residence). As regards the threshold, the European supervision order is an option whenever there is a possibility under the national law of the issuing Member State to order that a suspect be remanded in custody, irrespective of the fact that the thresholds vary between Member States. However, the European supervision order is not only an alternative to pre-trial detention. It may also be issued in relation to an offence for which only less severe coercive measures (*e.g.* travel prohibition) than pre-trial detention are allowed, *i.e.* where the threshold may be lower than for remand in custody.

The proposal for a Framework Decision does not oblige the judicial authority to issue a European supervision order. It 'may' do so. This wording indicates that it is for the issuing authority to decide whether it wants to make use of this possibility. Although the suspect may request that a European supervision order be issued, he or she has strictly speaking no 'right' to it. However, the issuing authority must always, as a general principle, assess the elements of the case in the light of the right to liberty, the presumption of innocence and the principle of proportionality. Benefiting from a pre-trial supervision [order] in one's State of normal residence is probably often seen as less cumbersome than being subject to a supervision measure in the State where the alleged offence was committed, not to speak of being in pre-trial detention in that State.

The European supervision order would impose one or more obligations on the suspect aimed at reducing the three 'classical' dangers that allow pre-trial detention under national law, *i.e.* the dangers of suppression of evidence and re-offending and, in particular, the danger of flight. The obligations correspond to a certain extent to the recommendations of the Council of Europe concerning custody pending trial. The obligations that may be imposed by the issuing authority are all 'optional', except (i) the obligation on the suspect to make himself or herself available for the purpose of receiving summons for his or her trial (however, where a judgment *in absentia* under the law of the issuing State is possible, the suspect may not be required to attend the trial) and (ii) the obligation not to obstruct the course of justice or engage in criminal activity. The other ('optional') obligations correspond to the recommendations of the Council of Europe and national law (*e.g.* travel prohibition, reporting to the police, curfew and house arrest).

¹² COM(2006) 468 at page 8.

The Member State of normal residence of the suspect is responsible for the supervision of the suspect and is obliged to report any breaches to the issuing judicial authority, which can decide on the arrest and transfer of the suspect to the issuing State if this is considered necessary. Strict time limits apply. Before such a decision is taken, the suspect has the right to be heard by the issuing authority. This requirement may be satisfied through the use of video links between the issuing and the executing States. The transfer procedure is proportionate to the aim of the proposal, *i.e.* to reduce pre-trial detention as far as possible and is therefore compatible with the requirements of Article 5(1) ECHR (in particular paragraph b).

The proposal is in principle based on an obligation for the State of normal residence of the suspect to execute a European supervision order issued by the trial State. There are, however, some, although limited grounds for refusal that may be invoked by the executing State.”

28. The following flowcharts, which we have prepared, show how the procedures (a) for issuing and recognising an ESO; and (b) following breach of a condition of an ESO, would work.

FIGURE 1
Issuing and recognising an ESO

FLOWCHART 1–Issuing and recognising an ESO

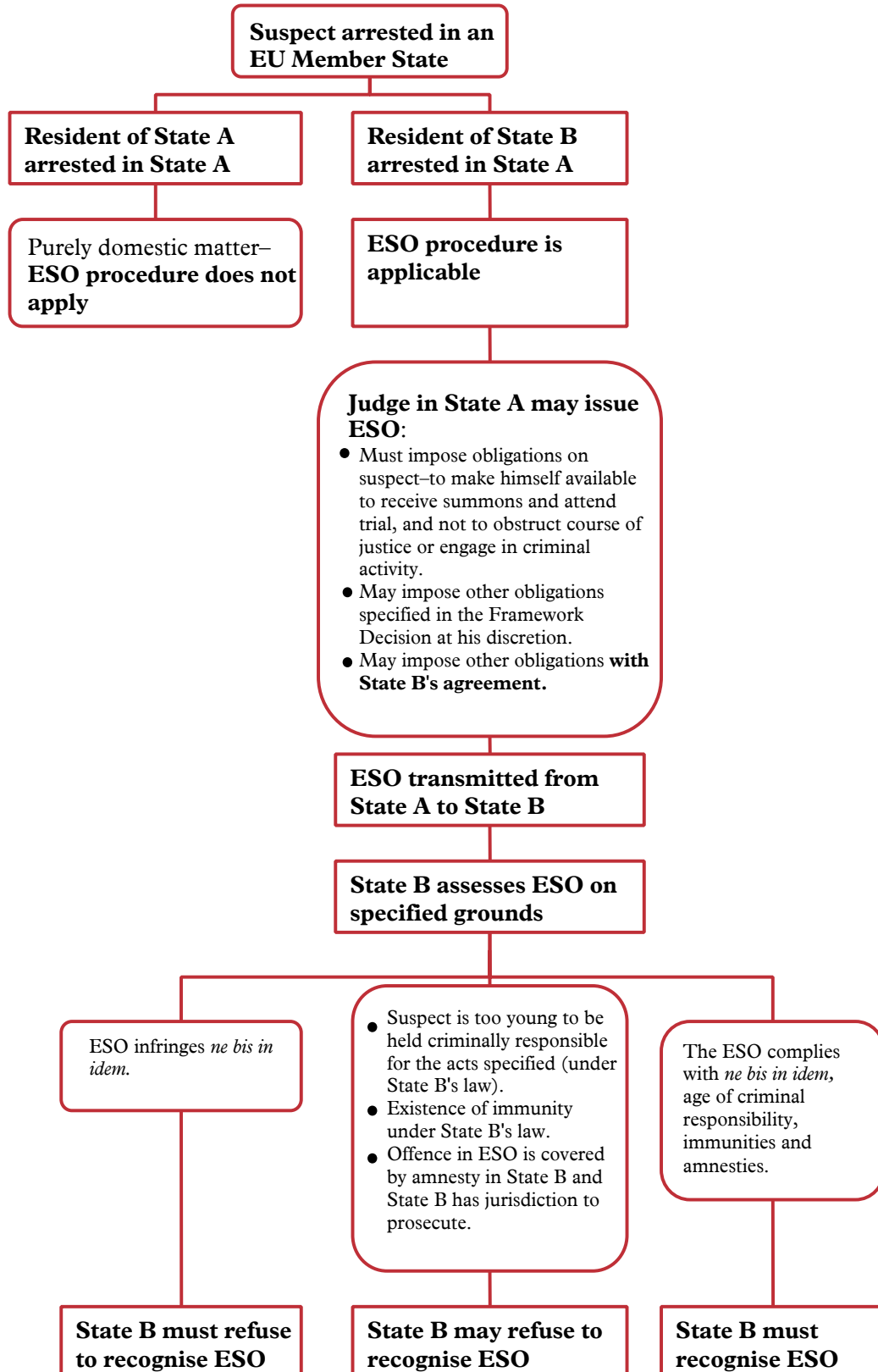
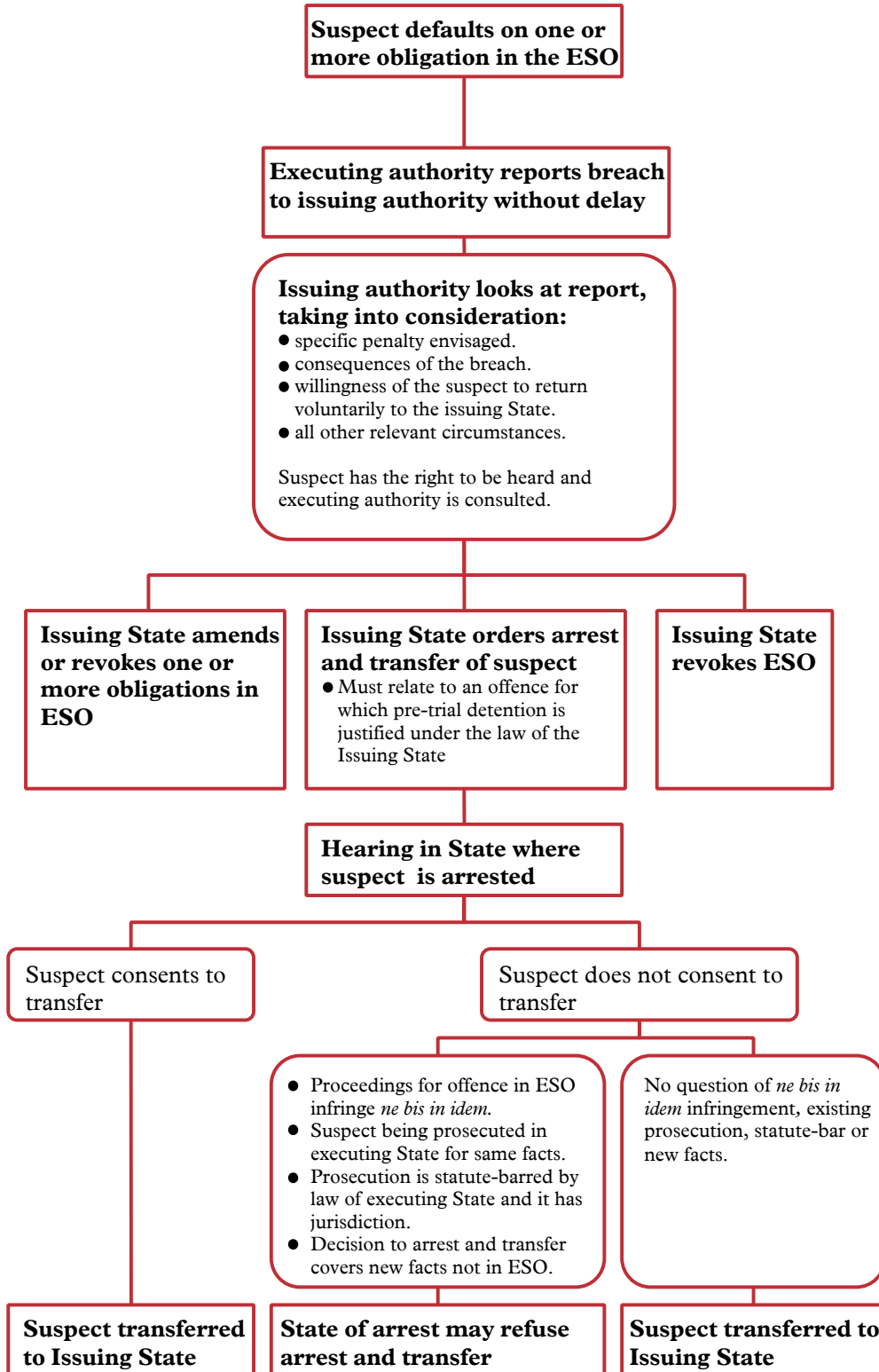


FIGURE 2
Breach of condition of ESO



Mutual recognition—the basis of ESO

29. Before looking at the detail of the Commission’s proposal it is, we believe, helpful to consider the conceptual basis of the ESO proposal, *i.e.* the principle of mutual recognition, and its adequacy in the present context. Mutual recognition requires that a judicial decision made in one Member State be recognised and enforced in all other Member States. However, in our view the ESO is not a simple or straightforward mutual recognition measure. The duty of the executing State is not limited to “recognition” of the ESO but extends to its day to day “execution” and “enforcement”, which calls for a greater role for the authorities than in many other mutual recognition instruments. In later chapters we therefore suggest that the mutual recognition principle may require some adaptation in relation to the ESO.

Importance of principle of mutual recognition

30. The principle of mutual recognition has been described as the “cornerstone” of judicial cooperation in EU criminal matters. As recital 5 to the Framework Decision on the European arrest warrant¹³ states, “Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice”. Mutual recognition, which seeks to minimise the need for harmonisation of laws and procedure, has, as mentioned, been endorsed by Member States at the highest level in the Tampere Conclusions and the Hague Programme. The ESO refers to Tampere,¹⁴ though not to Hague.¹⁵

The importance of trust

31. The success of the ESO will be dependent on the existence of a high level of trust, not only between courts of different Member States but also in relation to other Member States’ supervisory arrangements for defendants on bail. In comparison, the level of trust required for the operation of the European arrest warrant is limited: the simplified extradition procedure provided by the EAW requires the executing Member State to have trust in the issuing Member State’s warrant (that it was correctly obtained, that the process offers adequate guarantees etc). In contrast, the ESO requires the issuing Member State to have trust in the courts and authorities of another Member State to carry out functions in relation to the former’s own investigations and prosecutions and to return the suspect for trial in the issuing State if necessary. In short, in the case of an EAW, the issuing State has nothing to lose by using it; in the case of an ESO, the issuing State does have something to lose and may consider its interests best served by retaining the suspect on its own territory.

¹³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. [2002] OJ L190/1.

¹⁴ The draft ESO recites that “According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 36 thereof, the principle of mutual recognition should also apply to pre-trial orders”. The Tampere conclusions did not, however, expressly envisage pre-trial supervision measures.

¹⁵ The Hague Programme, adopted by the European Council on 4–5 November 2004, succeeded Tampere by setting out a work programme for the following five years.

32. JUSTICE doubted whether a sufficient level of trust existed between at least some Member States. Discrimination could arise if some States were to be trusted more than others, because, for example, of their high levels of bail supervision in relation to domestic cases and the quality of their police forces and judicial systems, and defendants from certain Member States were granted bail to return to those States while those from others remained in custody. JUSTICE was concerned that the ESO would face the problem that other mutual recognition measures had faced—that they envisage mutual trust in a situation where standards are not equivalent across the EU. Not all Member States might exercise the same high degree of supervision of bailed suspects available in England and Wales, including curfews, electronic monitoring, reporting to police stations, etc (pp 96–97).
33. Senior District Judge Timothy Workman reported that the EAW has worked to speed up the extradition process in many cases and the principle of mutual trust had been effective in securing this (QQ 312–3). But while mutual trust was the right basis for the ESO, it was a more complex proposal than the EAW and if the detail was not sufficiently worked out the ESO might not evoke the necessary confidence in judges expected to use it (Q 315).

The rival proposal—Eurobail

34. The Commission describes the concept of Eurobail in the following way:
- “This model is based on a division of functions between the trial court and the court of the suspect’s country of residence. The trial court makes a preliminary assessment whether the offence is “bailable”. If the answer is yes, the suspect is sent back to his or her country of residence, where the court makes the final decision on the provisional release. The State of residence is responsible for sending the person back to the trial State (if required).”¹⁶
35. The fundamental difference between the ESO and Eurobail lies in who determines the type and conditions of the pre-trial supervision measure. Under the ESO it would be the court in the trial State; under Eurobail the trial court would simply determine whether the offence was “bailable” and the court in the State of residence would decide on whether to grant bail and what conditions to impose. Consequently, where bail is refused, the suspect would, under the ESO, serve pre-trial custody in the trial State. Under Eurobail, he would be remanded in custody in his home State.
36. Because the Commission opted for a mutual recognition measure, the Eurobail concept has not been developed in a detailed proposal. There was some debate regarding what would be involved in an assessment of whether an offence was “bailable”. One view is that that would require the trial court to determine whether the offence was, as a matter of law, one in respect of which bail could be granted.¹⁷ This was the approach taken by Stephen Jakobi (the author of Eurobail) and the CPS (QQ 14, 15 and 71). But the Commission’s understanding was different: the trial court would have to go further, to make an assessment on the facts and form a view as to whether it was or might be an acceptable case for bail (Q 137).

¹⁶ COM(2006) 468 at page 7.

¹⁷ However it is arguable that, under ECHR, every offence is theoretically bailable. See the discussion at Q 57.

Eurobail v ESO—views of our witnesses

(i) Mr Jakobi

37. We had the benefit of hearing from Stephen Jakobi, the founder and until last year the Director of Fair Trials Abroad and, as mentioned, the author of Eurobail. Not surprisingly, he argued the case for Eurobail strongly. He believed that the ESO would “make very little difference indeed because the prejudices involved—institutionalised prejudice, I am not looking at individuals—in granting bail to foreigners will persist” (Q 10). Mr Jakobi strongly believed that Eurobail would be fairer (Q 9). He accepted, however, that Eurobail would not necessarily result in more suspects being bailed and might therefore lead to the situation where executing States effectively bear the burden of keeping in prison people awaiting trial in a foreign country. Mr Jakobi believed that this had a number of social advantages to the prisoner (Q 36).
38. Mr Jakobi did accept, however, that the ESO could help the “marooned”, that is, those granted bail in a foreign country but confined to that country pending trial. The number concerned was small, “not thousands but 100 or 200 so far as we can see” (Q 10).

(ii) the Commission

39. In light of the mutual recognition approach adopted in the field of EU criminal justice, it was not surprising that Mr Csonka, for the Commission, while accepting that there were arguments in favour of both schemes (Eurobail and the ESO), defended the Commission’s choice of the ESO. He did not accept that there was institutionalised prejudice affecting Member States’ decisions on whether to grant bail to non-residents (Q 146). He argued that the decision on bail should be in the hands of one Member State, and that this should be the trial State. He also believed that the authorities in that State would be well placed to make a decision on bail because all the evidence in the case would be gathered by the prosecutor there. Eurobail, the ESO’s main rival, would, in Mr Csonka’s view, dent the concept of mutual recognition and create significant difficulties between the trial State and the suspect’s State of residence. He did not think Member States would depart from the principle of mutual recognition in favour of Eurobail (QQ 136, 141, 145, 215).

(iii) the CPS

40. The CPS preferred the Eurobail option: it was simpler and involved the executing State much more in the decision-making process. Mrs Bowring said: “it seems to be very straightforward”. The issuing State having made the preliminary assessment, the suspect would be sent back to his home State which would apply its own legislation. Unlike the ESO, there were no parallel jurisdiction problems nor problems about information sharing and risk assessment. The CPS believed that Eurobail reduced the chances that relevant information in the bail decision-making process would not be available—not just antecedents, but details on local conditions which may affect a successful supervised period of bail. It would also ensure that the concerns of the executing State in relation to public protection would be taken into account (p 27, Q 75). Notwithstanding their preference for Eurobail, the CPS described the ESO as “a feasible and viable option”. They

did, however, have concerns about the detail of the proposal; notably costs; complexity of the proposed process; and the different bail rules within the European Union (EU), in particular some Member States having a more serious threshold for remand in custody (p 26).

(iv) the Law Society

41. The Law Society of England and Wales, on the other hand, expressed a preference for the ESO: “We believe that mutual recognition is the appropriate basis for any measures requiring enhanced cross-border cooperation and certainly in this instance” (p 55). The Law Society noted that the Eurobail concept had not been tried and tested or put through the scrutiny procedures that the ESO had, albeit at the pre-draft stage, with Commission consultations. There had been no discussions on the detail of Eurobail, of how and when the suspect would be transferred, on whether Member States would readily consent to persons being returned or to receiving them as the case may be, and on how much of the evidence would need to be transferred to the second Member State to make its determination (QQ 239, 240 and 242). The Law Society did, however, recognise that the ESO was not without its problems: “We did take the position that the supervision order was preferable, but we can see that there are lots of improvements which need to be made” (Q 239).

(v) the judges

42. Judge Workman also thought that the ESO, rather than Eurobail, was the way forward (Q 316). He said: “the best court for deciding bail is the court which is actually responsible for the offence”. The trial court had the “prime responsibility”. However, he added, “If it were possible to devise a system where, if they were refused bail, they could be remanded abroad then I suppose there is some merit in that” (QQ 414–7). Again, he recognised that the devil was in the detail: “I think its principle is quite simple and clear and clearly worthwhile, but the detail I think is much more difficult to work out than the European arrest warrant” (Q 407). The Magistrates Association considered that “the practical difficulties appear huge” (p 99).

(vi) JUSTICE

43. JUSTICE said that the ESO faced “major practical difficulties, especially if it is to avoid discriminatory application”. The Framework Decision did not incorporate human rights protections and, in JUSTICE’s view, wrongly envisaged that Member States could “out-source” their human rights obligations to one another (p 96).

(vii) the Government

44. The Government acknowledged that “if you do have individuals who are not given bail for the sole reason that they are a national from another country and therefore are at risk in terms of what that judicial system sees as being a non-returner, that is obviously very serious” (Q 423). They would have preferred the Eurobail option but accepted that the ESO could “deliver some real advantages across Europe” (Q 422). However, Baroness Scotland of Asthal QC, then Minister of State, Home Office, said: “the devil really will be in the detail and that detail has not really been gone through to any extent to date” (Q 421). A particular concern of the Government in taking the

proposal forward was that the ESO should “not trespass on own bail law” (QQ 422, 434).

Views of the Committee

45. When, in 1999, we considered the proposed bail rules of the *Corpus Juris* (a draft code of criminal law aimed at fraud on the Communities’ finances) we expressed a preference for a regime based on mutual recognition and enforcement of bail conditions. We believed, at that time, that such a system might be simpler and more attractive to Member States than that of Eurobail as was then being proposed by Mr Jakobi and Fair Trials Abroad.¹⁸ However, when the detail of the ESO, a system clearly based on the principle of mutual recognition, is examined the comparative simplicity of Eurobail is noteworthy.
46. In the conclusion of its explanatory memorandum¹⁹ the Commission states that Eurobail “would to a certain extent address the problems in the current situation. It has already met a strong opposition from the Member States, who argued that in this model, the trial State would lose control over the pre-trial process and the executing State would be in charge of proceedings when the crime was not committed in its territory”. Stephen Jakobi said: “It is a political decision about what the Commission thought they could get through the governments” (Q 20). Seen against the backdrop of the key role played by the principle of mutual recognition in the development of EU criminal law without, or with the minimum of, harmonisation of national laws, that may well be right. Any Framework Decision on bail would require unanimity and in reality some countries are likely to object to a situation, as is envisaged under Eurobail, which would put bail in the hands of other legal systems, which they do not know about and in which they may not have complete confidence.²⁰
47. We also query whether the ESO would be as unhelpful in practice as Stephen Jakobi suggested. There might be more decisions that it is appropriate to grant bail because the trial State would at least know that if the foreigner was bailed, he could be escorted back to his home country for that home State to impose the necessary conditions of bail and be able to monitor him, supervise him and eventually do its best to ensure that he would finally be returned to stand trial in the trial State. Trust in the foreign system would be stronger if, as we recommend below, the Framework Decision’s provisions on breach of bail conditions were made clear and strengthened in favour of local enforcement.
48. **The ESO is the way forward though, as we discuss below, the mutual recognition principle might be usefully supplemented by allowing a greater role for the executing State than is currently envisaged in the ESO proposal.**

¹⁸ *Prosecuting Fraud on the Communities’ Finances—the Corpus Juris*, (9th Report 1998–99, HL Paper 62), para 138.

¹⁹ Para 6.3 on page 29.

²⁰ For example, as the opinion of the European Committee of the German *Bundesrat* clearly indicates there is a deep suspicion of the adequacy of Romania and Bulgaria to fulfil their obligations under the ESO. Document 654/1/06 of 23.10.06 at paragraph 5.

Division of competence between issuing and executing States

49. The principle of mutual recognition does not exclude the possibility of a division of competence and responsibility that accords a measure of control to the executing State. The French and German initiative for a Framework Decision on the recognition and supervision of suspended sentences²¹ is a case in point and provides an interesting comparison with the ESO. The Framework Decision would allow non-resident offenders on whom suspended sentences or alternative sanctions have been imposed to return to their home States to serve the sentences there. However, unlike the ESO, the suspended sentences proposal envisages that once a judgment imposing a suspended sentence or alternative sanction has been transferred to the executing State, the sentencing (or “issuing”) State would no longer have competence to take further decisions relating to the sentence, including revoking or modifying the suspensory measure or indeed imposing a sentence in the case of conditional sentences, although there is provision allowing the sentencing State to reserve competence in relation to conditional sentences. We note that in this case the Government are strongly in favour of full transfer of suspended custodial sentences and release on licence cases to the State of residence.²²
50. At first glance it may be thought that there is some inconsistency in approach between the suspended sentences and ESO proposals. However, closer examination reveals this not to be the case. Where the ESO applies, the issuing State has a strong interest in retaining control over the procedure as it is expected that the accused will ultimately return to the issuing State for trial. In contrast, the suspended sentences proposal deals with transfer of a sentenced person once the trial process has been completed and, in most cases, no further procedure is envisaged in the sentencing State. The importance of this difference is highlighted by the distinction drawn in the suspended sentences proposal between suspended sentences (a custodial sentence has been imposed but its execution is suspended) and conditional sentences (a custodial sentence has not been imposed but may yet be imposed). As noted above, the sentencing State is entitled to reserve competence in relation to conditional sentences, which implicitly recognises that the sentencing State—as the “owner” of the judicial process—has a strong interest in imposing any sentence itself.²³ Thus it can be seen that the question of division of competences is not clear-cut. We return to this issue in Chapter 5 where we deal with the question of enforcement of the ESO.

Greater involvement of the executing State—a hybrid approach

51. As the detailed analysis of the proposal set out in Chapters 3 to 5 reveals, the proposed Framework Decision requires substantial amendment, at least in parts, if it is to be clear and workable. In some instances amendment may be needed simply to make clear what the Commission’s scheme currently intends as part of its implementation by Member States. It is not just a question of trust (or lack of it). There are, as we explain in Chapter 5, sound

²¹ Document 5325/07 COPEN 7, currently held under scrutiny by Sub-Committee E (Law and Institutions).

²² See letter of 19 April 2007 from Baroness Scotland of Asthal QC to Lord Grenfell.

²³ Indeed the UK does not support the inclusion of conditional sentences or alternative sanctions in the suspended sentences proposal because it considers that measures which may require the imposition of a custodial sentence in the future will render the scheme too complicated given that imposition of sentence is a matter for the sentencing State.

practical reasons why greater responsibility and even a measure of control should be given to the executing State. **While we support a mutual recognition measure here, we believe that such a measure will not work in this context without substantial augmentation.**

52. Whether greater involvement of the executing State in the issuance and enforcement of an ESO would mean that the outcome could or should be characterised as a hybrid, as the Law Society at one point seemed to suggest (Q 239) and Baroness Scotland did not dismiss (Q 425), is debatable. The ESO would remain the order of the judge in the issuing State.

Practical burden—how the ESO might affect the UK

53. There is no clear evidence or even estimate as to what the effect of the ESO would be as regards the UK. Baroness Scotland said: “We are not certain of how many numbers we are talking about, how many people would have to come back and how many people would be sent. We are looking at the options internally. We are trying to discover what the practical implications would be because once we have done that, of course it better enables us to advocate a system which we think would work” (Q 458).
54. Mr Gibbins, for the CPS, said that there were concerns among practitioners that the UK would be more likely to be on the receiving rather than the issuing end of ESOs. One reason for this related to the definition of “issuing authority” and the different nature of criminal proceedings in some other Member States. The ESO, Mr Gibbins explained, would be available for countries using the investigating magistrates’ system: “One can imagine the situation where a British national is being investigated by an investigating magistrate in a European State for an offence; it might not be a particularly serious offence and the inquiries might not be at a particularly advanced stage. The investigating magistrate may, at some stage, wish to talk to him again, and indeed may at some stage want to charge him, or whatever the equivalent would be. The European supervision order would be a very attractive proposition in those circumstances because it would involve supposedly little cost by way of detention, which would be the alternative in that country’s courts” (Q 79).
55. The CPS also drew attention to the difference between the ESO and the EAW. Extradition is dealt with by a specialist division within the CPS and is dealt with by a limited number of judges at designated courts and a relatively limited number of defence practitioners. EAW cases are dealt with at the City of Westminster Magistrates’ Court. By contrast, the CPS envisaged the ESO procedure being applied in any magistrates’ court and therefore any prosecutor and defence practitioner could come up against it (Q 98). The CPS noted that the Framework Decision made no provision for a central authority but contemplated direct transmission between authorities. In relation to the EAW the Serious Organised Crime Agency (SOCA) had been designated as the central authority for the receipt and transmission of dealings on EAWs (QQ 101, 103).
56. **We consider that there may be a case for designating one or more central authority/ies in the UK to deal with incoming ESOs. This is a question we consider further in Chapter 3.**

The general costs burden

57. The CPS expressed concerns over costs. It envisaged that in England and Wales the police would have the responsibility for dealing with the day to day supervision of ESOs. The CPS would deal with the court proceedings and elements of the liaison between the issuing and executing authorities. The bulk of the work would fall to the police and/or to a central authority that was charged with it (p 26, Q 109).
58. Mrs Bowring said: “We have noted what the [Commission’s] impact assessment says, that there will be no additional operational expenditure. We are slightly unclear as to how this conclusion was reached. As we see this, there will be real costs in training of the judiciary, court staff, CPS, defence practitioners and the police at the moment”. There would also be costs in relation to the liaison aspects of the ESO: “when we receive the European supervision order from the issuing authority, for certain conditions they need our agreement. We do have to look at it. It is complex and you need the people there to deal with it in a skilled manner. Obviously there is a cost in manpower hours as well as in the training involved.” There would also be costs for the police in carrying out the supervision of those subject to ESOs. Mrs Bowring concluded: “We consider that will be a huge cost particularly for the CPS” (QQ 98–9).
59. As mentioned, much of the responsibility and cost of supervision would likely fall to the police. Chief Superintendent Hall, for the Association of Chief Police Officers, said: “we have concerns about the numbers of these cases that may be forthcoming from other Member States. Certainly the experience in the recent past with mutual legal assistance and the European arrest warrant indicates that these are rising significantly and the concern would be that these provisions would also lead to a significant increase in work. I think it is the point that was made earlier, which is that they may be available within inquisitorial systems much earlier in the investigative process and that might broaden the net for European States in a way in which it would not in the UK, so the resourcing implications for policing in the UK may be significant” (Q 120).
60. The Government emphasised that the ESO should not have “unintended adverse consequences or costs” (Q 421). Baroness Scotland said: “whether this is deliverable at a reasonable cost is obviously going to be a matter of real consideration as to whether we can or cannot deliver it and find it acceptable. The drive must be to construct a system which will be efficient, effective and also cost-efficient and cost-effective if it is going to have any real utility. Therefore, if you were to cost the current structure which is being proposed, it is likely that it would be cost-inefficient, but that is not necessarily the scheme we will be identifying or supporting at the end of the day. It is clear that this scheme is going to have resource implications and it is going to have resource implications for all of the agencies involved in this process” (Q 456).

Costs of translations and interpretation

61. The Law Society referred to the potential costs of translation and interpretation, particularly in relation to any liaison between issuing and executing authorities and to the transfer of suspects and proceedings between jurisdictions. However, they did not anticipate a large number of cases or a special need to have interpreters on call. Compliance with Article 6 ECHR

rights already required interpretation for defendants in domestic criminal proceedings and the Law Society thought that existing resources should suffice (QQ 255–6). **We agree.** Unless there is a sudden influx of a large number of criminals from one particular Member State we do not see that there should be a problem in terms of getting the interpreters or the translators to do the work for an ESO, because arrangements are already in place.

Need for UK impact assessment

62. Mr Gibbins said: “we would very much welcome a UK-specific resource impact assessment to ensure that all the agencies are covered, not just CPS but the police and a central authority if there was to be one (Q 103). Baroness Scotland acknowledged that a full impact assessment would need to be undertaken and told us that, as part of the work presently being undertaken by the criminal justice agencies and departments to define the UK’s view and negotiating position, the Government were looking at the cost issues (QQ 456, 462).
63. **We are pleased to see that the Government intend to carry out a full impact assessment including an examination of the likely costs of the ESO.**

CHAPTER 3: GRANT OF AN ESO

64. Witnesses drew attention to a number of concerns relating to the practical application of the ESO. A number of questions also arose from the drafting of the Framework Decision. In parts the text is opaque and in some instances it seems to produce a result at odds with what the Commission intends. In this Chapter we look in detail at those Articles dealing with the making of the ESO. Chapter 4 deals with issues relating to the recognition and execution of an ESO. Finally, Chapter 5 looks at enforcement and return of the suspect.

Involvement of the suspect

65. Article 5 provides that an ESO may be issued after the suspect has been informed of the obligations to be imposed pursuant to Article 6 (*i.e.* bail conditions) and of the consequences of a breach of the ESO and the conditions for arrest and transfer of the suspect back to the issuing State (the State where the person is under investigation or facing prosecution). The form of the order is set out in an Annex to the Framework Decision. The issuing State is obliged to translate it into the official language of the executing State (the State to which the defendant is being released on conditional bail) (Article 7).

Article 5—Information of the suspect²⁴

<p>1. A European supervision order may be issued by the issuing authority after having informed the suspect of any obligations to be imposed pursuant to Article 6 and of the consequences, in particular of those set out in Articles 17 and 18.</p> <p>2. The issuing authority shall record the information given to the suspect in accordance with the procedure laid down by the national law of the issuing State.</p>
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66. Significantly, the draft makes no express reference to, and sets out no mechanism for, the participation of the suspect in the making of an ESO. Witnesses pointed out that there are practical reasons why the suspect should be involved. As the Law Society of England and Wales indicated, there were points on which the suspect would be best placed to provide information, for example, in relation to any residence condition in a specific locality. Further, some of the matters set out in Article 10 as grounds for non-recognition and non-execution would probably only be known to the defendant (such as the existence of double jeopardy or an immunity or privilege).
67. We would have expected Article 5 not merely to refer to the suspect being informed, but also that he should have the opportunity to make representations about any conditions to be imposed, before any ESO is made. The suspect has a right to be heard in our domestic proceedings; he can speak to any conditions to which his bail may be made subject (QQ 327, 345). The silence in Article 5 is the more surprising because, by contrast, Article 13 (review of ESO) expressly provides that the subject of the order be heard (Article 13(4)) and that he be provided with interpretation and legal advice (Article 13(8)).

²⁴ The boxes in this Report set out the relevant provisions of the Framework Decision in their entirety.

68. Article 5 of the European Convention on Human Rights (ECHR), which guarantees the individual's right to liberty and security, is relevant here.²⁵ The Commission acknowledged that Article 5 ECHR would apply and agreed that there would have to be a hearing and that the suspect would have an opportunity to say, "I should have one of these orders and you shouldn't impose this, that or the other condition" (QQ 152–3). Mr Ljungquist explained why the Commission's text contained no reference to a hearing: "we think that all the Member States already have such a provision, but I can say that maybe for the sake of clarity it would have been better to remind the Member States of this in Article 5 [of the Framework Decision]" (Q 157). As to the difference in the drafting of Article 13, the Commission considered that it was necessary to make express reference to a hearing there because a right of review was not expressly provided for in the ECHR (Q 158).
69. As we shall explain, it is clear that in many, if not all, cases there will have to be some liaison between the authorities in the issuing and executing State before an ESO is made. But the use, for example, of liaison judges or of informal communications between judicial authorities heightens the risk of decisions being taken without due regard to the rights of the suspect. As Stephen Jakobi, consultant, Cross-Border Justice, said: "One could see a practice building up where these decisions are taken in the absence of an accused, which is surely not right" (Q 49).
70. **Article 5 ECHR entitles the suspect to be heard on the issue of bail. We believe that it would be helpful for Article 5 of the Framework Decision to provide that the suspect has a right to be heard before an ESO is made and in particular on what obligations, if any, should be attached to the order. While the precise details of the manner and means by which the suspect is to be heard should be left to Member States the basic right should be expressly set out in the Framework Decision.**

Importance of the conditions

71. The conditions to be attached to an ESO are likely to be a matter of great importance to Member States. The conditions must be effective so as to ensure appropriate supervision and ultimately the suspect's return for trial. They must also be workable in practice in the executing State where the "normal" bail conditions and resources available for their supervision may differ from those in the issuing State. In this context we note that the Government's support for the ESO is dependent on there being no adverse impact on domestic bail law and practice, although it is not clear what sort of negative effect they are contemplating here. Baroness Scotland of Asthal QC, then Minister of State, Home Office, said: "This whole issue is about what the conditions are going to be, who is going to set them, how they are going to be exercised, how they are going to be enforced and 'what happens if'" (Q 432). The Commission's text sets out a scheme in Article 6 but Baroness Scotland envisaged that there would be considerable discussion in the Council before any agreement was reached (Q 432).

²⁵ Article 5(3) ECHR provides: "Everyone arrested or detained ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditional by guarantees to appear for trial".

Article 6—Imposition of pre-trial supervision measures and obligations of the suspect

1. The issuing authority shall impose an obligation on the suspect to make himself available for the purpose of receiving summons for his trial and to attend the trial when summoned to do so. Obstructing the course of justice or engaging in criminal activity may constitute a breach of the European supervision order. The issuing authority may impose one or more of the following obligations on the suspect:

(a) to attend preliminary hearings relating to the offence(s) with which he has been charged; or

(b) not to enter specified places in the issuing State without authorisation; or

(c) to reimburse the costs for transferring him to a preliminary hearing or trial.

2. Subject to agreement between the issuing authority and the executing authority, the issuing authority may impose one or more other obligations on the suspect which may include, but are not limited to, the following:

(a) to travel at a particular time and on a particular date to a specified address in the executing State;

(b) to report to the executing authority at a specified place or places at specified times;

(c) to surrender his passport(s) or other identification papers to the executing authority;

(d) to be at his specified place of residence, which may include a bail hostel or a specialised institution for young offenders in the executing State, at specified times;

(e) to be at his specified place of work in the executing State at specified times;

(f) not to leave or enter specified places or districts in the executing State without authorisation;

(g) not to engage in specified activities, which may include involvement in a specified profession or field of employment;

(h) to undergo specified medical treatment.

3. Any obligations imposed by the issuing authority in accordance with paragraphs 1, 2 and 3 of this Article shall be recorded in the European supervision order.

4. In addition to the obligations provided for in the European supervision order, the executing authority may, in accordance with the law of the executing State, modify the obligations contained in the European supervision order as is strictly necessary for the purpose of executing the European supervision order.

More mandatory conditions

72. Article 6(1) provides that the issuing authority “shall impose an obligation on the suspect to make himself available for the purpose of receiving summons for his trial and to attend the trial when summoned to do so”. The Article goes on to say that obstructing the course of justice or engaging in criminal

activity “may” constitute a breach of the ESO; it is not clear whether this is intended to be a mandatory condition but it appears to be treated as such (Q 138). Other conditions are optional. So the issuing authority may order him “to attend preliminary hearings”, “not to enter specified places in the issuing State” and “to reimburse the costs for transferring him to a preliminary hearing or trial”. Questions arise as to the scope of the conditions set out in Article 6(1) and also, more generally, on the need for and desirability of mandatory conditions.

73. JUSTICE identified a number of difficulties with Article 6(1), noting that it “appears to contradict the preamble by stating that the issuing authority shall order the defendant to ‘attend the trial when summoned to do so’ and may order him ‘to attend preliminary hearings’ and ‘to reimburse the costs for transferring him to a preliminary hearing or trial’. ‘Attend’ may refer to video link but this is by no means clear. Secondly, the discretion to order reimbursement could result in impecunious defendants being denied an ESO because they would clearly be unable to pay the costs of their return. This would contradict Article 14 ECHR, which states that the Convention rights (including the right to liberty under Article 5) shall be secured without discrimination on the grounds of, *inter alia*, property or other status” (p 97).
74. On the more general issue of the scope of Article 6(1), we asked witnesses whether there should be more mandatory conditions. Would it be useful to impose an obligation on the suspect to return to his State of residence, *i.e.* the executing State, when the ESO has been made in his case? Should there be a mandatory reporting obligation so that there would be a scheme for checking that the suspect has not absconded or been lost track of?
75. The general reaction of our witnesses was not to favour any further mandatory conditions. The Law Society’s starting point was that bail was, in every case, particular to the individual’s circumstances. Mr Anand Doobay, for the Law Society, said: “One thing which we feel may be missing from the Framework Decision is a requirement that only those conditions which are both proportionate and necessary are imposed, and therefore to have mandatory conditions may impose conditions which a court does not, in fact, feel are required to meet their concerns about releasing the defendant pursuant to a European Supervision Order” (QQ 260, 264).
76. **We agree with the Law Society that there is a need for flexibility in relation to the granting of bail and this would not be assisted by having further mandatory conditions. The court is best placed to determine what conditions are required to meet its concerns about releasing an individual. An ESO must contain a condition that the accused “make himself available for the purpose of receiving summons for his trial” and this appears to us to be an adequate basic means of keeping track of individuals. An issuing State seeking further assurances may stipulate additional conditions. There is no need for more mandatory conditions.**

Common conditions

77. The Law Society reported that a recent study conducted by them in conjunction with the Czech and Spanish Bars has revealed that there is no

standardisation in terms of conditions which courts impose for bail.²⁶ Conditions which are commonplace in the UK, such as restrictions relating to place of residence or surrender of passports, may meet with fundamental or constitutional objections from other Member States (QQ 250, 252). The Law Society has been advocating a pan-EU study, to try to identify the basic common conditions which no EU Member State would find alien to its system and which all Member States would find easy to implement. Mr Doobay said: “The Commission has not chosen to follow that route, but certainly we see the force in having such a study, because it is very difficult to argue that each Member State has trust in the other Member State’s legal system when we cannot even have a common definition of the basic conditions which are applied throughout the EU for bail” (Q 256).²⁷

78. Senior District Judge Timothy Workman supported the Law Society’s suggestion that research should be undertaken to see what common conditions there are. In his view it would cut down the need for consultation between the relevant authorities. He envisaged five or six common conditions (perhaps relating to security, residence, curfew, reporting to the police, surrender of passport and contact with any specified victim or witnesses) which could properly be imposed in any State. The issuing authority could then decide which (if any) of them it wished to attach to the ESO. Consultation with the executing authority might then only be needed to establish the practicalities, for example, of which police station the suspect should report to, or whether his address was a valid one (QQ 320–1, 323, 328, 331, 350).

Need for liaison

79. The Framework Decision does not currently provide for the involvement of the authorities of the executing State in the proceedings leading to an ESO. However, the Article 6(2) list of optional bail conditions are “subject to agreement” between the issuing and executing authorities, which implies some level of consultation. Witnesses pointed to the need for some liaison between issuing and executing authorities at the early stages of making an ESO. The Law Society, for example, suggested that the executing authority needs to be involved lest the issuing State put in place obligations that the executing State would not be able to supervise or monitor (QQ 246, 251)
80. While there should be no controversy surrounding the imposition of the Article 6(1) mandatory conditions (Q 155), the imposition of further conditions (Article 6(2)) may require consultation between the issuing and executing States. For example, one of the conditions in the Commission’s list is that the suspect should undergo “specified medical treatment” (Article 6 (2)(h)). The trial court would need to discover whether the sort of treatment envisaged was available and how easily it could be provided. Mr Ljungquist said: “Of course the issuing authority must investigate if the executing State

²⁶ See *Better Bail Decisions—A project to improve the quality and consistency of bail decision making by courts in England and Wales, Spain and the Czech Republic*; and *Better Bail Decisions—A commentary, discussion and advice paper on bail from the English and Welsh Task Force for the Better Bail Decisions Project*, The Law Society, March 2004.

²⁷ The Commission did, however, undertake some work in this area prior to the publication of its Green Paper on pre-trial supervision measures—see Commission Staff Working Paper *Annex to the Green Paper on mutual recognition of non-custodial pre-trial supervision measures* SEC(2004) 1046. Brussels, 17.08.2004, Annex 2.

has the means to provide for such treatment”. He also acknowledged that it would be possible to discuss the grounds for non-recognition and non-execution at this stage: “This is not provided for explicitly in the Framework Decision, but of course we have to have an Article which tells us on what grounds such an ESO can be non-recognised. So it is foreseen that there are contacts between the two authorities” (Q 156).

81. Under the Commission’s proposal, the issuing State could make decisions granting bail without reference to the executing State. With the exception of Article 6(2) there is no express provision for any liaison with the home State at this stage. This was a matter “of great concern” to the Crown Prosecution Service (CPS): “It means that the issuing court would not be making a fully informed decision, nor would it be taking local concerns or resource issues in the executing State into consideration. This would have both potential legal and practical implications in terms of fairness and proportionality” (p 26).
82. The issuing State may already have some information on which to base its decision. The circumstances of arrest may give some indication as to whether the suspect is someone who is likely to abscond and the circumstances of the offence alleged may give rise to some inference about likelihood of commission of further offences but as Mr Gibbins, for the CPS, said: “We would say that it would be extremely important for that consultation to take place. It might be at the purely administrative level as to the suitability of an address or the availability of a particular police station; it might be on much more complex matters” (Q 87). The CPS proposed that the identity, nationality and residence of the person concerned should be established before a ESO was issued. Further, “the issuing State should have before it not only the details of the alleged offence but also the background of the defendant and the local circumstances. This may affect the conditions imposed, in addition to balancing the need to protect the public; to support the presumption of innocence; and to maintain the principle of proportionality” (p 27).
83. The Commission acknowledged that there was a question whether the trial court has sufficient information to make a risk assessment. To some extent this might be provided by the current proposal for an EU system of criminal records²⁸ and the effective electronic exchange of information to which that might lead (Q 146). The Commission nonetheless accepted that there would have to be communication between the two relevant authorities. How much would depend on the particular case. Mr Csonka, for the Commission, said: “If it is a very straightforward case, a traffic offence, for example, I do not think it would be necessary to have extensive consultations with the resident. If it is a person whose personal situation is complex, family-wise or otherwise, or there are indications that he or she is a repetitive offender, I think there would be consultations between the two States, particularly as to the suitability of some of these additional supervision measures, such as reporting to the police, appearing at the workplace at certain times, withdrawing the passport and perhaps other identification documents” (Q 154).

²⁸ Proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States, COM(2005) 690, Brussels 22.12.2005.

84. **Although there is no express provision in Article 6(2) for communication and consultation between the authorities in the respective Member States it seems implicit in the fact that any Article 6(2) conditions are “subject to agreement” that there should be some machinery for discussion between the two States in advance of such a decision. We agree with the CPS that there needs to be a close liaison between the issuing and executing States on the conditions to be imposed. Both authorities should be involved early in the decision-making process, and an ESO should not be issued without such consultation.**

Effective and timely liaison

85. If there is to be communication between the respective authorities it needs to be simple and capable of speedy application. Otherwise delays might easily occur. Judge Workman explained that experience seeking further guidance under the EAW “takes quite a long time. I would say it measures in weeks rather than days, but probably not months” (Q 325). Speaking from his experience at Fair Trials Abroad Stephen Jakobi said: “The practicality of toing and froing means that anything other than a simple effective scheme with very little documentary transmission and query will defeat the purposes of a remand scheme of any sort because if things are not finalised, the wretched defendant, no matter whether he should be bailed or not, will be sitting inside until they are” (Q 48).
86. A number of practical suggestions emerged from our discussion with practitioners.

(i) central authority

87. The Framework Decision, unlike the EAW,²⁹ makes no provision for a central authority but contemplates direct transmission between authorities in the issuing and executing States. The CPS could see “considerable merits in that process being facilitated by a central authority”. Mr Gibbins pointed out that in relation to the EAW the Serious Organised Crime Agency (SOCA) had been designated as the central authority for the receipt and transmission of dealings on EAWs. SOCA had language facilities available and a 24-hour capacity. The CPS believed that a central authority would be important if they were to meet the turnaround times and deadlines contemplated by the Framework Decision (QQ 101, 103).
88. Judge Workman described his experience under the EAW: “as between the judicial authorities of the requesting State and receiving State there is very little contact initially. We receive the warrant and we get on with it, but I do know that before that it passes through the Serious Organised Crime Agency and I believe there are a number of occasions when those warrants are examined by the Agency and further questions which arise from them are answered” (Q 317). But there have been occasions when the executing authority here has asked for further advice and guidance from the EAW’s

²⁹ Article 7 (Recourse to the central authority) provides: “1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities. 2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.”

issuing authority (Q 318). As regards the ESO, the approach of Judge Workman was to look for ways to reduce the need for consultation, for example, by common conditions (see below) or administrative means not requiring the court (for example, to identify the local police station to which the suspect must report) (QQ 328, 343, 348).

89. The Law Society also envisaged communication between issuing and executing Member States taking place via a designated central authority: “the Framework Decision leaves it to each Member State to appoint their own executing authority, and obviously it would be desirable to have a central executing authority in the UK so that there was a nominated agency which was a point of contact ... we would see that authority as being the participant from the UK which would be able to say “These are conditions which we can practically deal with”” (Q 249).
90. The executing authority and the central authority need not be the same person. Baroness Scotland made clear that the executing authority in the UK for the ESO would be the court but she did not exclude the possibility that there might also be a separate central authority. The issue gave rise to a number of questions in the mind of the Government: “If there is going to be a central authority, who should that central authority be? Should there be a central authority in each country similar to the central authority we have, say, on the Hague Convention in relation to child abduction? If so, how is that going to be paid for? What are going to be the rules that will operate in relation to how the central authority will work in unison with the executing authority?” (QQ 434–6).

(ii) video links

91. The Framework Decision appears to place weight on the ability to carry out hearings using video links. The Commission believed the technology to be well established and available in most Member States (Q 206). The Law Society envisaged video links being used not just when an ESO was being reviewed (under Article 13) but more widely throughout the procedure: for example, at the early stage in order to get an agreement both from the issuing State and the executing State (Article 6) and, later, in dealing with possible breaches of the order (QQ 245–6).
92. However, as JUSTICE pointed out, video links might not always be available and it is by no means certain that all courts in all Member States will adopt the same attitude to hearings via video links (p 97). There was, Judge Workman said, some experience in dealing with other jurisdictions via video links. Not every court in England and Wales had such facilities but there was a central court within most areas that had a video-link. The procedure was not, however, without its difficulties: “I have to say that our experience of video-links is that it becomes extremely difficult in terms of interpreters. It can be managed, but it is not easy” (QQ 354, 356).

(iii) tripartite proceedings

93. As mentioned, the Law Society believed that the process of making an ESO required the involvement of the suspect and also the executing authority. The Society envisaged that there could be a tripartite hearing (using video links where necessary—see above) before an ESO was made. Such tripartite hearings might also be relevant at later stages of the process. So, once the person is transferred, any hearings of substance, whether of review of the

ESO or of breach of an ESO, would again require those three parties to be involved in those decisions (Q 245).

How prescriptive should the Framework Decision be?

94. There seems to be no dispute that there should and in many cases would be communication and liaison between the authorities in the issuing and executing States. Mr Ljungquist said: “How these contacts are going to take place is not specifically provided for in the Framework Decision and I think maybe it could also be dangerous to regulate that in detail” (Q 156).
95. **We believe that while the Framework Decision should leave a substantial measure of discretion to Member States in implementing the Framework Decision nevertheless there could usefully be included in Article 5 an obligation on the authority in the issuing State to consult the relevant authority/ies in the executing State before making an ESO which contains Article 6(2) conditions. The ESO is a complicated scheme, whose effectiveness in a particular case will be dependent upon setting conditions which will satisfy the issuing court and can be operated by the executing authority. This requires a substantial measure of initial cooperation and consultation.**
96. **We note the reliance placed by the Framework Decision on video links but are sceptical as to whether they will suffice. We therefore recommend that ways should be sought, wherever possible, to facilitate consultations between Member States’ authorities and reduce the range of the discussions to ensure that they can be conducted quickly and effectively. A list of common conditions (described above) is one way in which this might be done.**
97. **We believe that there might be practical benefits if the ESO proposal included provision for recourse to a central authority. Experience in relation to the EAW would suggest that informal consultations can usefully take place between administrative authorities in the respective Member States, thus reducing the need for judge to judge contact. We urge the Government to examine this suggestion which, as described above, has across-the-board support from practitioners. The extent of involvement of a judicial body in the final agreement of any Article 6(2) conditions will need careful consideration in implementing legislation.**
98. **The consultation should focus on the conditions in the ESO but should also cover other matters. For example, Article 10 deals with grounds for non-recognition and non-execution. It seems inconceivable that the authorities could discuss the terms of an ESO, then formally transmit the order (under Article 8), and then the executing State say that it will not recognise it. The executing State should be under an obligation to provide the issuing State with such information as it needs to decide whether to make an ESO and if so on what terms.**
99. We consider below the question of a timetable and therefore fixing time limits within which such liaison should in principle be accomplished.

Return of suspect to his home State

100. As mentioned, the Framework Decision is silent on a number of important practical details. Significantly, there is no provision for the transfer of the suspect to his home State when an ESO is made. The Law Society described this as “one of the major, practical details that have not been thought out” (Q 265). It is not clear, for example, from Article 12 when the person would be transferred *i.e.* once a decision has been taken on recognition and enforcement or prior to this p 56). Nor is it clear whether the suspect is expected to make his own way home. Jakobi and Debbie Sayers, solicitor, commented: “Presumably there will be some assistance provided to the accused on transfer to prevent problems with compliance with the ESO *e.g.* reaching a bail hostel in another country before a certain time etc. If so, relevant state responsibilities should be clearly articulated” (p 23).
101. The Framework Decision appears to leave the position flexible. The Commission suggested that if the issuing State wished to ensure that the suspect went back promptly to his home State it could impose a reporting condition, for example, to a local police station in the home State; it could order the suspect to go straight to the airport and get a plane home; or it could introduce some provision whereby bail on conditions was suspended and he was in fact escorted under police escort back to the executing country (QQ 172, 182, 184).
102. **Where only the basic mandatory requirements are imposed on a suspect, it would appear that he is not obliged under this proposal to proceed to the executing State; the Framework Decision itself envisages the arrest of the suspect on the territory of any EU Member State (see Chapter 5). Return to the executing State will only be required where the ESO conditions require the presence of the suspect at a specified location in the executing State. A Member State which wishes to ensure the suspect’s return to the executing State should insert the necessary conditions in the ESO to ensure that he does so.**
103. We also asked the Commission what happens to the suspect while the executing State is considering whether to recognise the ESO. The Commission was clear that the individual need not be detained in custody. He could be made subject to some other pre-trial supervision measure in the issuing State (Q 172). We note that if the suspect is detained this would count against any custodial sentence ultimately imposed by the trial court—see Article 22.
104. It is not clear from the Framework Decision at what point a suspect who has been granted an ESO should be released from custody if he has been detained in the issuing State. The Commission suggested that this would happen once the issuing State has confirmation that the executing State will recognise and execute the ESO (QQ 170–172).
105. **The Framework Decision should be more specific about the practical aspects of the grant and issue of an ESO. While the individual need not be detained in custody, it seems to us that similar arguments as to flight risk would apply here and that Member States are no more likely to release a non-resident suspect on remand pending a final decision from the executing State on recognition of an ESO than they would be to release such an individual under domestic bail provisions**

at the moment. We agree with the Commission that the suspect should be released as soon as the issuing State has been notified that the ESO has been recognised by the executing State.

Time limits

106. The Law Society contrasted the ESO with the European arrest warrant, which sets timetables for all stages (Q 270). There are only two instances in the Framework Decision where the procedure is made subject to time limits. Article 12 gives the executing State five days to decide on recognition and acceptance (although they can provide reasons why they cannot comply within that time). Article 20(1) requires a suspect to be transferred back to the issuing State within 3 days of arrest. Even these seemed highly ambitious to a number of our witnesses. Chief Superintendent Hall, for the Association of Chief Police Officers, thought that these limits “would prove to be extremely challenging and may not be achievable in every case” (Q 117).
107. The Law Society expressed a general concern as to the time the ESO procedure could take. There appeared to be “a great deal of delay inherent in liaising between issuing and executing States as to the non-mandatory conditions in the ESO and then taking a decision on recognition and enforcement” (p 56). Jakobi and Sayers commented “These arrangements may take some time to achieve and it is unclear how long the overall process may take. No deadline is set and, for the accused’s protection, it is important that proceedings should not be allowed to drift” (p 22).
108. It is clearly a matter of some concern that a suspect might linger for months in custody while, without any constraints of time, there is discussion between the two States’ authorities as to what precise conditions shall apply and whether there will or will not be non-recognition once the order is issued. It is somewhat odd that the draft is so strict in Article 12 (the 5 day rule for recognising an ESO) but leaves it completely unspecified as to time for the actual issue of the order in the first place. Mr Ljungquist accepted that “this decision must be very quick regarding the requirement of the Convention”. But he thought that under the relevant national law it might be possible to release the person and provide for non-custodial coercive measures, for example reporting to the police, during this time (Q 162).

Need for a timetable

109. The Law Society suggested that there should at least be aspirational timescales for the initial hearing to decide on the ESO (Q 270). Support for a timetable also came from Judge Workman, who emphasised that any matter of bail must be dealt with at the earliest opportunity. His experience in relation to the EAW had been that the response from the other States varied considerably: “Some places are very swift and responsive, but others take quite a long time and I do not think we would find it very easy to get control of this unless there was a time limit” (QQ 405–6).
110. As we have noted above (paras 103 and 108) while States may be competent to order provisional liberty pending a decision to recognise an ESO, we are not convinced that they would be any more likely to do so than they would be to bail a non-resident suspect under domestic bail provisions. At best, this would enable those who were previously “marooned”—*i.e.* at liberty but obliged to stay within the trial State—to be marooned temporarily only, but

we were told that the number of those granted bail under obligation to remain in the trial State is small (Q 10). It seems probable that the majority of non-resident suspects will, in practice, be detained pending a decision to recognise an ESO.

111. **We therefore believe that further consideration should be given to the inclusion of more time limits in the Framework Decision.** We recognise, however, that there may be difficulties in fixing when a particular period might begin, including when the ESO procedure itself starts. And it is conceivable that in many cases the time limits would be indicative as opposed to prescriptive in character. While there is a clear interest in securing the liberty of the individual speedily that liberty should not be denied merely because the procedure cannot, for whatever reason, be completed within a specified timescale.

CHAPTER 4: RECOGNITION AND EXECUTION

Decision to recognise/refuse an ESO

112. The ESO, once made, is sent directly to the executing authority. Article 9 provides that “Except as otherwise provided for in this Framework Decision” the executing authority must recognise an ESO “transmitted in accordance with Article 8, without further authority being required”. The exceptions are listed in Article 10 (Grounds for non-recognition and non-execution) and Article 11 (Guarantees to be given by the issuing State in a particular case). Within five days the authority in the executing State must take a decision whether to recognise and execute the order or to invoke grounds for non-recognition. That decision is then communicated to the issuing State (Article 12).

Grounds for non-recognition

113. The executing State must refuse to recognise the order where there would be an infringement of the *ne bis in idem* principle. Recognition may be refused where suspect is not of an age of criminal responsibility in the executing State, where there is an immunity or privilege in the executing State, or where the offence to which the order relates is covered by an amnesty in the executing State.

Article 10—Grounds for non-recognition and non-execution

1. A court, a judge, an investigating magistrate or a public prosecutor, in the requested State shall refuse to recognise and execute a European supervision order if it is clear that criminal proceedings for the offence in respect of which that order has been issued would infringe the *ne bis in idem* principle.

2. A court, a judge, an investigating magistrate or a public prosecutor, in the requested State may refuse to recognise and execute a European supervision order on one or more of the following grounds:

(a) if, under the law of the requested State, the suspect may not, owing to his age, be held criminally responsible for the acts on which the European supervision order is based;

(b) if there is an immunity or privilege under the law of the requested State which would prevent the execution of the European supervision order;

(c) if the offence to which the European supervision order relates is covered by an amnesty in the requested State, where that State had jurisdiction to prosecute the offence under its own criminal law.

114. Article 10 appears to provide limited grounds (one mandatory, three optional) for the executing State to decline to recognise an ESO. However, the CPS was not sure that this was necessarily the case. They saw parallels between the ESO and the EAW and noted that before a court in this country can return somebody pursuant to an EAW, it has to be satisfied that to do so would be compatible with his ECHR rights. Mr Gibbins, for the Crown Prosecution Service (CPS), said: “that opens the door to all sorts of arguments on fairness of trial, defendant’s personal situation and so forth. We think, whether explicitly or implicitly, that our domestic legislation in having to comply with the ECHR would necessarily involve that kind of

process in dealing with a European supervision order” (Q 89). We note that Recital 8 provides that the Framework Decision respects fundamental rights although, unlike the EAW Framework Decision³⁰ it does not refer to fundamental rights in the body of the text. This was an issue identified by JUSTICE: “Our major concern in relation to the system proposed is that, beyond the bare statement that it ‘respects ... fundamental rights’ in the Preamble there is no mention of human rights” (p 98).

115. **Member States are bound by the ECHR and any implementing legislation would have to ensure compliance with the guarantees set out in that instrument. For the sake of clarity, it may be helpful to include an article in the body of the ESO proposal which provides that in implementing the Framework Decision Member States must ensure respect for fundamental rights.**

Age of criminal responsibility

116. Of the three discretionary grounds for non-recognition one is especially noteworthy. Article 10(2)(a) permits the executing State to decline to recognise an ESO on the grounds that the accused has not attained the age of criminal responsibility in its State. This is a remarkable provision because it appears to work to the detriment of the child concerned.
117. Mr Csonka, for the Commission, explained that this ground of non-recognition “is a common ground for refusal in mutual recognition instruments and the Member States have insisted in the past on this particular ground of refusal to be included in the previous instruments” (Q 188). It exists, for example, in the European arrest warrant although there, as Senior District Judge Timothy Workman confirmed, it works to the advantage of the child (Q 366). The position is different under the ESO, as the CPS explained: a State which chooses not to recognise an ESO on this ground would be effectively condemning the underage person to pre-trial detention abroad, or at best, to pre-trial liberty under obligation to remain in the trial State (QQ 124–5).
118. The Commission acknowledged that the rule in Article 10(2)(a) could act to the child’s disadvantage but Mr Csonka considered these consequences to be “logical”: “the law of the prosecuting State ... determines the age of responsibility for the prosecution ... If the child is considered a minor who is not responsible under the laws of the executing State, then the consequences have to be drawn from this and therefore the executing State should, in our opinion, refuse to recognise that supervision order”. The Commission believed that given the differences in the ages of criminal responsibility across the Union (ranging from seven in Ireland to sixteen in Portugal) the only way to eliminate this ground for refusal would be to harmonise the age limit for criminal responsibility (Q 188).
119. The Law Society of England and Wales took the view that the age of criminal responsibility should not be a ground for non-recognition, but, Mr Anand Doobay, for the Law Society, said, “we understand ... that this is a matter of great political sensitivity in some EU Member States and it is at their insistence that they do not wish to be seen to be supervising a measure to allow the under-age person to be released, because they are assisting in the

³⁰ Article 1(3).

prosecution process of the person who is under the age of criminal responsibility in that State” (Q 257).

120. The Government consider that the question whether to recognise an ESO for a child under the age of criminal responsibility in that State should be a matter for the executing State. Baroness Scotland of Asthal QC, then Minister of State, Home Office, said: “The reason for that is, you will know, there is a very broad spectrum in the European States as to the age of criminal responsibility ... That is why we think it should be at the discretion of the executing State because we are not going to necessarily persuade any given State in a short space of time that the age of criminal responsibility is necessarily to be changed” (Q 450).
121. We fully recognise that such a ground for non-recognition has a place in the EAW, where it operates to the advantage of the child and, as Stephen Jakobi (consultant, Cross-Border Justice) said, “you cannot see Parliament allowing under-age children to be shipped back to a foreign country. We would never allow such a law to pass” (Q 56). But different considerations apply to the ESO. While ultimately an ESO may operate to require an underage person to be returned to stand trial in another EU State, liberty in the State of residence and return to the trial State for trial must be preferable to detention (or even liberty) in the trial State pending trial in the trial State.
122. We question why removal of this ground for non-recognition would require the harmonisation of the age of criminal responsibility across the Union. The Framework Decision might provide: “It shall not be a ground for refusing to accept a European supervision order that the suspect is below the age of criminal responsibility in the requested State”. Member States would thus be required to give to their young people the same advantages of pre-trial release as if they were older. But such an amendment would, we acknowledge, be hugely controversial and we would not wish to jeopardise the adoption of the ESO (which requires unanimous agreement by Member States). **It is to be hoped that when national parliaments come to consider their implementation of the Framework Decision they will have full regard to the welfare of the child whose liberty would be restricted if Article 10(2)(a) is invoked.**

Dual criminality

123. Dual criminality (that the conduct is regarded as criminal under the laws of the two States concerned) is a common condition in the context of mutual legal assistance and extradition agreements. The issue was, it will be recalled, a matter of central importance in relation the European arrest warrant. We therefore enquired whether the executing State should be able to refuse to recognise an ESO if the prosecution were for an offence not recognised by that State. Mr Csonka explained the Commission’s position: “the core principle of most mutual recognition instruments is actually to abolish or to restrict dual criminality as much as possible” (Q 187).
124. The Government have not made dual criminality a precondition in the present context. Having noted the precedent of the EAW, Baroness Scotland said: “Our position has always been we look at the merits of the proposal on the table; if those merits can be delivered without dual criminality, we have not let that stand in the way of agreement; and if they cannot be delivered without dual criminality, then we have” (Q 449). The Law Society was clearly opposed to the absence of dual criminality constituting a ground for

non-recognition. Mr Doobay said: “it would operate ... against the defendant’s interest. Whereas in the European arrest warrant it is a safeguard, here it would actually hinder the defendant being released prior to their trial.” (Q 259).

125. **We agree that the absence of dual criminality should not be a ground for refusing to recognise an ESO. It should be understood and accepted that the result of this will be that the UK will be required under this Framework Decision to supervise ESO conditions imposed on a UK resident pending trial for, for example, Holocaust denial. The UK will also be obliged to return the individual for trial should he refuse to return voluntarily when requested by the trial State to do so. As in the case of underage persons, we are of the view that the benefits of liberty in the State of residence pending trial outweigh the political motivations which might otherwise justify refusal to recognise the ESO in these circumstances.**

Execution

Article 12—Decision on enforcement

1. A court, a judge, an investigating magistrate or a public prosecutor, in the requested State shall, as soon as possible and in any case within 5 days of receipt of the European supervision order, decide whether to recognise and execute it or to invoke grounds for non-recognition and non-execution. The competent authority in the requested State shall inform the issuing authority of that decision by any means capable of producing a written record.

2. Where in exceptional cases it is not possible to take a decision on the recognition and execution of the European supervision order within the period laid down in paragraph 1, the competent authority in the requested State shall without delay, inform the issuing authority thereof, of the reasons therefore and of the number of days required to take the decision.

3. Where the European supervision order is incomplete, the court, the judge, the investigating magistrate or the public prosecutor in the requested State may postpone its decision on the recognition and execution of the order until it has been completed by the issuing authority.

4. If, in accordance with paragraph 3, the recognition and execution of the European supervision order is postponed, the court, the judge, the investigating magistrate or the public prosecutor in the requested State shall forthwith communicate a report detailing the grounds for postponement directly to the issuing authority by any means capable of producing a written record.

5. As soon as the grounds for postponement have ceased to exist, the competent authority shall forthwith take the necessary measures for the execution of the European supervision order.

126. Clearly some sort of decision “executing” an ESO is contemplated by Article 12(1), and as discussed in Chapter 3 it is the decision to execute that triggers the release of the suspect in the issuing State. Baroness Scotland said that in the UK the executing authority would be the court: “that is the body which is going to be able to make a judicious assessment as to whether the rights of the individual are being catered for properly, that it is proportionate, that the bail conditions, if bail is granted, are not too onerous” (Q 436). Given that it

is at this stage that the Article 10 grounds for non-execution are formally considered (although informal discussions may have already taken place between the issuing and executing States in the context of agreeing the ESO conditions) it would appear that a decision by “judicial” authorities would be appropriate here, and that a hearing at which the suspect may make representations would normally be required.

127. The decision to execute would provide the necessary assurances to the issuing State that the executing State will supervise the agreed conditions, will take action in the event of a breach of the conditions, and will ultimately return the suspect to the issuing State if required to do so. For this reason too it seems to us that a decision by judicial authorities would be more appropriate than a decision by an administrative or operational body, such as the police. Furthermore, questions relating to enforcement of the ESO and the executing State’s powers of arrest may be more easily resolved where there is a domestic judicial order which executes the ESO.

Amendment/review of an ESO

128. An ESO may need to be varied from time to time as circumstances change. Article 13 makes provision for review of the ESO.

Article 13—Requests for review

1. The suspect shall, in accordance with the law of the issuing State, be afforded the same rights with respect to review of the European supervision order as if the obligations contained therein were imposed on him as pre-trial supervision measures to be executed in the issuing State. However, the suspect shall have the right to request the issuing authority to review the European supervision order no later than 60 days after it has been issued or last reviewed.
2. The executing authority may request the issuing authority to review the European supervision order 60 days after it has been issued or last reviewed.
3. Upon a request for review in accordance with paragraphs 1 or 2, the issuing authority shall, as soon as possible and in any case within 15 days of receipt of the request, review the European supervision order in accordance with the law of the issuing State.
4. The suspect shall have the right to be heard by the issuing authority, in accordance with the law of the issuing State. This requirement may be satisfied through the use of appropriate video or telephone links with the issuing authority (hearing by video or telephone conference). The issuing authority shall also consult the executing authority on the review of the European supervision order.
5. The executing State may assign a person designated in accordance with the law of that Member State to take part in the hearing of the suspect.
6. The issuing authority may, in accordance with the law of the issuing State, decide:
 - (a) to uphold the European supervision order in the form in which it was first issued;
 - (b) to uphold the European supervision order but, subject to Articles 5 and 6, amend one or more of the obligations contained therein;

(c) to uphold the European supervision order but revoke one or more of the obligations contained therein; or

(d) to revoke the European supervision order in its entirety.

7. The issuing authority shall forthwith communicate its decision to the suspect and the executing authority.

8. When the European supervision order is reviewed pursuant to this article, the suspect shall have the right to interpretation and legal advice.

129. As Ms Louise Hodges, for the Law Society, pointed out, Article 13 is the only identifiable provision dealing with change (*pace* “modification”—see below) in the conditions attached to an ESO. A review can be requested either by the suspect or the executing State, but it is not clear whether the issuing State of its own motion can review the obligations. This, Ms Hodges said, “seems slightly perverse to me” (Q 247). **This point could usefully be clarified.**
130. Unlike Articles 5 and 6, Article 13 expressly provides that the suspect has the right to be heard by the issuing authority, though this is qualified by the words “in accordance with the law of the issuing State”. It is clear that the suspect need not return to the issuing State: the requirement to be heard may be satisfied through the use of appropriate video or telephone links. The issuing authority is required to consult the executing authority on the review of the ESO (Article 13(4)). JUSTICE sees some cause for concern here: “if obligations/requirements under an ESO are being enforced in an executing Member State, a person must have a remedy in the courts of that State in relation to those obligations/requirements. Article 13 of the FD, however, requires that any request for review of the conditions must be directed to the courts of the issuing Member State. This, we believe, would contravene Article 13 ECHR, which provides that anyone whose Convention rights have been violated shall have ‘an effective remedy before a national authority’” (pp 98–99).
131. JUSTICE has raised an important issue regarding the compatibility of the Framework Decision with Article 13 ECHR. **We urge the Government to arrange for the Council of Europe to be consulted on whether Article 13 of the Framework Decision as currently drafted complies with the provisions of the ECHR. We note that an opinion from the Council of Europe was obtained in relation to the Framework Decision on procedural rights; there may be a case for a general opinion on the ESO to be requested.**

The 60 days rule

132. Article 13(1) provides that the suspect shall have the right to request the issuing authority to review the ESO “no later than 60 days after it has been issued or last reviewed”. We queried why the suspect should be prevented from seeking a review after 60 days had passed. The need for a review is the more likely to arise, the longer the period since any ESO was made. For example, bail conditions regarding residence, work, movement, activities or medical treatment may all become inappropriate and require variation with time. We note that Article 13(2) allows the executing authority to request the issuing authority to review the ESO “60 days after it has been issued or last reviewed” (which means, presumably, “not less than 60 days after”), but it is

not clear why any request for review subsequent to the 60-day period would have to be channelled through the executing authority.

133. It became clear when we heard the officials for the Commission that the drafting of Article 13 is defective. What is intended is that where a Member State imposes a time limit for the intervals within which a review can be sought that should not be longer than 60 days (QQ 158–61). **The Framework Decision should make clear that an ESO can be reviewed from time to time and Member States should not be able to delay it (by imposing a waiting period) for more than 60 days.**

Modification contrasted

Article 6—Imposition of pre-trial supervision measures and obligations of the suspect

4. In addition to the obligations provided for in the European supervision order, the executing authority may, in accordance with the law of the executing State, modify the obligations contained in the European supervision order as is strictly necessary for the purpose of executing the European supervision order.

134. It is unclear how far the executing authority can “modify” conditions attached to an ESO without need to seek a review under Article 13. Under Articles 13(6) and 14(1) it is the issuing State which has the power to revoke and the power to amend. While it seems that, given the need for a modification to be “strictly necessary” in order to execute the ESO, the power to modify is more restrictive than the power to amend, it is less clear how far “modification” allows the executing authority to substitute different conditions or to add fresh conditions. Nor is it clear whether the power under Article 6(4) is a one-off power, or a continuing power which would allow modification at any time during the currency of the ESO.
135. The Commission contemplated the executing State’s power to modify as only extending to minor amendments to give practical effect (locally) to the issuing State’s order. Mr Ljungquist, for the Commission, emphasised the importance of control remaining within the trial State authority: “So in Article 6(4) we have used the words ‘strictly necessary’”. The Commission considered that only minor changes could be made; for example, to allow the suspect to report on a Tuesday where his normal reporting day was a Monday and the premises were closed because of a public holiday (Q 166). We would suggest that a change of address, provided it was notified and not otherwise significant, would also qualify as a modification. The example chosen by the Commission suggests that they envisage that the power to modify can be exercised at any time following the grant of an ESO, on more than one occasion.
136. **The Framework Decision should distinguish clearly between the issuing State’s power to amend and the executing State’s power to modify. In our view modification should be limited to changes of the minor nature suggested by the Commission and we emphasise the need for the issuing State to remain in control of the ESO and the conditions of bail. The power to modify should be a continuing one, to allow the executing State to deal with administrative and technical issues throughout the life of the ESO.**

Competing obligations to surrender or extradite

137. Article 15 provides that the existence of an ESO shall be “without prejudice” to the executing Member State’s obligations under a European arrest warrant, request for extradition presented from a third country, or in relation to proceedings before the International Criminal Court. The Article also confirms that the existence of an ESO does not prevent the executing authority from taking its own criminal proceedings. It does not, however, provide any guidance on how to deal with competing ESOs.

Article 15—Competing obligations to surrender or extradite on the part of the executing State

The existence of a European supervision order shall be without prejudice to the executing Member State’s obligations under:

- (a) a European arrest warrant under Council Framework Decision 2002/584/JHA;
- (b) a request for extradition presented by a third country;
- (c) the Statute of the International Criminal Court.

It shall not prevent the executing Member State from initiating or pursuing criminal proceedings of its own.

138. Article 15 was criticised by a number of witnesses for its lack of clarity. Comparison was made with the position under the EAW.

Competing surrender instruments

139. The CPS construed Article 15 as giving the ESO no precedence over European arrest warrants, extradition requests and ICC (International Criminal Court) surrender requests. Mr Gibbins believed that because an ESO might be trumped by any one of the above four types of proceedings that would “clearly be something that I think the court would want to take into account, particularly if it looked at a defendant’s antecedents and saw that he had a significant criminal record so that it would not be beyond the bounds of possibility that some other country might have a European arrest warrant waiting in the wings for him” (Q 79). This might affect the courts’ willingness to issue an ESO.
140. Mr Csonka, for the Commission, took the view that an ESO would have to give way to an EAW, though the EAW could have regard to the ESO and include a provision imposing a condition of return for the continuation of the supervision measure pending trial. “So the person is transferred back to a third State on the condition that he or she will be returned and the supervision can be suspended during that time” (QQ 210–1).
141. Mr Csonka suggested that Eurojust³¹ could assist Member States in deciding, at a practical level, which proceedings to prioritise where there is more than one request and the order which takes precedence relates to a less serious offence: “Those cases actually do happen and Member States need to talk to each other. Eurojust is there to sort out those cases, so we believe that Eurojust could help set the priorities in such situations. They could determine with the two or three Member States involved which one should

³¹ Eurojust is an EU body established in 2002 to enhance the effectiveness of Member States’ authorities in dealing with the investigation and prosecution of serious cross-border and organised crime.

- take which procedure first” (Q 212). Mr Csonka believed that the matter should be resolved by informal discussion rather than by regulation at European level (Q 213).
142. Other witnesses did not find that approach attractive. Jakobi and Debbie Sayers, solicitor, contrasted the position under the EAW³² and argued that the EAW scheme should be followed in the ESO for consistency and legal certainty (p 24). The Law Society noted that the UK, in implementing the EAW, had set out a list of criteria to be considered by, in this case, the Secretary of State, if there are competing EAWs. Mr Doobay said: “I am not sure necessarily we would say it was a matter to be dealt with in the [ESO] Framework Decision but we do feel that there should be some criteria and/or certainty as to which process is to be dealt with first” (Q 299). The Law Society was opposed to “an informal model where it is simply left up to an executing Member State to take soundings, or not, if they desire” (Q 302).
143. The Government want to have some flexibility in this matter. Baroness Scotland said: “We really believe that Article 15 ought to mean that the ESO will not impede other proceedings which may arise after release. We are inclined towards allowing judicial flexibility in the consideration of which obligation should be given priority, depending on the circumstances of the relative case. We believe that the precedence of the European arrest warrant, Extradition Orders or domestic proceedings should be determined by the circumstances and criteria set out in each of those processes” (Q 451).
144. As Article 15 is framed it appears that an ESO would not stop the implementation of an EAW or an extradition request, or attempted prosecution by the International Criminal Court. An ESO could have the lowest priority of all. **The “without prejudice” formula is potentially confusing and might discourage use of the ESO. This would be regrettable. While we would not advocate that an ESO should necessarily take precedence over the international instruments to which Article 15 refers there is a need for guidance as to how Member States’ obligations under the relevant competing legal instruments might be prioritised. Consideration should be given to providing criteria in the Framework Decision to be taken into account by a national judge deciding whether to return a suspect under an ESO, an EAW or other international extradition order or arrest warrant. We also welcome a role for Eurojust in facilitating coordination between Member States to decide how best to prioritise proceedings.**

Priority of domestic prosecutions

145. Article 15 also confirms that the existence of an ESO does not prevent the executing authority from initiating or pursuing its own criminal proceedings. We asked which prosecution would take priority on return if the subject of the ESO is being prosecuted in the executing State for another offence. Mr Csonka, for the Commission, responded: “The Framework Decision

³² Article 16 of the Framework Decision on the European arrest warrant expressly provides that, in the event of multiple requests, a decision on execution is made by the executing State’s judicial authorities taking into account circumstances such as the seriousness of the offence, date of offence etc. They can seek the advice of Eurojust. Similarly if there is a conflict between an EAW and extradition, the same procedure is followed. The EAW functions only “without prejudice” to a warrant from the ICC. In the UK, the International Criminal Court Act 2001 provides the Home Secretary with the power to decide on extradition requests which compete with ICC warrants in Schedule 2 Part 2.

does not particularly cover this situation. It would be a matter for the national practice of the home State to determine what should be done in that scenario” (Q 208).

146. Jakobi and Sayers suggested that the ESO should again follow the precedent in the EAW and provide that the return of the suspect must be postponed if there are proceedings in the executing Member State with regard to a “new” offence (p 24). There is currently no flexibility under the EAW scheme (as implemented by section 22 of the Extradition Act 2003) and this could have unsatisfactory consequences if an urgent prosecution elsewhere were to be delayed, or even frustrated, because of some comparatively minor offence here (QQ 397–399 and 402). For this reason, Judge Workman would prefer the court in the executing State to have a discretion whether to return the suspect to the issuing State. Baroness Scotland noted experience of the EAW (where domestic prosecutions take precedence over EAW proceedings) and agreed that there should be flexibility in relation to the ESO (Q 453).
147. The Framework Decision does not prevent Member States from deciding, when implementing the Framework Decision, to allow the national judge some flexibility in assessing whether the domestic proceedings should take precedence over an ESO. **We agree that there needs to be flexibility here and welcome the Government’s support for a more flexible approach in the UK. In our view the issuing State will clearly be cautious about making an ESO if that order can be overridden by a prosecution, for a relatively minor offence, in the executing State. Here again, consideration should be given to providing criteria in the Framework Decision to be taken into account by the national judge in deciding which proceedings should take precedence. Here again, there may be a useful coordinating role for Eurojust.**

CHAPTER 5: ENFORCEMENT AND RETURN

Breach of an ESO

148. Chapter 5 of the proposal deals with the question of breach of an ESO. The executing authority is obliged to report breaches—the Framework Decision provides a standard form for doing this (Article 16). When the breach has been reported to the issuing State the latter has to make a decision whether to revoke the ESO, amend or revoke one of the obligations in the ESO and/or order the arrest of the suspect (Article 17). When making a decision to order the arrest and transfer of the suspect the issuing authority has to “consider all the relevant circumstances, including the specific penalty involved, the consequences of the breach and, in particular, the willingness of the suspect to come back voluntarily to the issuing State” (Article 17(3)). Further, the suspect has to be heard and the executing State consulted (Article 17(4)). The hearing may take place by telephone or video conference and so the suspect need not return to the issuing State (Q 219).
149. Before the issuing authority decides that the suspect should be arrested and transferred the suspect has a right to be heard by a judicial authority of the Member State on whose territory he is arrested (it may not always be the case that he is arrested in the executing Member State (Article 18(1))). If the suspect does not consent to transfer there are only limited grounds on which the Member State on whose territory he is arrested can refuse arrest and transfer (Article 18). The Framework Decision envisages the suspect being transferred speedily—Article 20 refers to “on a date mutually agreed between Member States concerned and in any event no later than three days following the arrest”. Only exceptionally, for example for serious humanitarian reasons, may a transfer be postponed.

Determination of breach

Article 16—Obligation to report any breach

1. The executing authority shall, without delay, report to the issuing authority any breach of the obligations contained in a European supervision order of which it becomes aware. The report shall be made using Form B as set out in the Annex. The form shall be signed, and its contents certified as accurate, by the executing authority.
2. The report shall be transmitted by the executing authority directly to the issuing authority by any means capable of producing a written record under conditions allowing the issuing State to establish authenticity. A copy of Form A (the European supervision order), as issued by the issuing authority in accordance with Article 7, shall be annexed to the report.

150. Article 16 appears to have been drafted upon the supposition that a breach will be self-evident—either there will have been a breach or there will not—but, as our witnesses confirmed, whether there has been a breach in any particular case may be disputed: for example, whether the subject has gone within a prohibited area or whether he has failed to attend the police when he has some perfectly good excuse.
151. **The Commission’s text does not grapple with the question of how to decide, in a contested case, whether or not there has been a breach. It**

is clear that this is a matter which requires some consideration. Cases in which the existence of a breach is disputed are likely to be quite common. The Framework Decision needs to address expressly whether establishment of the existence of a breach is the responsibility of the executing State or whether it is a matter to be decided by the issuing State.

Division of competences between the issuing and executing States

152. The question of the division of competences between the issuing State and the executing State in the establishment of a breach (and, as we discuss later, in any subsequent arrest and transfer proceedings) is a matter of both conceptual and practical significance. The principle of mutual recognition, on which so much EU judicial cooperation is based, generally accords prominence and priority to the issuing State. However, the exact extent of issuing and executing States' competence in each case is a matter for consideration. An interesting comparison can be drawn between the ESO proposal and the French and German Initiative for a Framework Decision on the recognition and supervision of suspended sentences and alternative sanctions, also currently under active discussion in the Council.³³ The latter proposal would allow for mutual recognition of judgments imposing suspended sentences and alternative sanctions, and the supervision in one Member State of such measures imposed in another. What is significant about the proposal is the substantial role it envisages for the executing State in comparison with that envisaged under the ESO. When one examines the detail of how the ESO would work, particularly as regards day to day supervision and enforcement, a strong case emerges for the executing State being given a greater role than presently appears in the Commission's text.
153. If, as a number of witnesses thought, there is a *lacuna* in the Commission's text, this could be filled by a provision dealing with how any breach is to be established. Given that the breach will have occurred in the executing State the authorities there might, because of their knowledge of or easy access to the facts, be better placed to decide on whether there has been a breach and, if so, what the consequences should be. However, the issuing State, as the trial State, has a clear interest in maintaining overall control of pre-trial supervision.
154. The Commission acknowledged that any breach of the supervision order had to be proved. But Mr Csonka said: "The issue at stake is, who controls the process? ... This Framework Decision is predicated upon the concept that it is the issuing State which is in control of the process" (Q 223). The Commission did not see how responsibility for the supervision order could be transferred because of a particular breach to the executing State. Mr Csonka said: "Even if the facts of the matter happened in the executing State, even if the information is immediately available to the executing State, still the information can be communicated to the issuing State. There are means for that" (Q 228).
155. Senior District Judge Timothy Workman agreed that in principle the decision should be one for the issuing State: "Provided there is a power to detain the defendant in custody pending that decision, then the decision effectively is one for the issuing State, because it is its case" (Q 390).

³³ Doc 5325/07 COPEN 7 of 15 January 2007.

A tripartite procedure

156. The Law Society of England and Wales proposed that, as in the case of procedure for the grant of an ESO (see para 93), the procedure relating to enforcement should also be a tripartite one, involving the issuing and executing States as well as the suspect. The Law Society did not believe that enforcement could be left exclusively to the executing State. Mr Anand Doobay, for the Law Society, said: “We do feel that the issuing State must be involved as well, simply because if they are kept out of that process then it may undermine their confidence in allowing an ESO to be granted in the first place” (Q 274).
157. The Law Society suggested that in order to determine the breach there should be a hearing in the executing State, which the suspect could attend and to which there would be a video link to the issuing State. Evidence would be given as to whether a breach had or had not occurred. A finding would be made as to whether there had been a breach. Consideration should then be given to what the consequences of the breach should be (Q 286). The Law Society envisaged that findings of fact would be for the executing Member State, not least because they are closest to the application of the ESO in their State. Findings of law, and decisions on the consequences of any breach, would be for the issuing Member State (Q 287).
158. **While we have doubts about the practicability of tripartite hearings (not least because of the difficulties with video links and interpretation) we do believe that further consideration should be given to the suggestion that the executing State should, having heard the suspect, establish whether there has been a breach in the particular circumstances.** The existence of a breach is essentially a matter of fact and it seems to us that there would be limited, if any, value in involving the issuing State in this determination. Furthermore, there is in our view no obvious reason why the issuing State would press for involvement in this stage of the procedure. The principle of mutual recognition requires not only that the executing State have trust in the ESO of the issuing State, but also that the issuing State have trust in the executing State’s discharge of its duties to supervise the conditions of the ESO, including the satisfactory determination of whether there has been a breach.

Consequences of a breach

159. Following the establishment of the existence of a breach, the proposal sets out the procedure to be followed by the issuing State to determine what the consequences of the breach will be. Article 17 provides that the issuing State may order the revocation of the ESO, the modification/revocation of one or more of the ESO conditions or the arrest and transfer of the suspect. The suspect has the right to be heard before a decision is made and the executing State must be consulted.

Article 17—Consequences of breach

1. In the event of a breach of the European supervision order, the issuing authority may, in accordance with the law of the issuing State, take the decision:

- (a) to revoke the European supervision order;

(b) to amend or revoke one or more of the obligations contained in the European supervision order;

(c) to arrest and transfer the suspect, if the European supervision order was issued in respect of an offence for which pre-trial detention is justified under the law of the issuing State, in particular when it is necessary in order to attend a preliminary hearing or trial;

(d) to arrest and transfer the suspect, in the following circumstances:

(i) if the European supervision order was issued in respect of an offence for which pre-trial detention was initially not justified under the law of the issuing State; and

(ii) if the European supervision order contains limitations of his freedoms of a degree comparable to deprivation of liberty; and

(iii) if the arrest and transfer is necessary to attend a preliminary hearing or trial.

2. Before deciding on arrest and transfer, the issuing authority shall consider all relevant circumstances, including the specific penalty envisaged, the consequences of the breach and, in particular, the willingness of the suspect to come back voluntarily to the issuing State.

3. If the issuing authority decides that the suspect must be arrested and transferred and, at the time of that decision, the suspect is in the territory of another Member State, that State shall arrest and transfer the suspect under the conditions of Article 18.

4. Before the decision under paragraph 1 is taken, the suspect shall have the right to be heard by the issuing authority, in accordance with the law of the issuing State. This requirement may be satisfied through the use of appropriate video or telephone links between the executing and the issuing authority (hearing by video or telephone conference). The issuing authority shall also consult the executing authority.

Power of arrest

160. In England and Wales, if somebody breaches their bail conditions (for example, by failing to report, not being at his home address as he should be or not attending an appointment) then the police can arrest him. However, it appears from the Framework Decision that in respect of a breach of an ESO the executing State could only arrest the suspect once it has received instructions from the issuing State to do so. The Commission's text appears to leave all decisions regarding enforcement to the issuing authority, subject only to duties on the part of the executing authority to report the matter (using Form B, set out in the Annex) "without delay" to the issuing State (Article 16(1)), as well as to arrest and retransfer the suspect to the issuing authority on the latter's request (Articles 17(3) and 18).
161. Witnesses expressed concern that the executing authority may be unable to act speedily or effectively to revoke bail and arrest the suspect or to impose further conditions as may, in the light of information coming to its attention, be necessary at any time. The Crown Prosecution Service (CPS) commented on the fact that the authorities in the executing State might have to wait for the issuing State to authorise such an action: "This will promote an inequality of treatment between domestic and non-domestic defendants on

bail and may undermine the very intention of the Framework Decision” (p 27).

Apprehended breaches

162. Articles 16 and 17 are also silent on the question of anticipatory breach: Judge Workman said: “taking a rather absurd example, if a defendant in England, having been bailed by the French court, is seen to be getting on a plane to South America, it would be no use us reporting the matter to the French Court because by then he will have gone” (Q 377).
163. Under our domestic law the police can act where a breach is apprehended. Judge Workman noted that this was a fairly recent change in our law, but “it is quite common now and a useful provision” (Q 384). Witnesses again expressed concern lest the Commission’s text would not allow the executing State to take pre-emptive action in the event of anticipatory breach (QQ 280, 379). Chief Superintendent Hall, for the Association of Chief Police Officers, said: “we do have concerns that we would not have the power to arrest someone when contemplating a breach. As the agency there to protect the public and manage the risks associated by these people being at large in the UK, I think that is a cause for some concern” (Q 115).

The Commission’s view

164. The Commission did not accept that if there was a suspected breach of the ESO the executing authority could do nothing about it except make a report back to the issuing authority. In the Commission’s view if, for example, the police here discovered that the subject of an ESO may be thinking of leaving this jurisdiction without permission, they would have power to arrest him (Q 176). There is no express provision in the Commission’s text to this effect but, Mr Ljunquist said, “it follows from the principle that the Member State has to implement the Framework Decision” (Q 177). Mr Csonka added that there would not necessarily be any pre-requirement to refer back to the issuing State; it would depend on how the executing States chose to implement the Framework Decision in its domestic law (Q 179).

Need for certainty

165. Other witnesses doubted whether such reliance could or should be placed on Member States’ implementation of the Framework Decision. In the Law Society’s view, a power of arrest in such circumstances would be “quite a significant power”. If it was the intention that the authorities in the executing State should have such power then it should be explicitly set out in the text of the Framework Decision (Q 281). The Government also thought that the Framework Decision should be explicit on the question of whether the executing authority should have a power of arrest (Q 460).
166. **We agree that there is a need for clarity and certainty here. It is unsatisfactory to leave matters such as the power of the executing State to arrest following a breach or in anticipation of a breach to Member States’ implementing legislation.**
167. **It is a matter of some considerable concern that the Framework Decision appears not to allow the executing State any power to arrest or take other action preparatory to gaining the instruction of the issuing State. Articles 16 and 17 should ensure that there are the**

necessary powers to take action in the event of a breach of conditions. In our view this does not offend against the principle of mutual recognition as any arrest by the executing State would follow directly from the recognition, execution and enforcement of the issuing State's ESO. Any arrest would have the effect of protecting, and not undermining, the position of the issuing State. It would not therefore be inconsistent with the purpose of the Framework Decision for the executing State to be able to order arrest to prevent the suspect absconding.

168. **The Framework Decision must also make clear that the authorities in the executing State must be able to deal with apprehended or anticipatory breaches without the need for prior report to and authorisation from the issuing State. This is a serious omission from the present text.**

Minor breaches

169. Mr Doobay drew attention to the fact that the proposal makes no distinction in relation to the cause or severity of the breach: "there may have been a breach of a condition of the ESO through no fault of the suspect. ... [T]he mechanism in the Framework Decision does not allow for any flexibility ..." (Q 275). The Government also thought there should be a discretion for the executing State to deal with the minor infractions of an ESO (Q 460).
170. **We believe that the judge in the executing State should also be trusted to deal with minor or technical breaches, subject to a requirement to report the decision to the issuing State. In this way the executing State would in many cases be able to resolve practical problems which, with foreknowledge, they would have been able to deal with under the power of modification given them by Article 6(4).**

Greater flexibility

171. There is also an argument for the judge in the executing State having greater powers. Judge Workman thought that there should be some flexibility in the system: "What I would have liked to have seen is a power to the court to be able to move in both directions, so that if we had something such as a defendant brought before the court for breach of his reporting conditions to the police station and he had arrived at the police station an hour late because the train broke down, I would want to be able to see that the court would be able to re-bail him, either on the same or more onerous terms, without actually having to go through reporting it all to the issuing State. There may be occasions where there is a sufficiently serious breach of the conditions of bail to warrant a remand in custody, but because we do not know the state of the case in the issuing State a remand in custody in this country pending the information which is required after reporting the breach to the issuing State may well be the way to move forward, so that the court has a discretion to deal with the minor breaches but a power to transfer him back immediately or to seek advice from the issuing State if it is more serious" (Q 391).
172. **There may also be a case for enabling the authorities in the executing State to go further and deal, if only provisionally, with breaches of an ESO where immediate action is necessary in order to ensure public**

safety or the protection of individuals or evidence. This situation might arise where a breach of an ESO is not considered sufficiently serious to warrant the immediate arrest of the suspect but nonetheless would justify the urgent imposition of additional supervision measures (such as an increase in the frequency of a reporting obligation). Subject always to the issuing State remaining in overall control and decisions having to be reported back, the judge in the executing State should be able to vary the ESO temporarily given that there may be a delay before the issuing court can be fully seised of the matter. The suspect would be heard before any such variation is made.

Return of suspect

173. It should be recalled that a mandatory condition in every ESO is the obligation on the suspect to attend his trial when summoned to do so. As with domestic bail, the suspect would not automatically be arrested and brought before the court for trial but would be expected to attend voluntarily. Only where he fails to do so would the question of arrest and transfer (on the basis of a breach of the mandatory obligation) arise. As we have noted in Chapter 3 the Framework Decision is silent on the issue of transfer of the suspect to his State of residence. By contrast a number of Articles deal with the return of suspects to the trial State following a failure to appear. Article 18 provides for his arrest and transfer to the issuing State. There is a tight timetable (within 3 days—Article 20). Other Member States must permit transit through their territory (Article 21).

Article 18—Conditions for arrest and transfer of the suspect

1. If the issuing authority decides that the suspect must be arrested and transferred to the issuing State, the suspect shall be heard by a judicial authority of the Member State on whose territory he is arrested.
2. If the suspect consents to his transfer the Member State on whose territory the suspect is arrested shall forthwith transfer him to the issuing State.
3. If the suspect does not consent to his transfer the Member State on whose territory he is arrested shall forthwith transfer him to the issuing State. It may refuse the arrest and transfer only
 - if it is clear that criminal proceedings for the offence in respect of which that order has been issued would meanwhile infringe the *ne bis in idem* principle;
 - if the suspect is being prosecuted in the executing Member State for the same facts as those on which the European supervision order is based;
 - if the criminal prosecution or punishment of the suspect is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
 - if the decision to arrest and transfer concerns new facts not covered by the European supervision order.
4. A Member State other than the executing State may also refuse to arrest and transfer the suspect on the basis of one or more of the grounds set out in Article 10.

Article 20—Time limits for transfer

1. The suspect shall be transferred to the issuing State pursuant to Article 18 on a date mutually agreed between Member States concerned and in any event no later than 3 days following the arrest.
2. The transfer of a suspect may exceptionally be temporarily postponed for serious humanitarian reasons, for example, if there are reasonable grounds for believing that transfer would manifestly endanger the suspect's life or health. The issuing authority shall immediately be informed of any such postponement and of the reasons thereof. The transfer of the suspect shall take place as soon as these grounds have ceased to exist on a date agreed between the Member States concerned.

Article 21—Transit

1. Each Member State shall permit the transit through its territory of a suspect who is being transferred pursuant to the provisions of this Framework Decision provided that it has been informed of:
 - (a) the identity and nationality of the person subject to the European supervision order;
 - (b) the existence of a European supervision order;
 - (c) the nature and legal classification of the offence;
 - (d) the circumstances of the offence, including the date and place.
2. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the Council.
3. The transit request and the information provided for in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.
4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

174. Witnesses identified a number of concerns. The CPS criticised these provisions relating to the physical return of the defendant for not being clear, especially as regards where the burden would lie in terms of costs (p 27).

Overriding considerations

175. Judge Workman raised a further concern. "I am concerned about sending somebody back who may be seriously ill and I think it would be useful to have some provision to give discretion to the court if somebody needs to be returned under the supervision order where they are seriously ill. A power to defer, or something of that sort, would be sufficient." (Q 370–72).
176. Article 20(2) of the ESO proposal enables transfer of a suspect to be temporarily postponed for "serious humanitarian reasons". A similar provision exists in the EAW Framework Decision (Article 23(4)). The latter has been implemented in the Extradition Act 2003. Under section 25 the

judge must order a person's discharge or adjourn the extradition hearing where the physical or mental condition of the subject of the warrant is "such that it would be unjust or oppressive to extradite him". **We recommend that consideration be given to the inclusion of a provision to similar effect when implementing the ESO.**

ECHR rights

177. As witnesses pointed out ECHR rights may apply at both stages of the breach procedure: the initial establishment of the breach; and then the arrest and transfer hearing before the issuing authority. Any decision as to whether to remand the accused in custody would have to be reached following procedures complying with the ECHR. The involvement of both the executing and issuing authorities was perceived to cause problems.
178. As regards the arrest and transfer hearing, JUSTICE took the view that "the executing State cannot devolve this responsibility to the court of the issuing State and then simply carry out the judgment of that court". Support for the view that there should be a hearing in the executing State could, JUSTICE argued, be found in Article 18 which provides that, if the decision is made by the issuing State for the arrest and transfer of the suspect, then there must be a hearing before the court of the State in which the suspect is located. JUSTICE said: "However, the obligation to have a fair hearing does not only apply to cases where the decision is made to arrest and transfer. At the least the defendant must have the opportunity to challenge the legality of any action taken on the basis of the hearing in the courts of the executing State. This, however, raises difficult conflict of law questions" (p 99).
179. **The adequacy of the arrest and transfer hearings envisaged under the ESO proposal is not a matter on which we received many submissions. However, the concerns expressed by JUSTICE should be given careful thought by the Member States and the final Framework Decision should be ECHR-compliant. While all Member States are bound to observe the guarantees set out in the ECHR, we do not consider that it is satisfactory to leave the question of the hearings for Member States' implementing legislation.**

Suspect in third Member State

180. As is envisaged by the Framework Decision, it is possible that a suspect may go to a third Member State (*i.e.* a Member State other than the executing State) and the question then arises of his being arrested there. We asked the Commission under what authority such an arrest would be made, given that that Member State would not until then be formally involved in any ESO process. The Commission's text is again silent and once more the Commission has presumed that Member States will fill in the gaps.
181. Mr Csonka, for the Commission, said: "We believe that when Member States transpose and implement this Framework Decision, in particular Article 17, paragraph 3, they will have to provide for the possibility of arresting the person who is being sought. So it will be under the authority of the national legislation transposing that Framework Decision" (Q 207).
182. **We believe that this position is unsatisfactory. There is a need for certainty and clarity in the Framework Decision as well as for consistency on the part of Member States in giving effect to its**

provisions. Articles 17 and 18 therefore need to be specific as to the responsibility and obligations of Member States other than the executing State where the arrest and transfer of the suspect has been ordered by the issuing State.

CHAPTER 6: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The ESO—a welcome measure

183. To date EU action in criminal law has focussed primarily on enforcement measures at the expense of human rights and civil liberties—a fact which is entirely understandable given the pressing need for States to cooperate in attacking terrorism and organised crime. Progress on measures, such as the Framework Decision on procedural rights, addressed at safeguarding and strengthening the rights of the individual, has in contrast been slow and disappointing (para 18).
184. It concerns us acutely that people are not being given bail in the trial State at the moment on the basis that, as non-residents, they are likely to abscond and go back to their State of residence, or for more technical reasons, such as a lack of fixed address in the trial State. The numbers are not huge but they are substantial (para 7).
185. The ESO, whose aim is to enhance the right to liberty and the presumption of innocence, is a welcome measure. The Commission's proposal addresses a serious issue affecting the liberty of the individual. It has the potential to reduce hardship for some thousands of EU citizens and is a proposal which, we believe, deserves prompt attention by Member States. However, there are a number of places where the ESO needs to be improved if it is to be workable (para 19).

ESO or Eurobail

186. The ESO is the way forward though the mutual recognition principle upon which the ESO is based might be usefully supplemented by allowing a greater role for the executing State than is currently envisaged in the ESO proposal (paras 48, 51).

Cost

187. We do not consider that the proposal will lead to a significant increase in the number of interpreters required. Existing resources should suffice (para 61).
188. We are pleased to see that the Government intend to carry out a full impact assessment including an examination of the likely costs of the ESO (para 63).

The ESO—grant and recognition

189. It would be helpful for Article 5 of the Framework Decision to provide that the suspect has a right to be heard before an ESO is made and in particular on what obligations, if any, should be attached to the order. While the precise details of the manner and means by which the suspect is to be heard should be left to Member States the basic right should be expressly set out in the Framework Decision (para 70).
190. There is a need for flexibility in relation to the granting of bail. The court is best placed to determine what conditions are required to meet its concerns about releasing an individual. There is no need for more mandatory conditions (para 76).

191. The ESO is a complicated scheme, whose effectiveness in a particular case will be dependent upon setting conditions which will satisfy the issuing court and can be operated by the executing authority. It seems implicit in the fact that any Article 6(2) conditions are “subject to agreement” that there should be some machinery for discussion between the two States in advance of a decision to grant an ESO. There needs to be a close liaison between the issuing and executing States on the conditions to be imposed. Both authorities should be involved early in the decision-making process, and an ESO should not be issued without such consultation (paras 84, 95).
192. The consultation should focus on the conditions in the ESO but should also cover other matters. The executing State should be under an obligation to provide the issuing State with such information as it needs to decide whether to make an ESO and if so on what terms (para 98).
193. There might be practical benefits if the ESO proposal included provision for recourse to a central authority, in particular to deal with incoming ESOs. Experience in relation to the EAW would suggest that informal consultations can usefully take place between administrative authorities in the respective Member States, thus reducing the need for judge to judge contact. We urge the Government to examine this suggestion which has across-the-board support from practitioners. The extent of involvement of a judicial body in the final agreement of any Article 6(2) conditions will need careful consideration in implementing legislation (paras 56, 97).
194. We note the reliance placed by the Framework Decision on video links but are sceptical as to whether they will work in practice. We therefore recommend that ways should be sought, wherever possible, to facilitate consultations between Member States’ authorities and reduce the range of the discussions to ensure that they can be conducted quickly and effectively. A list of common ESO conditions is one way in which this might be done (para 96).
195. The Framework Decision should be more specific about the practical aspects of the grant and issue of an ESO (para 105).
196. The suspect should be released as soon as the issuing State has been notified that the ESO has been recognised by the executing State (para 105).
197. Further consideration should be given to the inclusion of more time limits in the Framework Decision (para 111).

Recognition and execution

198. Member States are bound by the ECHR and any implementing legislation would have to ensure compliance with the guarantees set out in that instrument. For the sake of clarity, it may be helpful to include an article in the body of the ESO proposal which provides that in implementing the Framework Decision Member States must ensure respect for fundamental rights (para 115).
199. It is to be hoped that when national parliaments come to consider their implementation of the Framework Decision they will have full regard to the welfare of the child whose liberty would be restricted if the executing State refuses, under Article 10(2)(a), to recognise an ESO because the suspect is under the age of criminal responsibility in that State (para 122).

200. The absence of dual criminality should not be a ground for refusing to recognise an ESO (para 125).
201. The ESO could usefully clarify whether the issuing State of its own motion can review the obligations in an ESO (para 129).
202. We urge the Government to arrange for the Council of Europe to be consulted on whether Article 13 of the Framework Decision as currently drafted complies with the provisions of the ECHR. We note that an opinion from the Council of Europe was obtained in relation to the Framework Decision on procedural rights; there may be a case for a general opinion on the ESO to be requested (para 131).
203. The drafting of Article 13 is defective. The Framework Decision should make clear that an ESO can be reviewed from time to time and Member States should not be able to delay it (by imposing a waiting period) for more than 60 days (para 133).
204. The Framework Decision should distinguish clearly between the issuing State's power to amend and the executing State's power to modify. Modification should be limited to changes of the minor nature suggested by the Commission and we emphasise the need for the issuing State to remain in control of the ESO and the conditions of bail. The power to modify should be a continuing one, to allow the executing State to deal with administrative and technical issues throughout the life of the ESO (para 136).
205. The "without prejudice" formula in Article 5 is potentially confusing and might discourage use of the ESO. This would be regrettable. While we would not advocate that an ESO should necessarily take precedence over the international instruments to which Article 15 refers there is a need for guidance as to how Member States' obligations under the relevant competing legal instruments might be prioritised. Consideration should be given to providing criteria in the Framework Decision to be taken into account by a national judge deciding whether to return a suspect under an ESO, an EAW or other international extradition order or arrest warrant. We also welcome a role for Eurojust in facilitating coordination between Member States to decide how best to prioritise proceedings (para 144).
206. We agree that there needs to be flexibility for the national judge in assessing whether the domestic proceedings should take precedence over an ESO. We welcome the Government's support for a more flexible approach in the UK. In our view the issuing State will clearly be cautious about making an ESO if that order can be overridden by a prosecution, for a relatively minor offence, in the executing State. Here again, consideration should be given to providing criteria in the Framework Decision to be taken into account by the national judge in deciding which proceedings should take precedence. Here again, there may be a useful coordinating role for Eurojust (para 147).

Enforcement and return

207. The Commission's text does not grapple with the question of how to decide, in a contested case, whether or not there has been a breach of an ESO condition. It is clear that this is a matter which requires some consideration. Cases in which the existence of a breach is disputed are likely to be quite common. The Framework Decision needs to address expressly whether establishment of the existence of a breach is the responsibility of the

- executing State or whether it is a matter to be decided by the issuing State (para 151).
208. While we have doubts about the practicability of tripartite hearings (not least because of the difficulties with video links and interpretation) further consideration should be given to the suggestion that the executing State should, having heard the suspect, establish whether there has been a breach in the particular circumstances (para 158).
 209. It is a matter of some considerable concern that the Framework Decision appears not to allow the executing State any power to arrest or take other action preparatory to gaining the instruction of the issuing State. Articles 16 and 17 should ensure that there are the necessary powers to take action in the event of a breach of conditions (para 167).
 210. The Framework Decision must also make clear that the authorities in the executing State must be able to deal with apprehended or anticipatory breaches without the need for prior report to and authorisation from the issuing State. This is a serious omission from the present text (para 168).
 211. There is a need for clarity and certainty in the provisions of the Framework Decision relating to breach of an ESO. It is unsatisfactory to leave matters such as the power of the executing State to arrest following a breach or in anticipation of a breach to Member States' implementing legislation (para 166).
 212. We believe that the judge in the executing State should also be trusted to deal with minor or technical breaches, subject to a requirement to report the decision to the issuing State (para 170).
 213. There may also be a case for enabling the authorities in the executing State to go further and deal, if only provisionally, with breaches of an ESO where immediate action is necessary in order to ensure public safety or the protection of individuals or evidence. Subject always to the issuing State remaining in overall control and decisions having to be reported back, the judge in the executing State should be able to vary the ESO temporarily given that there may be a delay before the issuing court can be fully seised of the matter. The suspect would be heard before any such variation is made (para 172).
 214. Article 20(2) of the ESO proposal enables transfer of a suspect to be temporarily postponed for "serious humanitarian reasons". A similar provision exists in the EAW Framework Decision (Article 23(4)). In its implementation of the EAW in the UK the judge must order a person's discharge or adjourn the extradition hearing where the physical or mental condition of the subject of the warrant is "such that it would be unjust or oppressive to extradite him". We recommend that consideration be given to the inclusion of a provision to similar effect when implementing the ESO (para 176).
 215. There is a question whether the arrest and transfer hearings envisaged under the ESO proposal would be ECHR-compliant. We do not consider that it is satisfactory to leave the question of the hearings for Member States' implementing legislation (para 179).
 216. There is a need for certainty and clarity in the Framework Decision concerning the power to arrest a suspect in a third State as well as for consistency on the part of Member States in giving effect to its provisions.

Articles 17 and 18 therefore need to be specific as to the responsibility and obligations of Member States other than the executing State where the arrest and transfer of the suspect has been ordered by the issuing State (para 182).

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

Lord Borrie

Lord Bowness

Lord Brown of Eaton-under-Heywood (Chairman)

Lord Burnett

Lord Clinton-Davis

Lord Jay of Ewelme

Baroness Kingsmill

Lord Leach of Fairford

Lord Lester of Herne Hill

Lord Lucas

Lord Mance (co-opted for current inquiry)

Lord Norton of Louth

Declarations of Interest

A full list of Members' interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

Automobile Association

- * Ms Julia Bateman, Law Society of England and Wales
- * Mrs Amanda Bowring, Crown Prosecution Service
- * Mr Peter Jozsef Csonka, Directorate-General Justice, Freedom and Security, EC Commission
- * Mr Anand Doobay, Law Society of England and Wales

Freight Transport Association

- * Mr Brian Gibbins, Crown Prosecution Service
- * Mr Peter Hall, Association of Chief Police Officers
- * Ms Louise Hodges, Law Society of England and Wales
- * Mr Stephen Jakobi OBE, Consultant, Cross-Border Justice

JUSTICE

- * Mr Thomas Ljungquist, Directorate-General Justice, Freedom and Security, EC Commission

Magistrates Association

- * Ms Debbie Sayers, solicitor
- * Baroness Scotland of Asthal QC, then Minister of State, Home Office
- * Senior District Judge Timothy Workman, City of Westminster Magistrates' Court

APPENDIX 3: REPORTS

Recent Reports from the Select Committee

Evidence from the Minister for Europe on the June European Council and the 2007 Inter-Governmental Conference (28th Report, Session 2006–07, HL Paper 142)

The Further Enlargement of the EU: follow-up Report (24th Report, Session 2006–07, HL Paper 125)

The Commission's Annual Policy Strategy for 2008 (23rd Report, Session 2006–07, HL Paper 123)

Evidence from the Ambassador of the Federal Republic of Germany on the German Presidency (10th Report, Session 2006–07, HL Paper 56)

The Commission's 2007 Legislative and Work Programme (7th Report, Session 2006–07, HL Paper 42)

Government Responses: Session 2004–05 (6th Report, Session 2006–07, HL Paper 38)

Evidence from the Minister for Europe on the Outcome of the December European Council (4th Report, Session 2006–07, HL Paper 31)

The Further Enlargement of the EU: threat or opportunity? (53rd Report, Session 2005–06, HL Paper 273)

Annual Report 2006 (46th Report, Session 2005–06, HL Paper 261)

Correspondence with Ministers March 2005 to January 2006 (45th Report, Session 2005–06, HL Paper 243)

The Brussels European Union Council and the Priorities of the Finnish Presidency (44th Report, Session 2005–06, HL Paper 229)

Recent Reports from Sub-Committee E

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

European Arrest Warrant—Recent Developments (30th Report, Session 2005–06, HL Paper 156)

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

WEDNESDAY 21 MARCH 2007

Present	Borrie, L	Jay of Ewelme, L
	Bowness, L	Leach of Fairford, L
	Brown of Eaton-under-	Lucas, L
	Heywood, L (Chairman)	Mance, L
	Clinton-Davis, L	

Memorandum by Mr Stephen Jakobi OBE, Consultant, Cross-Border Justice

SUMMARY

1. Background: the history of the EU provisional liberty proposals

1. The writer initiated the concept in 1994 and with the aid of associate practitioners, he formulated the Eurobail system.
2. He attended all the Commission's expert meetings and consultations in this connection.

2. The need for EU action

3. **The Scale of the problem.** When your Lordships last examined the position my concern was noted.
4. This concern was based on a 1995 research project I conducted.
5. The conclusions of that project were that there were 5,000 foreign EU prisoners at any one time and if there was a viable bail system, half of them would not be in prison.
6. Over the intervening 10 years, the EU has expanded and the volume of interstate travel has increased.
7. The 2005 research by the independent contractor estimated 10,000 foreign EU prisoners at any one time and 80% potentially subject to discrimination.
8. The two studies are broadly in agreement, the number of prisoners has almost doubled and the number of citizens affected has more than doubled.
9. The observation is made that foreigners are likely to spend longer on remand than natives.
10. **The cost to the people involved:** the impact assessment uses an economically based assessment that observes that many are eventually acquitted and others given non-custodial sentences.
11. It is observed that the attempt to quantify the experience in economic terms, by reference to compensation sums, is risible. The psychological effect on the innocent is devastating, and frequently long-term or permanent. Suicide on release, though rare, is not unknown.
12. The cost of public authority is reasonably argued.

3. The major legal and practical implications of the Commission's proposal

13. **Legal and constitutional background:** the current inquiry needs to be considered against the background of House of Lords previous inquiries.
14. In the inquiry into procedural rights in criminal proceedings, it was noted that there was a dispute amongst Member States as to the legal basis of the framework decision.¹

¹ (1st Report 2005–05 HL Paper 28).

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15. The subsequent inquiry, “Breaking the deadlock” concluded that there would have to be constitutional reform before progress could be made.²

16. The lack of a common age of criminal responsibility within the EU gives rise to the possibility that adults would obtain bail and some young children would be left in custody.

17. **Incompatibility of justice systems:** the common law based systems in essence are compatible with any sort of enforceable international pre-trial transfer system.

18. By contrast, the code civile based systems (French example) generally insist on the availability of the accused for questioning until the formal trial.

19. It is therefore impossible, in theory, and sometimes in practice, for a Code Civile country to allow an accused bail outside that country. The only solution is a viable videoconferencing system throughout the EU.

4. The adequacy of the system proposed and whether another option is preferable

20. **Overview:** the classical factors in magistrates’ decisions to grant bail involve assessment of risk and therefore militate against foreigners. An adequate system needs to provide for informed and impartial risk assessment.

21. **The Commission’s perspective:** it is accepted by the Commission that its aim is to promote equal treatment of all citizens in the EU legal space.

22. There are no proposals in the documents for any mechanism to deal with the problem of risk assessment.

23. The guarantee of return to court is dealt with.

24. The mechanism for supervision of the citizen on bail is too complex.

25. Assessed against the Commission’s own aspirations for its scheme, it is considered it will only have a marginal impact on the problems if the European arrest warrant is any precedent.

26. **Eurobail** is the only viable alternative, since it is the only scheme proposed that involves impartial assessment of risk in granting bail.

27. The procedure is examined.

28. The power to deal with conditions of bail would be vested in the accused’s home Court.

29. Advantages: proof against xenophobic risks, applicable to all cases, allows all courts to apply their own familiar laws and is simple in concept.

30. Disadvantages: children, juvenile and Code Civile problems.

5. What amendments might be made to Commission’s proposal

31. Children and code civile problems.

32. Simplification of protocol between countries.

6. Observations

33. The impact assessment is severely flawed.

34. Statistical evaluation has been examined in detail.

35. Assessment of the policy options are roughly ranked according to their importance. Individual rights and notional cost of injustice are bound up together. The fourth, fifth and sixth criteria are simply different aspects of political acceptability and should be taken under one head.

36. The comparative assessment between the schemes discloses obvious bias against Eurobail under most heads.

37. Apart from the above, there is an inexplicable misrepresentation that the term “bail” only applies to monetary surety arrangements.

² (2nd Report 2007–07 HL Paper 20).

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7. Conclusions

38. There is no prospect of any viable scheme without fundamental constitutional change in the governance of the EU and therefore no reason why any scheme should be pursued against the current background.

39. However unpromising the setting, the need for EU action is even greater than the Commission's assessment of the position.

40. The impact of the Commission's scheme will be at best marginal.

41. There are serious practical shortcomings in all schemes.

42. The Eurobail system is clearly superior to the chosen scheme on merit and it is unfortunate that the comparison of schemes is not impartial. There should be no confusion between inherent merit and political expediency.

SECTION 1

BACKGROUND—THE HISTORY OF EUROPEAN UNION PROVISIONAL LIBERTY PROPOSALS

1. The writer can claim to have initiated the concept of an EU wide provisional liberty system. He invented the concept in the course of an article on European Bail problems published in the Times on October 18th 1994. He also invented the term Eurobail at about the same time though it does not appear in the article. In 1995 the writer, on behalf of the organisation he founded, Fair Trials Abroad (FTA), gave written evidence on the concept to your Lordships' Select Committee considering the 1996 Intergovernmental Conference. Apart from some activity by the Civil Liberties Committee of the European Parliament the concept made little headway until 1999. In the meantime, the writer had, at the request of the British Home Office and interested MEPs, been working on the practicalities of such a system with the aid of FTA's British, French, Dutch and Italian correspondents. By 1999 we had reached the final form of the system known as the Eurobail system.

In January 1999 both written and oral evidence was given on behalf of FTA to your Lordships' EU Select Committee on the Corpus Juris project. The ensuing report gave specific endorsement to the concept of Eurobail.³ Since then Eurobail System, in common with all other measures for protection of citizens' rights, was on "hold" until the 2002 Commission initiative.

2. From 2002 to 2005 the writer attended all the experts meetings mentioned in the Commission's proposal. It is of particular significance that in 2004 the official responsible for the preparation of the framework resolution met with FTA's European criminal lawyers panel (ECLAP). After a detailed exposition of the various alternatives canvassed in the impact assessment Eurobail was unanimously selected as the only system that answered the perceived problems.

SECTION 2

THE NEED FOR EU ACTION ON PRE-TRIAL SUPERVISION MEASURES

THE SCALE OF THE PROBLEM

3. It may be recalled that your Lordships last examined the bail position in the EU in the course of your inquiry into procedural rights in criminal proceedings.⁴ In paragraph 56 of the report it was noted "Mr Jakobi said that the question of bail causes far more misery and demonstrable injustice in the European system than almost anything else you can think of affecting foreigners. Whereas the native goes free on conditions, the foreigner sticks inside jail."

4. This observation was as a result of a desk research project carried out by the writer in 1995 to ascertain the number of EU citizens affected by pre-trial custody outside their own country and such evidence of discrimination as existed. For various reasons, including incomplete statistics, it was presented as a rough estimate of the parameters of the problem.

³ *Prosecuting Fraud on the Communities' Finances—the Corpus Juris* (9th Report 1998–99 HL Paper 62).

⁴ (1st Report 2004–05 HL Paper 28).

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5. The conclusions were as follows

There are at least 5,000 prisoners in the EU at any one time who are on remand and facing the legal handicaps discussed in this paper.

Nearly half of them, over one in five of the total number of "foreign" EU prisoners would not be in prison if they were natives of the country holding them.

At the experts' meeting held in 2005 it was apparent that this was the only published work on the topic before the external contractor was commissioned.

6. Over the intervening 10 years, the EU has expanded and there was more interstate travel by EU citizens. These factors must be taken into consideration in comparing the new figures, compiled by the external contractor, with the old results.

7. The Commission impact assessment⁵ summed up the numbers of people in pre-trial detention as follows, *"During each calendar year, it is estimated that almost 10,000 EU nationals are detained in pre-trial detention in EU countries other than their normal country of residence. At any moment, there are around 4,500 EU nationals in pre-trial detention in EU countries other than their normal country of residence."*

"Based on the data from several countries, it was estimated that as many as 80 per cent of EU nationals currently in pre-trial detention could be potentially subject to a pre-trial transfer order and the application of alternative measure than pre-trial detention."

"This would suggest that during any one year as many as 8,000 EU non-resident pre-trial detainees could be subject to an alternative pre-trial non-custodial measure."

8. It will be seen that the two studies are broadly in agreement: the number of prisoners has almost doubled, probably primarily due to the two factors noted above, and the number of citizens affected has more than doubled.

9. With regard to the problems experienced by EU nationals in pre-trial detention⁶ attention should be drawn to the figure in table 3.2 for France. Whilst it would appear that the average pre-custodial remand time for the jail population as a whole is four months a more realistic figure in the writer's experience would be approaching double that for the non-native. The writer would attribute this to delays in obtaining and assessing foreign evidence in relation to the case. Unfortunately there is an absence of data for Spain in the Table.

THE COST TO PEOPLE INVOLVED⁷

10. These have been categorised in the Impact Assessment under four heads: loss of freedom, loss of earnings, "consequential loss" (professional standing, stigma, breakdown of families and relationships) and cost of family and friends visiting whilst in detention. The section goes on to observe that many people who have been held in pre-trial detention are eventually acquitted and to those should be added cases that are disposed of in a non-custodial manner.

11. As one who has had probably more professional opportunity to observe at close quarters the effects of discrimination in remand practices involving the innocent on both the victims involved and their families than anyone, I am forced to comment that the attempt to quantify the experience in economic terms by reference to compensation sums is risible.

The psychological effect on the innocent and their close family of even a comparatively short term of imprisonment in a foreign country for whatever reason is devastating. It usually leads to the need for professional assistance and frequently long-term or permanent economic, social and psychological breakdown. Matrimonial breakdown is a prominent feature of such incidents, and suicide, though rare, is not unknown.

THE COST TO PUBLIC AUTHORITY⁸

12. The economics of custody and its alternatives would appear to be reasonably argued. Videoconferencing is a major technological advance which needs to be built into the thinking of those concerned with cross-border justice policy generally.

⁵ SEC (2006) 1079 clause 3.2.

⁶ *Ibid* 3.3.

⁷ *Ibid* 3.4.1.

⁸ *Ibid* 3.4.2.

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SECTION 3

THE MAJOR LEGAL AND PRACTICAL IMPLICATIONS OF THE COMMISSION'S PROPOSAL

LEGAL AND CONSTITUTIONAL BACKGROUND

13. The current inquiry needs to be considered against the background of your Lordships' previous inquiries into **Procedural rights in criminal proceedings**⁹ and, subsequently, **Breaking the deadlock**.¹⁰

14. In the inquiry into **Procedural rights in criminal proceedings** it was noted¹¹ "that some member states have in the past expressed reservations about the usefulness and legality of such a proposal. They have argued that subsidiarity precludes action at EU level and that the treaty does not provide a sufficient legal basis for the proposal."

15. The subsequent inquiry, **Breaking the deadlock**,¹² specifically focused on the problem of progress of procedural rights. The Writer summarised the position as follows:¹³

"The committee based its deliberations on evidence given by the Attorney General and various government officials. To summarise: the European law on procedural rights, which would have made a marked difference to the rights to justice of Britons abroad, is so locked in committee that the UK Government has despaired. As a consequence, the UK Government, together with the Czech Republic, Irish Republic, Malta, Cyprus and Slovakia, is proposing a non-binding "code of good practice" resolution to the same affect.

During the course of his evidence, the Attorney General went out of his way to point to the difficulties which have arisen for this type of legislation as a result of the failure to ratify the constitutional treaty. In particular: "This treaty would have brought important changes to the way criminal justice measures are agreed in the (European) Council." It was quite clear that he considered the abolition of the unanimity rule as a vital ingredient to progress.

His comments are applicable to the whole spectrum of criminal justice measures."

CHILDREN AND JUVENILES EXCLUDED

16. During discussions of the Commission proposals for a Framework Decision on Cross-border Supervision of Probation a serious anomaly was discovered due to the lack of a common age of criminal responsibility within the EU—which varies from 7 in Ireland to 16 in Portugal. The problem is that the European arrest warrant has as a mandatory ground for refusal to execute it that the child is below the age of criminal responsibility in the executing authority. It would appear to be impossible for any other criminal justice measure within the ambit of the European legal space to deviate from this precedent.

What this must mean in practice is that while some adults may get bail, some quite young children in the same circumstances may be detained in a strange land with no one to speak their language while their case is disposed of.

The EU must determine a common age for criminal responsibility, and what that should mean in practice for foreign children, as a matter of urgency.

INCOMPATIBILITY OF CRIMINAL JUSTICE SYSTEMS

17. The common law based systems, in essence, are compatible with any sort of enforceable international pre-trial transfer system since they share the following characteristics:

- The accused has to be charged or released within days of arrest, the outside limits being, at present, 28 days in the UK.
- After charging, the accused cannot be questioned in the course of the inquiry, although the police are at liberty to continue their inquiries.

⁹ (1st Report 2004–05 HL Paper 28).

¹⁰ (2nd Report 2006–07 HL Paper 20).

¹¹ Paragraph 9.

¹² Op. cit.

¹³ Letter to *The Times* 18th of January 2007.

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- The trial commences as a specific stage of the proceedings, is continuous and starts at a specific date.

18. By contrast, the code civile based systems share the following characteristics to a greater or lesser extent (the French system is used for this comparison):

- Charging is a much more flexible concept. In 95 per cent of the cases, the investigation is conducted by the police and are judicially supervised by the prosecutor. In these cases, charging usually occurs as quickly as it does in a common law system. The other 5 per cent are the more serious charges, where an examining magistrate is involved and is potentially a very lengthy investigation. It is possible for the accused to be in custody for months before formal charges are decided by the examining magistrate.
- The accused can be questioned at any stage of the inquiry until the examining magistrate hands the case over to the trial tribunal.
- The trial can be said to commence with the opening of the inquiry by the examining magistrate since all the evidence taken in the presence of the accused and his lawyer is, in general, unquestionable evidence for the formal hearing at trial. The accused is not only questioned about the offence, he will also be questioned about his background and personality.

19. It is for these reasons that a code civile criminal justice system requires the availability of the accused to attend the examining magistrate at all stages of the pre-trial procedure until the case is closed and passed to the trial tribunal. It is therefore essential that a viable video conferencing system be set up throughout the EU before any practical pre-trial alternative to custody for non-residents can operate.

SECTION 4

THE ADEQUACY OF THE SYSTEM PROPOSED AND IN PARTICULAR WHETHER ONE OF THE OTHER OPTIONS CONSIDERED BY THE COMMISSION WOULD BE PREFERABLE

OVERVIEW

20. In its response to the Commission Green Paper¹⁴ FTA stated its view that the heart of the problem regarding discrimination against foreigners, was best expressed as follows:

“As both the Commission in itself and the ECJ have recognised, the magistrate’s decision on bail essentially involve ‘the classical grounds.’ That is to say consideration of three factors: gravity of the offence, the likelihood of further criminal activity whilst on bail (including interfering with witnesses or repetition of offence) and the danger of absconding.

Of these classical grounds, the gravity of the offence is a common factor for nationals and foreigners alike. However, the other factors involve assessment of risk and militate against foreigners. It is routine for a court, secure in its knowledge of its own society, to assess such important factors as ties with the community when it comes to nationals. By contrast, for foreigners, the assessment of ties with the community is fraught with difficulties: there is an inevitable lack of personal information before the court and possible cultural difficulties.

Further, in the absence of swift and effective arrest arrangements operating throughout the EU against fugitives from justice, magistrates will fear that if a foreigner is allowed home he will not return.

What is required in an adequate system is that it provides answers to these two needs such as an informed and impartial personal risk assessment, coupled with an ironclad guarantee that the defendant would be arrested and returned to the court if he/she became a fugitive from justice.”

THE COMMISSION’S PERSPECTIVE

21. The Commission’s proposal (referred to as policy option 2 in the impact assessment) is for a new Council framework decision. It is accepted by the Commission that “the general aim of this proposal is to . . . promote equal treatment of all citizens in the common area of freedom and security and justice.”¹⁵

22. The impact assessment document¹⁶ agrees in general terms with the view expressed by FTA on risk assessment.¹⁷ However, one searches in vain for any mechanism in the proposed framework decision for

¹⁴ “A fair approach to provisional liberty/bail” October 2004.

¹⁵ Explanatory memorandum: consistency with other policies and objectives of the Union.

¹⁶ SEC (2006) 1079.

¹⁷ In particular, *ibid* 3.3 “the court in a ‘foreign’ country is in a difficult position to make a risk assessment . . .” And the remaining arguments expressed therein.

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dealing with this problem. On the contrary, the original provisional liberty decision remains with the issuing court.

23. The guarantee of a return to court on application by the issuing authority is reasonably dealt with, if one can accept that children and juveniles will be excluded from operation of the framework decision.

24. The mechanism for supervision of the citizen released on remand between release and trial is of unnecessary complexity, put forward by the Commission on the grounds that it is necessary to keep the issuing court in control of the process (see above).

25. Assessed against the Commission's own aspirations for its scheme, it is considered that it will only have a marginal impact, if any, on the problem posed by the mass discrimination established in section 2 of this paper. The European Arrest Warrant has been operational for some three years, and is in essence a compulsory extradition system. It may be recalled that claims were made by the Commission on its launching that its existence would increase the likelihood of provisional liberty being granted. The ECLAP experience was that defence practitioners who cited the arrest warrant in efforts to obtain provisional liberty for their clients found no practical difference in the results attained.

THE ONLY ALTERNATIVE: EUROBAIL

26. Since the only scheme proposed that deals with the inherent xenophobic factors involved in an original bail decision by a foreign tribunal is Eurobail, it is the only viable alternative, in view of problems concerning the objectivity of the Commission's impact study in its final form and bizarre misrepresentations made concerning Eurobail. The procedure and advantages of the scheme as presented to the Commission¹⁸ is set out below.

27. Procedure

The authority where the foreign national was arrested would consider if the offence, as committed, could result in provisional liberty for a national of that country. If the offence and its circumstances were too grave to permit provisional liberty, the accused would be remanded in the custody of that authority. If the circumstances of the offence might permit provisional liberty, the arresting authority would notify the appropriate authority in the accused's home country, whereupon the accused would be sent home as expeditiously as possible for the disposal of his application for provisional liberty. It would then become the responsibility of the accused's home law enforcement officials to ensure that the accused is delivered back to the jurisdiction of the crime.

28. Reasonable notice of requirement for judicial purposes would be a factor. The power to vary conditions or rescind bail between release and return would be vested in the accused's home court.

29. Advantages

- It is proof against xenophobic risk assessment in any of its manifestations (culture clash, evaluating community ties of a foreigner or the quality of foreign evidence collection).
- It is applicable to all cases involving the provisional liberty of a foreign EU citizen.
- It allows both trial and home court to apply their own laws and knowledge at appropriate stages of consideration of transfer.
- It is simple in concept, in that responsibility for ensuring the defendant shall be present at trial passes with his person.

30. Disadvantages

- Children and juveniles.
- Code Civile problems unlikely, in practice, to be completely solved even by universal videoconferencing arrangements.

¹⁸ "A fair approach to provisional liberty/bail", FTA response to the Commission's Green Paper, October 2004. See also: Eurobail: preliminary reflections for a framework programme, FTA June 2002.

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SECTION 5

WHAT AMENDMENTS MIGHT BE MADE TO THE PROPOSAL TO IMPROVE THE PROCEDURE

31. Establishing a common age of criminal responsibility, coupled with an approximation of systems for dealing with juveniles and a common age of transition between juvenile/adult. The Approximation of regimes for dealing with the young is an important prerequisite for any scheme to operate fairly.
32. Code Civile problems require solution.
33. The protocol recommended with regard to communication and powers of the competent authorities in both countries concerned should be re-examined with a view to simplification.

SECTION 6

OBSERVATIONS

IMPACT ASSESSMENT

34. It has already been remarked that the impact assessment is severely flawed. The criticisms that follow should not be laid at the door of the external examiner. It is specifically stated in the impact assessment that he was working under the guidance of a steering committee, and, in accordance with usual practice within the Commission, the Commissioners bear the responsibility for the accuracy of the impact report.
35. **Statistical evaluation:** has already been examined in detail in section 2.
36. **Assessment of the policy options.** The criteria are explained in detail in the introduction to the assessment.¹⁹ They are, in fact, roughly ranked according to importance.
- **The first (individual rights and equal access to justice)** is vital if any scheme is to pass muster policy in accordance with the most fundamental principles on which the EU is founded.
 - **The second (notional cost of injustice)** is bound up with the first criteria, and it is somewhat hard to see how qualitatively the two can be distinguished. Indeed, detailed perusal of the ranking of all schemes shows no difference between these two rankings within any individual schemes (eg if **** for first criteria then **** for second criteria). What was the point of the exercise?
 - **The fourth, fifth and sixth (reducing the net costs of detention and the spin-off effects on judicial and police co-operation)** are not to be considered as of equal importance to the first three criteria. It is submitted that they are all, in fact, different aspects of political acceptability and they should really be lumped together under that one head.
37. **The comparative assessment: new legal instrument (NLI) and Eurobail**
- **Ensuring equal access to Justice.** (Impact assessment NLI ***** Eurobail *****). Since NLI does nothing to alleviate discrimination in risk assessment during the original decision to grant bail it must surely merit a rating of merely **/***. On the other hand, what are the grounds for not granting Eurobail ***** status?
 - **Reducing notional costs of injustice.** (Impact assessment NLI ***** Eurobail *****). In view of the remarks on criteria (36) NLI**/***? Eurobail*****?
 - **Decreasing the risks of absconding** (NLI** Eurobail**) is correctly explained in the comment on NLI which is applicable to both schemes. So what is one to make of the comment on Eurobail?
 - **Reducing the costs of detention.** (NLI***** Eurobail*****) since the same comments are applicable to this criterion as to the others noted above NLI**/*** Eurobail*****
38. **Misrepresenting Eurobail.**²⁰ Apart from the curious presentation of comparative star ratings noted above, the assessment of benefits and constraints rests upon an inexplicable misrepresentation that the term “bail” only applies to monetary surety arrangements. Not only was it explained in the memorandum submitted on behalf of FTA during the consultation process that the British expression “bail” should be taken in this context as being the equivalent to the continental expression “Provisional liberty”, the concept was explained in all papers and expert meetings throughout the process.

¹⁹ Impact assessment, 6.1.

²⁰ Op. cit 6.2.5. And table 6.5.

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SECTION 7

CONCLUSIONS

39. The Attorney General has given evidence that there is no prospect of any viable scheme for a European Council framework decision to be enacted in the sphere of fundamental procedural rights without fundamental constitutional change in the governance of the EU. Accordingly, there is no reason why an inferior scheme should be pursued for political expediency purposes against current background.

40. However unpromising the setting the need for EU action on pre-trial supervision measures is even greater and more urgent than the assessment contained in the impact statement. The numbers affected by the lack of a proper measure have demonstrably increased over the last 10 years and will continue to do so. The assessment of the effect of injustice on them is likely to be greater since foreigners are likely to be kept on remand awaiting trial and the economic assessment made is risible.

41. The experience gained through the operation of the European Arrest Warrant, although anecdotal in character, suggests that the impact of the new legal instrument scheme on the mass injustice demonstrated will be at best marginal.

42. There are serious practical shortcomings in all schemes. The lack of a common age for criminal liability, coupled with a lack of approximation in methods of dealing with juveniles, generally requires attention. The Code Civile criminal justice system requires virtual attendance of the accused on demand throughout the criminal justice process from arrest to close of the dossier. This problem can be largely solved by mandatory video conferencing arrangements throughout the EU which may take a long time to become operationally viable. Since there are clearly no reasonable prospects in the near future of any scheme being brought into operation it is recommended that the Commission now gives priority to resolving these obstacles by establishing a common minimum age for criminal responsibility and a practical judicial video conferencing system.

43. The Eurobail system is in fundamental rights terms clearly superior to the chosen framework option, but is apparently considered by the Commission to be politically inexpedient in the current climate of the European Legal Space. It is unfortunate that the impact assessment and comparison of schemes considered bears the appearance of stealthy bias under the cloak of impartial appraisal. It is surely right that political expediency and acceptability be separately assessed so that there is no confusion on inherent merit.

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Examination of Witness

Witnesses: MR STEPHEN JAKOBI OBE, consultant on cross-border justice, and MS DEBBIE SAYERS, solicitor, examined.

Q1 Chairman: Mr Jakobi and Ms Sayers, welcome and thank you for coming to help us. As you may know, this is the opening session of this particular inquiry. You are our first witnesses. I know, Mr Jakobi, you have given evidence to this committee on at least one earlier occasion, so you know the form. I would be grateful if you would correct or supplement the transcript when you receive it. You have had notice of the area of questions, the sort of matters we want to ask you about and a copy of the written evidence submitted to us by the Law Society and the CPS, both fairly brief.

Mr Jakobi: That is correct.

Q2 Chairman: We have two background questions we would like to ask but we can perhaps take them broadly. It is fairly evident from your own involvement in the development of this idea over the years, and indeed from the helpful written evidence that you have submitted, that you see a compelling

need for something to be done to redress the balance, the injustice, that has for many years existed in relation to what one might call foreign suspects, who, down the years, have always been more likely to have been remanded in custody than their counterparts from the trial state. Plainly, unless there are international arrangements, it is more difficult to ensure that they will eventually attend trial.

Mr Jakobi: That is partially correct, my Lord. That is one of the problems.

Q3 Chairman: What would you say was the other main problem?

Mr Jakobi: Sheer prejudice, bias against foreigners in one way or another, thrown up by the legal system. It is institutionalised prejudice that we are battling against, if I could put it that way and rather simply. I am indebted to my colleague, Debbie Sayer, who pointed out to me that for example in 2005 there were under 6,000 European arrest warrants issued in

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Europe, so we are dealing with greater numbers than that. It does put things in some sort of perspective.

Q4 Chairman: The sort of figures that you will have seen canvassed in the various explanatory memoranda, and I think in your own evidence, suggest that there are getting on for 10,000 EU nationals detained in other Member States per annum, 4,500 at any given time. These are the sorts of statistics that we have. Does that remain about the size of it?

Mr Jakobi: I think so. The figures from the independent contractor, from the Commission, are greater than the ones I found 10 years ago when I tried to account for the difference. We have similar orders of magnitude accounting for the greater problem. From everything one can see, it is going to increase. The EU has more Members.

Q5 Chairman: Exactly, and there is greater movement across borders?

Mr Jakobi: Yes.

Q6 Chairman: On the statistics again, about four-fifths, about 8,000, quite possibly would be advantaged by some scheme which enabled, instead of custodial remand, a pre-trial release on conditions. One particular part of the initial question is this. Have there been problems particular to certain offences and/or Member States? Is there a particular problem in identifiable areas either as to offending or as to individual Member States?

Mr Jakobi: I think that the general institutional problem is throughout, but, on the other hand, my own experience is mainly involving British, Dutch, Spanish and German citizens facing trial or investigation in Spain, France, Belgium, Italy, Greece and Portugal. Bluntly, we [Fair Trials Abroad] never managed to cover Europe properly in my watch. This is where we have clients, for one reason or another. These are the countries where miscarriages of justice reported to us most frequently took place: the Spanish and French jurisdictions. Since we only got cases of merit and we tried to work that out, our experience is not universal but, on other hand, they are the hard luck bail stories because if you are guilty and you do not get bail, it is not nearly as much of a problem, than if you are spending time inside prison and you are innocent. That was a Fair Trials Abroad problem. That is what my experience relates to essentially.

Q7 Chairman: This is not going to cure miscarriages of justice. Whatever the scheme is, it is intended to lead to the return of the person concerned to the foreign state to stand trial. If a miscarriage of justice occurs, it occurs on his return.

Mr Jakobi: Yes, but if you are imprisoned unnecessarily before the trial, this is in itself in various practical aspects possibly prejudicial to the trial. We did note a number of cases, quite glaring cases, where people were sentenced at trial to rather ridiculous terms which coincided with time served. This sort of problem did occur, especially in France and Spain. One particular example, and an example is always useful, is of a lorry driver who was sentenced to 10 years at first instance and the sentence was reduced to nine months on appeal.

Q8 Chairman: That happened to coincide with the period he had already spent in custody?

Mr Jakobi: That is right. We have another case of a so-called football hooligan who was not guilty and who was eventually declared innocent by a constitutional court in Belgium, who was sentenced to immediate imprisonment of six months at first instance. That was altered to a suspended sentence on appeal. I am quite convinced that was because he was immediately bailed after an early summary trial, or else he would have seen time served again the other way round. So there is some indication of what I talk about in this. We were talking about the possibility of particular types of case, basically, the cases we had followed, cases with an international element to them perforce, and the staple diet is of drug offences, international drug offences. A very large proportion of the clients we had were lorry drivers crossing frontiers and being arrested with goods in their loads, so experience has very largely been accumulated through that type of case: also offences against the person, rape cases and violence, but very little fraud or white collar crime. I do not think I can take it much further.

Q9 Chairman: Besides obviously people being remanded in custody when, if they were nationals of the trial state, shall we call it that, they would be getting bail, is it also a problem that the very fact that they are in custody or subject to a travel restriction abroad is a harsher penalty upon them than if they were in custody on remand, or indeed subject to travel restrictions, in their own home state?

Mr Jakobi: It is obviously better for things like family relationships if you are in custody in your own home state on remand. I have always freely admitted that if Eurobail is to work, people should be escorted in custody back to their local magistrates' court and a large percentage will remain there until they are called upon for trial. That is surely what would happen. I never pretended that it would make bail easier, but it would make it fairer.

Q10 Chairman: Let me clarify this. Eurobail was an earlier scheme and I think one that you have in fact yourself supported, but that has now given way to the

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present proposal, which is the European supervision order, which as I understand is in contrast to Eurobail in this critical regard that under the proposed scheme, ESO, it is the trial state, the issuing state, which will in fact lay down the conditions of bail.

Mr Jakobi: I am afraid it is a classic case of having a problem and not seeking the solution to the problem but seeking what is politically expedient to deal with undercurrent conditions. Their proposed scheme will make very little difference indeed because the prejudices involved—institutionalised prejudice, I am not looking at individuals—in granting bail to foreigners will persist. The lack of ability and the lack of a fair ability to assess such things as the community ties of foreigners will mean that foreigners will continue not to receive bail. It is these things that Eurobail was trying to tackle. The only thing that the Commission's proposed order would solve is the problem, and it is a small problem—it affects not thousands but 100 or 200 so far as we can see—of the marooned. That is, people who have been granted bail in a foreign country and are confined to that country pending trial. This can go on for a very long time and you have side effects, such as, unfortunately, the non-interchangeability of social security between countries, which means that the marooned may be without means of financial support if they have been granted bail and have to stay near the court. Particularly in France and Spain we have come across this.

Q11 Lord Clinton-Davis: What proportion of that quite small number are in receipt of Legal Aid?

Mr Jakobi: It depends of course where we are talking because we do not grant Legal Aid to UK citizens abroad, and nor does any other country, so far as I am aware.

Q12 Lord Clinton-Davis: I am talking about any form of Legal Aid, whether it is from here or somewhere else.

Mr Jakobi: That again depends where they are. Legal Aid in any acceptable sense, and we would find the practice in most countries in Europe not acceptable for our Legal Aid, would mean somebody sitting by you at trial, and that still only covers something like 50 per cent of the current EU. We come across this huge problem of non-qualified students acting under the direction of university professors trying to assist foreigners under serious charges in various countries in the EU. Therefore, if we are talking about a qualified lawyer of some sort assisting you at trial, we are still only covering 10 countries, maybe 12 countries, out of 25, something like that.

Q13 Chairman: Can I press you a little on the contrast between the Eurobail scheme and this scheme, the ESO scheme? Under the Eurobail scheme, it was still going to have to be for the trial state to take the preliminary decision as to whether this was a case for bail or not?

Mr Jakobi: That is right, yes. Different countries have different laws on what is bailable. The good thing about Eurobail is that nobody really needs to know any other law than that of their own country.

Q14 Chairman: I had rather understood that it was not simply a legal question as to whether the offence was bailable but also it would require the trial state to form some view as to whether it was or might be an acceptable case for bail at all, or is that not so?

Mr Jakobi: That is not so.

Q15 Chairman: I have misunderstood then.

Mr Jakobi: What I would hope the trial court would do is have a memorandum of the circumstances of the crime to be sent over. That is the way that would get in to the system in the executing state. The magistrates of the home state would have the circumstances of the crime as found out by the trying state in front of them as one of the important ingredients for deciding whether the person is bailable or not.

Q16 Chairman: In this country, you can get bail, even if you are charged with murder.

Mr Jakobi: Yes.

Q17 Chairman: If we were the trial state and it was a Frenchman, and it was under the Eurobail scheme, would we simply automatically send the accused, the suspect, back to France, saying, "This is a bailable offence and it is for you, the French, to decide whether or not to release him on bail"?

Mr Jakobi: And they would have the circumstances of the crime.

Q18 Chairman: Exactly, but that is how it would work, is it?

Mr Jakobi: Yes.

Q19 Chairman: But under the ESO, in the illustration I have just given, it would be for the UK court to decide whether this was a suitable case for bail and, if so, to decide on the conditions and then simply issue one of these European supervision orders, and tell the French, "Make sure you report daily and are subject to a curfew, you cannot go out after seven in the evening". That is how it works under the ESO?

Mr Jakobi: Yes. The ESO changes absolutely nothing except for a decision where bail would be granted anyway. What we are looking at is the

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various prejudicial factors and trying to get rid of them which prevent almost all foreigners being granted bail if they are accused of any sort of fairly serious offence.

Q20 Chairman: You make it sound so unhelpful and I really wonder if it is quite as unhelpful as that. Surely, under this ESO you will get more decisions that it is appropriate to grant bail because the trial state will at least know that if this foreigner is bailed, he can be escorted back to his home country for that home state to impose the necessary conditions of bail and be able to monitor them, supervise them and eventually guarantee—that is putting it high—and do the best they can to ensure that he will finally return to stand trial in the trial state?

Mr Jakobi: I would immediately say that if the countries trusted each other to the latter extent, first of all, we would surely have had more grants of bail under the European Arrest Warrant cases and the practitioners reported to me there was no change just because you could get them back and an arrest warrant problem. Secondly, it employs the sort of trust between countries, mutual recognition, that would make Eurobail work perfectly well, and it is not there, which is why we have not even got the current order and we do not appear to have proceeded with fundamental rights legislation in its entirety, the keystone of which this is just another brick. No progress has been made whatsoever on defendants' rights, including the rights to bail. I would have said that we are looking at something that would improve the lot of 5 per cent at best of those who are being considered or should be considered for bail and the other 95 per cent will not be considered fairly and will not get bail. It is not curing the problem at all. It is a political decision about what the Commission thought they could get through the governments. They could not get it through the governments, but the impact report I dissected at some length. I thought that the whole thing was gerrymandered in favour of forgetting about inherent merits of systems and political expediency, which I will immediately accept is a proper consideration, unfortunately, that took over everything to the point of skewing the merits as well, which is something I think the Commission should answer for.

Ms Sayers: May I add that I think one of the problems with the potential increase in grants of bail through the European supervision order is that it really relies upon the order itself containing an effective coercive mechanism so that states can reassure themselves that, if they grant this person bail, that person is likely to be returned. My perusal of the documents and the suggestion for a coercive mechanism would suggest that the mechanism is not effective and may be quite unworkable. If the trial

state, for example, issues an order sending somebody back to their own country and the executing state is then responsible for monitoring the bail conditions, if that person breaches their bail, for example if they had a condition to report to a police station daily, there would be no power of arrest on the part of the British police, for example, until the trial state, the issuing state, then decides to take a decision that this person should be arrested and transferred. That means there is a real difference in the way that justice is administered between individuals in a country and it leaves the police effectively powerless in their own jurisdiction to apply the law that they know. I think that could really hinder mutual trust.

Q21 Chairman: So you think the actual scheme itself will not be effective and will in turn cause people to lose confidence in its prospects and its potential?

Ms Sayers: Yes.

Q22 Lord Jay of Ewelme: This point has partly been covered. I would find it helpful if Mr Jakobi could briefly describe the Eurobail system, which I am not sure I fully understood or have seen fully in the papers. You have been working on this for many years. Could you deal with that briefly and also why you think that scheme would cover far more cases than the European supervision order, just to set the one against the other?

Mr Jakobi: It evolves round the mechanisms for the fundamental decisions on bail. There are various criteria obviously, but behind the criteria, the possibility of flight is the one thing that both systems deal with to some extent. The likelihood of repeating a crime whilst on bail is one of them. Once you look at the bottom line, it is tied with the community and decisions on character that determine whether bail will be granted. Local judges throughout Europe of course know where they are with their native citizens in front of them and can judge these matters. There is also a question of character evidence and all this sort of thing, whereas if you are in a foreign jurisdiction, views are likely to be taken without proper information and proper background, social background, and without being able to judge the cultural ties and all the rest of it of the foreigner, and so the underlying decision has this built-in institutionalised xenophobia. Eurobail solves this because, as we were discussing earlier, there are some jurisdictions which just say that if you are charged with murder, you cannot get bail or provisional liberty and matters of this sort. The trying country's judges will know about this and they will say, "This offence is not bailable" and that is the end of it. So nobody needs to know anything other than their own fundamental laws on criminal

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offences and bailability but, if it isailable, then there is a pretty simple mechanism; the Home Office Central Authority uses a system for warrants and evidence on all sorts of things. The same mechanism could very well be used for arranging for somebody to be sent back in custody for their own magistrates' court to take into account all the proper factors in granting bail. It will be that country that is responsible for sending people back for trial and ensuring that they are available for interview over video connections, videoconferencing, and matters of that sort, if they are needed in the interim period. What you have is elimination of bail bites which is so strong in practice that foreigners very rarely get bail in England or anywhere else, unfortunately. It is not just this fear of flight.

Q23 Lord Jay of Ewelme: I have not quite worked out who does what and to whom in this. If you are in prison in Greece and it is aailable offence, under the Eurobail system, what happens?

Mr Jakobi: You are sent back to the UK as your country of residence.

Q24 Lord Jay of Ewelme: Who decides that?

Mr Jakobi: It is automatic if you areailable under the new treaty, the Eurobail Treaty, unless quite obviously there is going to be a trial within a week or two. There will have to be time limits.

Q25 Lord Jay of Ewelme: Is itailable under the jurisdiction of Greece of Britain? If it is a Brit who is up before the courts in Greece, under Eurobail, does he get sent back?

Mr Jakobi: There is a two-stage process. The first one is a Greek legal process: if you are notailable, you stay in prison in Greece.

Q26 Lord Jay of Ewelme: Let us assume that it is aailable offence.

Mr Jakobi: Then it is up to your home country. You are sent to the UK. It will be up to your local magistrates to decide whether you areailable or not.

Q27 Lord Jay of Ewelme: Suppose it is aailable offence under Greek law but not under British law?

Mr Jakobi: Tough, you are going to sit in prison because the local magistrates will not allow you bail and vice versa.

Q28 Chairman: You are going to be sitting in prison in England?

Mr Jakobi: Yes.

Q29 Chairman: I have only just rumbled this myself that under Eurobail it is a purely legal issue as to whether it is aailable offence in the trial state which determines whether the person is then sent back to his

home country and even if he is not bailed there, he will be remanded in custody there, rather than returned to be in custody on remand in Greece?

Mr Jakobi: That is right.

Q30 Chairman: If you look at paragraph 27 of your written evidence, under the heading, "The only alternative: Eurobail", paragraph 27, "Procedure", states: "The authority where the foreign national was arrested would consider if the offence, as committed, could result in provisional liberty for a national of that country. If the offence and its circumstances were too grave to permit provisional liberty, the accused would be remanded in the custody of that authority. If the circumstances of the offence might permit provisional liberty, the arresting authority would notify the appropriate authority in the accused's home country, whereupon the accused would be sent home as expeditiously as possible for the disposal of his application for provisional liberty." Now, provisional liberty here means bail pending trial.

Mr Jakobi: Yes.

Q31 Chairman: Where you speak about "If the offence and its circumstances were too grave to permit provisional liberty", I have read that as meaning: if they thought that this was such a serious offence that actually nobody ought to be granted bail, then they would not make the provisional decision to send you back. What you have now told us, as I at last understand it, is that that is not the question. The question is whether it is theoretically aailable offence under the law of the trial state.

Mr Jakobi: That is correct. What you are doing is sending the body home and wherever the body is, that authority takes responsibility for it, but with that body, if the system is going to make any sense, you have got to send the trial country's circumstances of crime.

Lord Jay of Ewelme: So that everything can be taken into account by the home magistrates, and so that is the way that is taken.

Q32 Chairman: One consequence of the difference is that under Eurobail, to take Lord Jay's illustration, the Brit in Greece accused of murder—and I have no idea whether Greece allows you theoretically bail if you are charged with murder or not but if they do—you are sent back here and under that scheme you might find yourself remanded in custody in England?

Mr Jakobi: Yes.

Q33 Chairman: But under the ESO, there is no question of your being remanded in custody in your home state. That must be right, must it not?

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Mr Jakobi: I think that must be right, or at least there is no provision—

Q34 Chairman: By definition, you do not get into ESO unless the trial state has said, “This is suitable for bail, provided always of course that the executing nation, the home state, is prepared to supervise the conditions that we impose for the grant of bail”?

Mr Jakobi: I think the standard case is likely to be that you are sent home to a home prison to await trial. To anybody who has done a lot of crime, and I think some of us have here—

Q35 Chairman: Do not look at me! I am not as experienced in crime as many of my colleagues!

Mr Jakobi: All I can say is that there will be a lot of criminals who will not be let loose on the streets under any conditions.

Chairman: Obviously I have had criminal jurisdiction down the years to a degree.

Q36 Lord Mance: Can I test the point that the Lord Chairman has been putting to you and which you have been accepting? If it is right, it seems to me there has been a fairly fundamental misconception in the European authorities which have considered this. I certainly read your paragraph 27, especially the word “might”, “If the circumstances of the offence might permit provisional liberty” then you notify and send home as expeditiously as possible, as introducing a discretion on the part of the issuing state. That is certainly, if you look at page 73 (paragraph 5.2.5), how the European impact assessment has understood your proposal, Eurobail. The sentence in the middle of the paragraph reads: “The trial court makes a preliminary assessment whether the offence is ‘bailable’.” The difficulty, it seems to me, about the opposite proposition which you have had put to you by the Lord Chairman and which you have accepted is that it means in many cases, in respect of states for example which simply apply the European Convention on Human Rights tests for bail, which are generally discretionary tests, you would have automatically to send people back to their home state, even in cases where it was absolutely obvious that there was no question of bail in fact, simply because it was possible in principle in relation to that type of offence, albeit it was a serious murder, to grant bail. That is the consequence of your suggestion that you exclude all discretion. I cannot think that that would be regarded as a very sensible situation and it would impose on executing states effectively the burden of keeping in prison people awaiting trial in a foreign country. You may think that is a good idea. Just to give you one further reference, it is quite plain on pages 83-84 that the impact assessment does not understand Eurobail like that. Look at the foot of 83: “The trial state

authorities would have no control over how the supervision measures are implemented and therefore would be reluctant to use such alternatives in the first place.” That postulates that Eurobail involves some form of discretion in the issuing state. As I say, while I see the attractions of Eurobail in many respects, I do find it difficult to think that it is practical to have a system whereby simply because in principle an offence might as a type of offence involve a claim for bail, therefore any assessment of a claim for bail must be done by the executing state. That is the problem I have.

Mr Jakobi: I do not find that as a problem, my Lord Chairman. The reason I do not is that quite obviously we are looking at offences where people are going to wait a very long time for trial. We are not looking at short-term things. We are looking at serious offences with a long-term element where the pre-trial period is many months. If people are merely to swap the foreign country’s jail for their own country’s jail, this has a number of social advantages to the prisoner, but otherwise I cannot see any problem, unless of course mutual recognition is not the basis on which the European legal space is founded, and governments of course do not trust each other, in which case we all go home and we forget about every piece of legislation that is going through the European legal space. If they do, as I have said, what is likely to happen is that those who are not bailable will exchange one prison for another; those who should have been bailable will be instead of sitting in a foreign prison released on whatever conditions they are released within their own country. That is the good that one is trying to get. The problem with the European supervision order is that it does not address the fundamental problem of bail at all and we will continue to have this alarming discrepancy, with the exception of a few people who are granted bail confined to the trying country who will be enabled to go home. That is a very small proportion in my experience. There is a considerable benefit to this group who would be bailable in their own country but are not getting bail in the foreign country and who would benefit. The others would just exchange one prison for another.

Q37 Lord Mance: How would you distinguish the short term from the long term? You said that we are looking at offences where the trial will not occur for a long time. Is there some way of distinguishing?

Mr Jakobi: One of the problems with international crime or crime with an international element is that the moment you get that element for evidence, any form of evidence, the pre-trial stage lengthens over the normal latest stage. That is a very important factor. What I was really thinking of is this. There is a summary cut-off point where it is quite sure that if the trial is going to occur in a month or two months,

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and it is not up to me to say where the summary cut-off point is, it is not worth going through the procedure. I recognise that. Somebody has to determine where that cut-off point is, but if it is likely that there is not going to be a trial for six months, this is a very important factor, I would suggest. We have thought about it.

Q38 Lord Borrie: One of the big disadvantages, as I understood from you, Mr Jakobi, about the framework decision in front of us is that it will not make a lot of difference to the problem that you have been looking at for many years that the trial country, the trial state, in which someone is present for a period but is not resident will not have very much knowledge on which to base a decision that somebody ought to be given a supervision order and what the conditions might be because a lot of that information is really only feasible in the hands of the country or the courts of the country where the person is resident. If I have understood that point from Mr Jakobi and if I think, as I do at the moment, that there is such a radical difference between the system being put in front of us by the Commission and a system of Eurobail, then I ask myself: is there any room for some intermediate position, for example, as in accordance with the Commission's proposal, where the trial state makes the decision but is required before coming to the final decision to have consultation, discussion, information, et cetera from the country in which the person is resident on which to make a more intelligent decision about a supervision order and what the conditions might be.

Mr Jakobi: There are two very difficult problems here, one of which is that unfortunately we do have institutional xenophobia amongst magistrates in the bottom tier who take these decisions. People are willing to admit it, if you ask them, that once you are a foreigner, you are a little suspicious. That, I am afraid, will still continue. The second is that by the time you have the sort of exchanges of information within the EU, the time for trial will have already passed. It is much easier for the country of residence to have this information within days than for a huge exchange system to work for further character inquiries and all the things that go around an intelligent decision whether to grant bail or not to operate. This is likely to take months rather than days in the foreign country. You are defeating the objective if you do this, whereas a simple circumstances of the crime report, which is something that the trial country is very capable of giving, will give the resident country magistrates a very good idea of what they are dealing with and would be very helpful in determining the gravity of the offence and things like that for them to work the

other perhaps more nebulous stuff that we are looking at, to determine a decision to grant bail or not. You did put your finger on it at the beginning. I cannot see for myself a viable compromise because of what I have just said. It is not only all or nothing. What we are being offered by the Commission is nothing or virtually nothing. I think one of the very interesting lines of inquiry is why. I would again suggest that practical merit makes it much easier for everybody to apply their own laws, which is really what I am trying to say, rather than learn new laws and have complicated mechanisms for transfer of this and that, which we can go into. We have come to the conclusion that the ESO as it stands has an unworkable system anyway, and my colleague would go into this in some detail if required, quite apart from the impact report talking about equality of treatment as well as and in conformity with the European Convention and all the other things and forgetting about that entirely in its assessment in favour of certainty of return, which it does something about. I found the impact report quite extraordinary, particularly the misunderstanding of Eurobail in the report as being financial only, which is a common continental misconception, though at every expert meeting I attend I make that very clear, and the submission of evidence to the Commission made that very clear indeed, and also, the fact that the independent contractor is British. So somebody has been fiddling with the original report on the way up to get this result as put in the Commission impact report. I cannot believe that the independent contractor has made such a mistake.

Q39 Chairman: On this misunderstanding as to the scope of Eurobail, the report is written as if all that can happen by way of Eurobail is the stipulation of a surety in a particular sum or his own recognisance in a particular sum. It is a financial sanction if you fail to surrender to your bail, but that is the only condition to which you can subject pre-trial release. Is that it?

Mr Jakobi: There are implications along those lines, if you read the impact report and the merits, that that is what is understood by some people who have been responsible for the impact report. That worries me very much indeed because our understanding of provisional liberty and bail is that the two terms are totally interchangeable in modern parlance.

Q40 Lord Bowness: There is one minor point, Mr Jakobi, and forgive me. I think I have probably misunderstood you. At one stage I thought you said that the only difference the ESO in practice would make was that people would be in their own jail rather than in a foreign jail. You must have been referring to Eurobail in that regard.

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Mr Jakobi: I was referring to those who cannot be released on bail. They would be sitting awaiting trial in their own country's jail instead of in a foreign jail.

Chairman: That is under Eurobail.

Q41 Lord Bowness: That is Eurobail not ESO.

Mr Jakobi: ESO does not really have anything to say whatsoever about it.

Q42 Lord Bowness: That has clarified that point. The other point that I would really like to pursue with you is the suggestion that with the ESO there are no sanctions for breach. There is a whole chapter in the draft framework decision on breach of a European supervision order, including such things as if the issuing authority decides the suspect must be arrested and transferred and at the time of that decision the suspect is in the territory of another Member State that state should arrest and transfer the suspect. There are provisions for the suspect to be heard by way of a video or telephone link and there are some articles dealing with the conditions of arrest. I am not quite sure why you say there are no teeth or are you just saying that the United Kingdom just would not be interested in enforcing a supervision order issued by one of the other countries?

Mr Jakobi: I am going to ask my colleague to answer this.

Ms Sayers: Clearly there is a coercive mechanism set out in the European supervision order proposal. The point is that it may not be as workable as you would want it to be. If it is not a workable coercive mechanism, then will states be motivated to use the European supervision order? It is not workable for several reasons. Firstly, as I indicated before, the power to grant a power of arrest rests with the issuing state. In the UK, in England and Wales, if somebody breaches their bail conditions, then the police officer could automatically arrest them for failing to report or not being at their home address as they should be or for not attending an appointment or for any of the conditions that were on their bail conditions. That would not happen under this order. What would happen is that under Article 16 the executing state has to refer back immediately to the issuing state. The issuing state then has to make a decision about whether or not they should order the arrest and transfer of the suspect. Then they have to do two things before making such a decision. Firstly, they have to decide whether that arrest and transfer should take place, looking at all the circumstances of the situation and also looking to speak to the executing state about the situation. There is also an ability of the suspect to be present at the hearing, via a video link if necessary, so they can make representations. My point as a former practising criminal lawyer is: how does the suspect end up at the hearing if there is no power of arrest? If somebody

has breached their bail conditions, are we suggesting that the arrest and transfer decision could take place in the suspect's absence? Otherwise, the police would not have the power of arrest to go out an arrest a suspect and bring them to a hearing at which they could make representations.

Q43 Chairman: With all the in-built delaying mechanism; if the chap does not report to the police, the best the police can do is to tell the home state authority, and the best they can do is to email, or however they would do it—they have to do it in writing—the trial state authority. The trial state authority then has in fact to refer to him and he has at least by video link to have an opportunity to say why he still should not be arrested. By this time, he could have gone to anywhere else you care to mention.

Mr Jakobi: Could I say something about this general type of problem? I have been a practitioner all my life. The people who worked on Eurobail with me were defence practitioners, defence lawyers from various countries in Europe. We tried to devise a practical scheme that would work. What we were faced with was a whole lot of, and I hope they will forgive me, highly intelligent bureaucrats who have seen very little, if any, practice of criminal law trying to devise schemes without regard to practicality. Every time you look at the other schemes, they fall apart on these practical points. This is another reason. I was pleased to see that the Crown Prosecution Service supported Eurobail, for example.

Q44 Chairman: I noticed that, absolutely, but I wonder if their understanding of Eurobail is what you now tell us is the correct understanding, which I have to tell you, and indeed must have been obvious, was not my nor Lord Mance's understanding from the documents of how it worked. Can I go back with you to paragraph 5.2.5 of the impact assessment, "Summary of policy option 5: 'Eurobail'." Do you see that paragraph?

Mr Jakobi: Yes.

Q45 Chairman: If you look at the second line at the end: "In the model suggested so far, there would be a division of functions between the trial court and the court of the suspected person's country of residence. The trial court makes a preliminary assessment whether the offence is 'bailable'." As I understand your evidence, Mr Jakobi, you say bailable means simple as a matter of law, yes or no, does the law in any circumstance allow for the possibility of bail for this particular offence?

Mr Jakobi: That is correct. This is precisely what I meant. I do not think that they got it wrong in saying what they said.

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Q46 Chairman: A preliminary assessment whether the offence is bailable, could be read in either of two ways. You could say: simply as a matter of theoretical law, does the law actually forbid bail in a case of murder, say, or you could read it as: do they think, having regard to all the circumstances of the case, it is the sort of offence where a court might on conditions be prepared to grant bail? It could mean either of those two but you say it means the former?

Mr Jakobi: I hope you will forgive me for saying this. The danger is that the moment you move away from matters of law, you are beginning to get this xenophobic discretion.

Chairman: Of course you are but it is a question of what is understood by it in the entirety of the European publications.

Lord Leach of Fairford: Might I just suggest that the fact that ‘bailable’ is put in inverted commas may carry much more weight than you would normally attach to it. That may be saying technically bailable. They may be trying to do that by putting it in inverted commas.

Q47 Lord Mance: Can I go back to a different point?

Let us accept what you have said obviously about your aims and wishes regarding Eurobail. I wonder, taking up Lord Borrie’s point, whether there is not a middle ground, which in fact I think the CPS may be supporting rather than your understanding of Eurobail. The CPS at paragraph 5.3 states: “There needs to be a closer liaison between the issuing and executing State on the conditions to be imposed. Both authorities should be involved early in the decision-making process, and the ESO should not be issued without such consultation.” Then in 5.4 they go on to make the valid points that you and your colleague have just made about the complete unenforceability or unworkability of the proposed scheme at a later stage. Let us just concentrate on the original making of the order. Can I direct you then to the actual draft, Article 6, paragraph 2? It does perhaps contain the seeds of something that might be an intermediate situation. If you look at it at page 13 it starts, “Subject to agreement between the issuing authority and the executing authority”. The difficulty is it does not actually go on to tell us how the agreement is reached. Then it talks, in Article 8, about transmission, as if you have a fully-fledged order. Then in Article 10 it talks about grounds for non-recognition and non-execution, but one would have thought that if discussion and agreement is contemplated at the early stage, things like non-recognition and non-execution would have been sorted out at that stage as well. It seems inconceivable that you could discuss the terms, then transmit the order, and then find the receiving state saying, “Sorry, we are not recognising this”. One does not want to put it too strongly, but I think that the

drafting is very inadequate from a practical point of view. I wonder whether there are not the seeds of something on which we might build, or someone might build, in the beginning of paragraph two, if one could work out a workable scheme for co-operation, such as Lord Borrie was, I think, suggesting.

Mr Jakobi: I was trying to work on this business of the circumstances of the crime as being the important contribution of the issuing state, that that is something they would know about and be able to transmit to the executing state. That was really I think all they could properly contribute. The rest of it starts building in a bias against the accused.

Q48 Lord Mance: They might know a bit about it, might they not? The arresting state probably does know a bit about the background to the person. The circumstances of arrest may give some indication as to whether he is someone who is likely to abscond and the circumstances of the offence alleged may give rise to some inference about likelihood of commission of further offences and so on.

Mr Jakobi: Yes, but I think we are talking about the offence itself in circumstances of arrest. Certainly one could get that built in to the documentation. It would be one document and only one necessity to get that document from one country to another. The practicality of toing and froing means that anything other than a simple effective scheme with very little documentary transmission and query will defeat the purposes of a remand scheme of any sort because if things are not finalised, the wretched defendant, no matter whether he should be bailed or not, will be sitting inside until they are.

Q49 Lord Mance: There might be a situation where, if one could develop the practice of use of liaison judges or informal communications between judicial authorities, a foreign judge could email or communicate with some judicial authority over here and say, “Look, are these conditions practicable and what is the correct reporting authority? Do the police welcome reporting restrictions that require you to turn up once every 24 hours?” The answer is “definitely not” and it is the sort of thing that an English judge would actually discuss in court with counsel and perhaps with the police and maybe a probation officer. I can see the input would be very valuable. I wonder whether you could not build it into the issuing authority’s decision in an informal way.

Mr Jakobi: What I find very difficult about this is that surely the accused has an absolute right to be present when these decisions are taken? Playing games with foreign authorities and getting their opinion in the accused’s absence that are going to make for bail or no bail is quite dangerous. One could see a practice building up where these decisions are taken in the

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absence of an accused, which is surely not right. I think that we can be generous and liberal looking at the circumstances of the crime but certainly this is going to be the trying court's chief contribution to the debate and it is very important that that should be heard and it means one document, which should carry due weight with the executing court, as we hope that executing court's considerations would carry due weight with the issuing court. That is their contribution. Their contribution is the circumstances of the offence and surrounding circumstances, which must be taken very seriously in all these considerations.

Q50 Lord Borrie: I am not sure why, Mr Jakobi, it should be regarded as so difficult for the court in the country of residence to give information at the request of the trial court to do with the background and knowledge that is held by authorities, probation type authorities in other countries and so on, which would be of use to the trial court in determining whether they should be bailed. Indeed, if I may make another point, picking up on what you have said, you said it would be a rather bad thing in principle for the trial court to rely on information which was given by the court of residence that would not have had the presence of the accused in front of them. I am talking about information which may well be of great benefit to the accused because the whole point of the ESO, and indeed the whole point of the Eurobail proposal, is to make it more likely that there will be bail on appropriate conditions and so on than custody, which surely must be a good thing from the accused's point of view. Of course in various countries modern communication, email and all the rest of it, surely can quite rapidly convey information from one to another. Courts in this country often have to wait for a medical report or a probation officer's report and so on and there is a delay built into that, but it is not a delay because one reporting body is in France or Greece or somewhere and the other is in Britain. There are often these things from different parts of one's own country.

Mr Jakobi: That is certainly true to an extent but, and the but is I think that in order to formulate an opinion, magistrates will frequently hear character witnesses. It is not all a matter of court formality in any country. I have been in French courts and Spanish courts and the same thing happens of course. If you get a letter from a character witness, you cannot question it, or if you do, there is enormous delay. Although it looks reasonable that the formalities will be observed, this is in effect a built-in, prejudicial factor. Secondly, unfortunately, in a perfect world I would completely agree with what was said about reports and things but when a foreign court asks for a probation report, local priorities tend to be on their own affairs, for obvious reasons.

Things are put to the back of the file. All I will tell you is that French courts that ask for appropriate information on previous convictions and things like this were complaining that there was several months' delay before they got the information. All these requests go up to ministries of justice, our Home Office, and down again and it does not work. I have always wanted to see a practical system for working bail. I feel, and other practitioners from different countries totally agree, we had not one dissenting voice from our family on this, that this would work. It obviously does not work for very short-term decisions and someone has to take a decision: if the trial is likely to come on within two months, do not let us bother with the system. I accept that that in itself is a practical limitation. Given that I am very aware that in countries like France and Spain, foreigners sometimes spend two years on remand waiting trial, lorry drivers and people of that ilk, it is quite common—not the average time of wait because they were waiting for foreign evidence and things—that there is quite a lot at stake for some people. I do not think I can take it any further than that.

Q51 Lord Bowness: At the risk of taking more of the Committee's time, could I go back to this business about enforcement? Is it really so weak as we suppose or is it, as Lord Mance has suggested, a question of drafting? I hesitate to make this point because it may not be a very good point but I will make it nevertheless. The criticisms of Article 17, consequences of breach, seem to be the same; people cannot be arrested for breach of the order. Do not Article 17 and 18 talk about arrest and transfer and arrest to make the transfer? It is not about enforcing the actual breaches of the order, which the framework decision seems to me to impose an obligation on Member States to enforce. "Enforce" must mean something. It cannot just mean that the court signs at the bottom of a piece of paper. Member States shall execute any European supervision order (Article 3). Surely, when a decision on enforcement comes before the relevant court, it talks about the court recognising and then executing it. It goes on later in Article 12: if it has been postponed for any reason, the competent authority shall take the necessary measures for the execution of the European supervision order. Surely with all these provisions which are possible under the Articles, once our own court (and I am assuming it is the United Kingdom in this example enforcing that) decides to do this and impose these conditions, does it not become an order of our own court? The provisions about arrest and taking the person back to the country, that is arrest and transfer. It does not seem to me that those provisions are actually prevention from enforcing the orders.

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Mr Jakobi: I just want to say, and I did point out earlier, that even if we had a fairly perfect enforcement mechanism, it would not apply to many under current conditions. I would agree with you it is possible to make better draftsmanship in the draft framework decision. I should also point out that it would be the obligation of 27 governments to translate whatever framework decision there is. I think most of the Committee here will have some idea of the trouble we ran into with the European Arrest Warrant. Any sloppiness anywhere is going to cause constitutional ructions, I would have thought.

Q52 Lord Bowness: It cannot be beyond the wit of the translators to make it clear that if our court executes an ESO, they have the power to enforce the conditions, which is actually quite different from the provisions about arrest and transfer back to those courts?

Mr Jakobi: I was trying to make the point that you need two things. You need a fair and equal playing field for bail, which is what we are trying to do for people, so that institutionalised problems go in allowing bail. You need an absolutely firm mechanism for getting people back. I always say that the alternative to bail is jail and if there is not a cast-iron mechanism for getting people back to the trying country with as little formality as possible, the whole scheme breaks down. I would accept that too. We are looking at part two, and it may be that that can be cured. I think that is the only positive benefit one gets from the ESO that it tries to provide a good mechanism for return, and that is a good. The great majority of bail decisions are going to be adverse ones for the reasons I suggested. Therefore, it is I think of little use. The other problem is the sort of Gresham's Law of law, that a bad piece of legislation that does not cure the problem will delay a good piece by 10 years in Europe. Everybody will say, "We have dealt with that". I think, given the enormous likely delay in getting anything through, we have time to have second thoughts and to do a better job. If it was already a done deal, which it is not or likely to be in the near future, I would agree we are talking theory here, but we are not; we are talking about the practical ability to have a decent practical system and there are problems with Eurobail. I will not pretend that we have looked at the administration or anything like this that could be ironed out in the meantime. There is this horrible question of age of criminal responsibility, which we have not turned to, my Lord Chairman.

Q53 Chairman: No, and that is indeed, as you rightly point out, one of the questions we should discuss. There is a huge age range for criminal responsibility, as someone pointed out, of seven in Ireland, 16 in Portugal and there are differences in the UK with

eight in Scotland and 10 in England and Wales. That is a discretionary bar, as I understand it, unlike under the European Arrest Warrant. It is a discretionary ground on which you can decline to recognise and execute an ESO under this proposal. Is that not right?

Mr Jakobi: I think not. I attended as an expert the inquiry on post-conviction alternatives to custody and probation. It was the view of the Commission, and this is when it came up, that because the European Arrest Warrant had given this bar as an absolute bar that all other measures produced across the spectrum, the European legal space, of similar nature would have the same force.

Q54 Chairman: I am looking at Article 10 of the proposal. Article 10 (1) is mandatory if it is a *ne bis in idem* case, a double jeopardy case, and then you have got to refuse. Under 10(2), you may refuse to recognise and execute the European supervision order on one or more of the following grounds of which the first is: "If, under the law of the requested State, the suspect may not, owing to his age, be held criminally responsible for the acts on which the ESO is based."

Mr Jakobi: I think that is a pious hope. There is no country that is going to send back somebody who is under their own age of criminal responsibility. It is not in any way practical.

Q55 Chairman: If you do not do that, then you are simply condemning this youth, who is under age under your law, to custody on remand and he will be tried in the trial state.

Mr Jakobi: I totally accept that and I pointed this out.

Q56 Chairman: You have a discretion so that you can in fact at least ensure that he has pre-trial bail.

Mr Jakobi: Under the European Arrest Warrant, the reason why it was made a mandatory exception was because no country would do it. If we were the 16-year-olds, which we are not, we are at the bottom end of the spectrum, you cannot see Parliament allowing under-age children to be shipped back to a foreign country. We would never allow such a law to pass. That really was the problem with the European Arrest Warrant. It is a pious hope by the framers. I think the only solution is to have some sort of approximation of age of criminal responsibility, however hard that may be to attain.

Q57 Chairman: I am sorry to go back to it, but it is so important at the end of the day to have clearly in mind what other options there are that I want to pursue this Eurobail. If in fact, you are right, the question then is simply: is this aailable offence under the law of the issuing trial state? The other point Lord Mance made, and it struck me as having great force, is this. Why, under ECHR, is not every offence theoretically

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bailable? There is no basis on which you can say: we do not bail people for murder, or we do not bail people for rape or anything else. You simply cannot have such a law because of the Strasbourg jurisprudence which says you can only have pre-trial custody on specific grounds, such as if there is a real risk of flight, real risk of interference with witnesses, real risk of committing other offences. I do not understand, without making a specific judgment as to whether one of those risks is a real one, how you can ever deny that an offence was bailable, in which case, on that approach, you would have to send back every accused foreigner for the question as to whether he should be released on bail pre-trial to be determined by his home state.

Mr Jakobi: It is a nice theoretical point because honestly if every country obeyed the European Convention on Human Rights and decisions made by the European Court on Human Rights, we would not need any of this mechanism at all. Unfortunately, it does not happen in practice. The difference between what happens at ground level and on what the European Court on Human Rights very sensibly often makes its decisions is appalling. We have had 25 years of a fundamental European decision on the provision of interpretation and translation services for the accused. About two countries obey that, this being one, after 25 years. You have all these problems and in effect, if we start playing with different national views on what is bailable, we are entering another problem. I thought it was best to put it this way.

Q58 Chairman: In the conclusion of the Commissions explanatory memorandum, at paragraph 6.3 on page 29 of their document, in the final paragraph it states: "Policy option 'Eurobail' (Option 5) would to a certain extent address the problems in the current situation. It has already met a strong opposition from the Member States, who argued that in this model, the trial State would lose control over the pre-trial process and the executing state would be in charge of proceedings when the crime was not committed in its territory." Do you accept that it has met strong opposition from Member States, and, if so, how do you explain that?

Mr Jakobi: I explain it that it is an attack of sovereignty overriding mutual recognition because it is not a really realistic argument if you do have mutual recognition and you have confidence in another state's ability to comply with its obligations. It has met strong opposition. Given the current constitution, it would only take one opponent and we would make no progress, which is, I would suggest, why we have this most peculiar impact report that does not seem to treat Eurobail fairly, and we are mixing up political expedencies, as I pointed out. This is not, under current circumstances, a politically expedient solution; it is a merit solution. If circumstances changed, and we are going to need that

to get any progress at all under any of these provisions, I think it would be easier because it would take more states and there would be more influence by parliaments that are concerned about freedom on the process, but at the moment no progress is made on any front because of the current constitution.

Q59 Chairman: Even in the 1999 report of the Select Committee on prosecuting fraud on the Community's finances, the *Corpus Juris*, one of the views expressed by the Committee at that stage was that 'a preferable solution to Eurobail might be a European Union regime for the mutual recognition and enforcement of conditions of bail, which in our view might be simpler to operate and more attractive to Member States'. So eight years ago now this Committee, having taken evidence, seems to have formed the view that there were problems even then with Eurobail and that the scheme, which is now represented by the Commission proposal might be preferable, might be simpler to operate and more attractive to Member States. You would take issue with that and you do.

Mr Jakobi: I would only take issue because the alternatives were not suitably investigated by anybody at that stage. Nobody had even looked at the problem, and in trying to approximate conditions of bail a great deal of work was done by the Commission and it was found unworkable. It is a great theoretical idea. It would be wonderful but of course they went through it country by country and then found out that, apart from some fairly obvious conditions common to most, one of them being reporting to the police (that, it seemed, almost everybody did but a couple of countries did not do that for example), it varied tremendously how these things were arranged. It is probably easier to try and get a system that works from one country to another than trying to approximate criminal procedure and justice. That is very difficult. It has been done for terrorism, I believe, and money laundering but almost nothing else in Europe. It is quite a problem.

Q60 Chairman: I begin to think that ultimately there is a stark decision between two dramatically different alternatives. If it is Eurobail, then effectively in every case, the home state as opposed to the trial state is going to be taking the decision yea or nay should there be bail, and, if there is not to be, pre-trial custody will be served in the home state not the trial state. That is the one possibility. The other is what is before us, which is the Commission proposal, which simply, you say, will not have any or sufficient practical effect; it will not solve the problem, but will in fact at least provide a possibility for a trial state to say, "I will let this foreigner have bail when otherwise I would not because at least I know that his home state where he will be on bail will be policing his conditional release,

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policing the conditions of bail, which I wish to set.” Those are the stark alternatives.

Mr Jakobi: I would like to re-emphasise just the one thing, that what I have called the marooned, people who have been granted bail confined to the country of trial—

Q61 Chairman: Subject to travel restrictions, therefore?

Mr Jakobi: Yes, they are stuck in that country.

Q62 Chairman: They have had to give up their passport to the foreign trial state.

Mr Jakobi: Yes. There was one dramatic result a couple of years ago when a lorry driver was reduced to doing work on a chicken farm in return for board and lodging in order to survive on bail because there is no interchangeable social security services and matters of the sort attached to the European legal space at the moment. They are very rare. They are the people who will benefit by the proposals we have here. I think I omitted that from my report. They are very rare. Most people will not be affected by this.

Q63 Chairman: Are they the 5 per cent?

Mr Jakobi: Yes.

Ms Sayers: May I add this point following on from that? There is a need perhaps to understand that different criminal justice systems operate in a different way from our own. For example, in France, it is not the trial itself but the investigation period which is the essential period in the criminal justice system. It is accepted by many commentators that custody is used as a tool of the investigative period so that it may not just be the fact that somebody is foreign as the reason that they do not get bail; it may be because the examining magistrate decides that that is the most effective way of applying pressure to the accused. Although the actual power to remand the accused in custody was taken away from the examining magistrate in France about five years ago, the research which is available has suggested that that has not resulted in any decrease in the levels of pre-trial detention in France.

Q64 Chairman: That is of natives as well as foreigners?

Ms Sayers: Yes. What is effectively happening is, rather than threatening a suspect with a remand in custody, they threaten them with a referral to the custody judge. There are deeper problems about bail across Europe rather than just this issue of discrimination. Unless those problems are tackled, if you leave the decision to the issuing state, that does not tackle the problem perhaps of the other reasons attached to the failure to grant bail as an issue.

Q65 Lord Mance: The difficulty with that is that that is not a matter which goes to discrimination against foreigners. That is a matter which equally affects French nationals, though one knows in fact that the French have just had a terrific scandal, have they not, where in a sexual matter people were kept in prison I think for four years on detention and ultimately every single accused was acquitted either at first instance or on appeal and the Minister of Justice, in so far as he is able, is investigating the custody judge. It was a young man, I think.

Mr Jakobi: There were two separate such scandals, one at the Pas de Calais and the other in Paris.

Q66 Lord Mance: The point I am making is that we cannot expect this measure to resolve all domestic problems around Europe. That is the difficulty.

Ms Sayers: Another reason may be that the executors said they took the state of residence but because it is more impartial, it is not going to use the issue of bail as a tool of the investigation. It may be a reason to justify sending the person back to their state of residence.

Lord Mance: It would certainly be nice obviously for foreigners. They would escape the rigours of some national systems, but one must have some sympathy for the local nationals. We cannot do anything about them. I am not sure this is the tool.

Chairman: Unless any Member of the Committee has any further questions, we will bring this to a close. There are one or two other questions which we previously outlined to you which we think could conveniently be dealt with briefly in writing. Could you let us have a brief response in writing? That would be enormously helpful. I repeat the thanks that I know the Committee feels and our gratitude to you for helping us with this inquiry and getting us off to such a stimulating and informative start. We have clearly quite a long way to go. You have set an interesting scene for us. Thank you very much indeed.

Supplementary letter from Stephen Jakobi OBE

The opportunity given to witnesses before your committee to check the evidence given in session is also an opportunity to reflect on the nature and quality of the evidence.

The mantra of Fair Trials Abroad that I have always sought to follow was articulated in a decision of the European Court of human rights.

*The European Convention on human rights is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective*²¹

I am concerned that whilst the principal behind Eurobail, that of equal treatment of citizens before courts within the European space, must be preserved practicality and effectiveness decree, as a number of members of the committee observed, that a compromise should be reached if possible.

It seems to me that there are two possible grounds for refusal by the issuing state to grant provisional liberty that should be explored.

SERIOUSNESS OF THE OFFENCE

You pointed out to me that in the UK all offences areailable, including murder. However, bail is rarely granted in cases of murder, as opposed to lesser charges of homicide. This also applies to other cases of violence against the person particularly sexual-offences involving children and major drug charges involving principals. There must be a number of “common ground” offences, which could be excluded from the workings of Europe bail. This would reconcile public opinion in member states to what on the face of it is a radical measure.

SPEEDY TRIAL

I have already given evidence to the effect that if a trial is to take place in the near future it is impractical to apply Europe bail principles.

Of course the test “the near future.” is in any event the opinion of the tribunal concerned taken judicially. But what can be done is to choose a relatively lengthy time limit. Initially, say, three months. This would reduce the numbers involved, but provide a cure for the worst cases: citizens who would be on remand for many months, if not years, otherwise.

This lengthy time limit could be treated as a confidence building measure, and provision be made for lowering the time limit progressively in due course.

Further research and consultation would be required on behalf of the Commission to work out the effect in practice, of either or both of these suggestions. As has already been pointed out, there will be plenty of time to explore these avenues.

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Supplementary memorandum by Stephen Jakobi OBE and Debbie Sayers

Can you see any difficulties in the mechanisms and deadlines for the ESO proposed by the Commission?

TIME LIMITS AFTER THE ISSUE OF THE ESO BUT BEFORE RELEASE (ARTICLES 5–12)

The deadlines before release are vague and may allow the accused to stay in pre-trial detention unnecessarily and after it has been agreed in principle that an ESO should be issued. For example:

1. Article 6 FD-ESO allows the issuing authority to grant an ESO subject to mandatory and discretionary conditions. It may impose conditions such as residence at a bail hostel or medical treatment but it will need the agreement of the executing authority to do so. These arrangements may take some time to achieve and it is unclear how long the overall process may take. No deadline is set and, for the accused’s protection, it is important that proceedings should not be allowed to drift.

²¹ Artico judgment 1980.

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2. The ESO is then transmitted but the only enumerated deadline is set in Article 12 which gives the executing state five days to decide in recognition and acceptance (although they can provide reasons why they cannot comply within that time). There is no provision setting out the overall time limit before release or remand in custody occurs. Further, there is no provision dealing with the transfer of the accused back to his/her country of residence and providing a deadline for it.²² Presumably there will be some assistance provided to the accused on transfer to prevent problems with compliance with the ESO eg reaching a bail hostel in another country before a certain time etc. If so, relevant state responsibilities should be clearly articulated.

THE COERCIVE MECHANISM ARTICLES 16–18

There are problems with the coercive mechanism which generally arise from the issuing state's control of the process. This is significant because ineffective mechanisms may hinder the development of mutual trust and undermine the purpose of the proposal. Problems include:

1. The breach process set out in Articles 16–18 leaves national police enforcing orders from other jurisdictions which may contain conditions that would not be imposed in their own country.²³ There may be a lack of clarity, will or commitment to such arrangements.
2. There is a cumbersome coercive mechanism. An Article 16 breach will be reported without delay to the issuing state but the decision to arrest appears to remain with the issuing state. Certainty in criminal law is a human rights requirement so it might be unsafe to imply a coercive power to arrest and detain from other parts of the proposal or from other words. The result could be a two-tier system for suspects with residents on an ESO potentially being dealt with in a different way to domestic suspects. Further, although the issuing state has to consider all the circumstances of the situation, including the suspect's representations, before deciding on arrest and transfer, what prevents the state making such a decision in the accused's absence? Indeed, how else is his/her arrest secured? If there is no opportunity to challenge the decision before transfer, this may present problems in terms of compliance with Article 5(4) of the ECHR.²⁴ Overall, the process is unnecessarily complicated and a breach of bail is more easily dealt with by the executing state in accordance with its own domestic law.
3. If the suspect is present for a breach hearing, there is a need for legal advisers and interpreters to be present as Article 6 ECHR rights would apply to any decision involving detention.²⁵ If this hearing takes place by video link, who will represent the defendant—a lawyer from the issuing state or the executing state or both? This could result in confusion about the law and practice applied.
4. The principle of proportionality requires that coercive measures such as pre-trial detention should only be used when this is absolutely necessary.²⁶ Under the FD-ESO, the issuing state retains authority for the decision to arrest and transfer and this could clearly lead to the accused's pre-trial detention. The decision to transfer might be the issuing state's but it still invokes the legal obligations of the executing state. We have noted the very limited grounds for refusing the issuing state's request to transfer under Article 18. In view of this, it might be wise to add a provision on compatibility with Convention rights under Article 18 (perhaps replicating Section 21 of the Extradition Act 2003).²⁷
5. Another practical problem arises if the grounds for the breach relate to the commission of another offence. What happens if the accused is arrested for committing a more serious offence in the executing state? The issuing state still retains the power to order the transfer and the grounds for refusal are very limited.²⁴ How does any order transfer order fit with Article 5(1) (c) ECHR if the suspect is already in detention in the executing state? Whose prosecution takes priority?

²² In contrast, a deadline for transfer after breach is set out in Article 20.

²³ For example, Article 138 French Code of Criminal Procedure allows the imposition of a bail condition which prohibits the suspect from engaging in his/her professional activities.

²⁴ This provides that when a person is deprived of liberty by arrest or detention, he is entitled to take proceedings by which the lawfulness of his detention shall be challenged by a court. Although Article 18 FD-ESO provides an opportunity for the accused "to be heard", it contains very limited grounds for refusal by the executing state.

²⁵ *Benham v UK* (1996) 22 EHRR 293.

²⁶ *Clooth v Belgium* (1991) 14 EHRR 717.

²⁷ Under this section, the judge is required to decide whether the person's extradition would be compatible with the convention rights within the meaning of the Human Rights Act 1998.

²⁴ In brief, the exceptions are *ne bis in idem*, the offence is statute barred and falls within the jurisdiction of the executing Member State, the suspect is being prosecuted in the executing Member State on the same facts and the transfer decision concerns new facts which are not covered by ESO.

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6. Article 18 sets out the grounds for the refusal to transfer a suspect. It includes the ground that if the transfer decision concerns new facts which are not covered by ESO then it can be refused. Does this refer to a new offence? This should be made clearer.

OTHER POTENTIAL PROBLEMS

1. The mechanisms for transfer and responsibility for costs need to be clearly set out.
2. The need for a coercive power creates two parallel systems of surrender operating in criminal proceedings in the EU—the FD-ESO and the FD-EAW. This could be avoided if the resident’s court deals with bail in accordance with its domestic law.
3. A link between the ESO and EAW has not been articulated. For example, there is no provision for applying for an ESO in response to an EAW.

INTERACTION OF THE ESO WITH OTHER EU CRIMINAL JUSTICE MEASURES

The Law Society is concerned that the relationship between the ESO and Member States’ obligations under the European Arrest Warrant, extradition arrangements with third countries and the Statute of the International Criminal Court is not sufficiently clear. Do you agree that there are problems here? How might they be resolved?

1. The FD-ESO states in Article 15 that its operation shall be without prejudice to the EAW, another request for extradition or a warrant from the ICC. It also confirms that it shall not prevent the executing authority from taking its own proceedings.
2. There is a lack of clarity here. Article 16 of the Framework Decision on the European Arrest Warrant confirms that:
 - (i) In the event of multiple requests, a decision on execution is made by executing state’s judicial authorities taking in to account circumstances such as the seriousness of the offence, date of offence etc and can seek advice of Eurojust.
 - (ii) Similarly if there is a conflict between an EAW and extradition, the same procedure is followed.
 - (iii) The EAW functions only “without prejudice” to a warrant from the ICC. It is left to domestic implementation and the UK International Criminal Court Act 2001 provides the Home Secretary with the power to decide on extradition requests which compete with ICC’s in Schedule 2 Part 2. This scheme should be followed for consistency and legal certainty.
3. The FD-ESO could also provide that the return of the person could be postponed because of proceedings in the executing Member State with regard to a “new” offence. This would be in line with Article 24 of the FD-EAW which allows postponed or conditional surrender, eg where a defendant is to be prosecuted or has complete a prison sentence in executing state.

The Crown Prosecution Service has suggested that the ESO proposal should be closely linked with the proposal on exchange of information in criminal proceedings. Do you agree? If so, what sorts of links are required?

In principle we would certainly agree as this might enable the issuing court to input the circumstances of the offence to the executing court and assist a fully informed decision on bail. A European wide system for checking bail conditions may be required subject to appropriate provisions on use and scope of data protection and retention. We are not really competent to devise or comment on the administrative process that might be adopted.

In the absence of agreement on the way forward for the proposed Framework Decision on Procedural Rights, do you consider that there are sufficient safeguards in place to protect EU citizens affected by EU criminal justice measures such as the ESO?

I stand by the evidence given to your Lordships’ House, with regard to the proposed framework decision on procedural rights. The framework decision on procedural rights is the keystone of various measures to ensure that citizens are treated equally throughout the EU in accordance with the spirit of the European legal space of which this is just one.

If one were to consider a “stand-alone” ESO, one must consider the stated aim of the FD-ESO which is to reduce unnecessary pre-trial detention by enhancing the right to liberty and the presumption of innocence.

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Thus, to be effective, the operative part of the proposal should include the following:

1. Confirmation of the accused's right to apply for (but not necessarily obtain) an ESO
2. An obligation on the issuing state to provide effective information in relation to the ESO. One cannot exercise a right without knowledge of it
3. A provision underlining the importance of the right to liberty and the presumption of innocence to all decisions on bail²⁸
4. A provision re-iterating existing Article 6 ECHR obligations (particularly in relation to legal representation and interpretation)²⁹

The fourth proposal, to be effective, requires a re-enactment of the framework decision on procedural rights!

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²⁸ For example, a provision emphasising the principles arising from the jurisprudence of the ECtHR such as the need to avoid stereotypical reasoning, the use of the least restrictive regime and the right to a fair trial—eg see *Caballero v UK* (2000) 30 EHRR 643.

²⁹ Article 11 “Rights of a requested person” in the FD-EAW sets out the suspect’s rights to legal advice and to an interpreter.

WEDNESDAY 18 APRIL 2007

Present	Bowness, L Brown of Eaton-under-Heywood, L (Chairman) Burnett, L Clinton-Davis, L	Kingsmill, B Leach of Fairford, L Mance, L Norton of Louth, L
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Memorandum by the Crown Prosecution Service

1. INTRODUCTION

1.1 The Crown Prosecution Service (CPS) has been requested by the Sub-Committee of the House of Lords' Select Committee on the European Union to submit views on:

- the need for EU action on pre-trial supervision measures;
- the major legal and practical implications of the Commission's proposal;
- the adequacy of the system proposed, and in particular whether one of the other options considered by the Commission would be preferable; and
- what amendments might be made to the proposal to improve the procedure;

in regard to the European Commission's Proposed Framework Decision on the European Supervision Order in pre-trial procedures between Member States.

1.2 Fundamentally, this is about the extent to which decisions regarding bail (including conditional bail) are "transportable" between EU Member States.

2. THE NEED FOR EU ACTION ON PRE-TRIAL SUPERVISION ORDERS

2.1 The CPS agrees that there is a need for such a Framework document as presently there are no international instruments that specifically allow the transfer of pre-trial supervision measures from one Member State to another. The European Commission has proposed a draft Council Framework Decision on the European Supervision Order in Pre-Trial Procedures between Member States of the European Union. This provides a mechanism for a court in one Member State to impose bail conditions on a defendant, which can then be monitored and enforced in another Member State, where the defendant is resident.

2.2 The proposal is a further step towards the implementation of the principle of mutual recognition in criminal matters, in the common area of freedom, security and justice. It supports the principle of fairness and equal treatment of suspects, with regard to both resident and non-resident EU citizens in the pre-trial process.

2.3 In principle, the proposed action seems to be a feasible and viable option. However, there are general concerns about the detail in the Framework Decision namely:

- costs;
- complexity of the proposed process; and
- the different bail rules within the European Union (EU), in particular some Member States having a more serious threshold for remand in custody.

3. THE MAJOR LEGAL AND PRACTICAL IMPLICATIONS OF THE COMMISSION'S PROPOSAL

3.1 The proposal that the issuing State (the State where the person is facing prosecution) can make bail decisions without reference to the executing State (the State to which the defendant is being released on conditional bail), is of great concern to us. It means that the issuing court would not be making a fully informed decision, nor would it be taking local concerns or resource issues in the executing State into consideration. This would have both potential legal and practical implications in terms of fairness and proportionality.

3.2 The involvement of the executing State in the decision-making process should not impinge upon the judicial authority of other Member States.

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3.3 The proposed mechanism for dealing with breaches of bail conditions does not allow the executing State to make an immediate arrest. Instead, it has to wait for the issuing State to authorise such an action. This will promote an inequality of treatment between domestic and non-domestic defendants on bail and may undermine the very intention of the Framework Decision.

3.4 The process for the physical return of the defendant following a failure to appear and where the burden lies in terms of costs is unclear.

4. THE ADEQUACY OF THE SYSTEM PROPOSED, AND IN PARTICULAR WHETHER ONE OF THE OTHER OPTIONS CONSIDERED BY THE COMMISSION WOULD BE PREFERABLE

4.1 There are five suggested options:

- do nothing;
- new legislative instrument for mutual recognition of pre-trial supervision measures;
- new legislative instrument for mutual recognition of pre-trial supervision measures and extension of the European Arrest Warrant;
- co-operation Programme; and
- Eurobail.

While this draft Framework Decision of the European Union is the preferred policy option by the European Commission, the CPS prefers the Eurobail option.

4.2 The Eurobail model includes the executing State much more in the decision-making process. It also reduces the chances that the relevant information in the bail decision-making process would not be available—not just antecedents, but details on local conditions which may affect a successful supervised period of bail. It also ensures that the concerns of the executing State in relation to public protection would be taken into account.

4.3 The proposed option would be more acceptable if some of the elements of Eurobail approach, in particular the role of the executing State, were included.

5. WHAT AMENDMENTS MIGHT BE MADE TO THE PROPOSAL TO IMPROVE THE PROCEDURE?

5.1 The identity, nationality and residence of the person concerned should be established before a European Supervision Order (ESO) is issued.

5.2 The issuing State should have before it not only the details of the alleged offence but also the background of the defendant and the local circumstances. This may affect the conditions imposed, in addition to balancing the need to protect the public; to support the presumption of innocence; and to maintain the principle of proportionality. The current proposal seems to allow the issuing State to make an ESO without any reference to the executing State.

5.3 There needs to be a closer liaison between the issuing and executing State on the conditions to be imposed. Both authorities should be involved early in the decision-making process, and an ESO should not be issued without such consultation.

5.4 The current proposal for both the revocation of the ESO (Article 17), and the arrest and transfer (Article 18) should be simplified to ensure that the enforcing State has the necessary powers to take action in the event of a breach of conditions. As currently drafted, a person exercising judicial functions needs to undertake this duty. However, under UK procedure, these issues are dealt with by the police and prosecution.

5.5 This Framework Decision should be closely linked with proposals concerning the exchanges of information in criminal proceedings, which would reinforce close cooperation between issuing and executing States.

6. CONCLUSION

6.1 Whilst the CPS agrees in principle with the idea of the Framework Decision, we have concerns about the current detail and the practicalities. There are considerable legal, practical and resource implications which would impact on the criminal justice system and careful negotiation would have to be undertaken to ensure that this proposal will work in practice.

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Examination of Witnesses

Witnesses: MRS AMANDA BOWRING, MR BRIAN GIBBINS, Crown Prosecution Service, and MR PETER HALL, Association of Chief Police Officers, examined.

Q67 Chairman: Good afternoon and welcome. This hearing is in public. You will receive a copy of the transcript and have an opportunity to correct it later but meantime it goes on the Web in its existing form. I know you have had notice of the area of questioning in which we shall hope to take your evidence and gather the help you can give us on the inquiry which we have started. We have had one evidence session already into the proposed new European supervision order. We have of course had your helpful written contribution where I think in the roundest terms you acknowledge the need for something to be done with a view to increasing the prospects of bail for those who are to stand trial in another Member State but you voice obvious concerns with the proposal as it presently stands. What is your own experience of the problems of getting bail in this country, of course for non-UK residents, and do you recognise the need for some measure to try and improve the situation? I shall direct my questions centrally to you, Mrs Bowring, but feel free to call on your colleagues to answer or supplement your answers.

Mrs Bowring: When we had notice of this session, we did email our 42 CPS areas. We put a finger in the wind, so to speak, as to how this issue is being dealt with. I think firstly that in some areas it is an issue; in other areas it is not. CPS Wiltshire, for example, said it is not a problem; perhaps unsurprisingly, CPS Kent said that this is an issue that frequently occurs. There seems to be a stark choice for prosecutors that when a non-UK resident appears in court, they are faced with either having to request a remand in custody to cover the lack of community ties or request bail with conditions that ensure the person stays within the country because clearly conditions that go beyond this jurisdiction are unenforceable. Lodging of a surety is the most common condition but of course that is not foolproof. We had an example of a Turkish lorry driver who was resident in Germany who was charged with human trafficking offences in Suffolk. The condition of his bail was a £20,000 security to be paid by members of his family living in the UK, which they duly did, and he has now absconded to somewhere in Germany and is subject to a European arrest warrant. There have been some innovative solutions to this. Some courts have a fast-track situation whereby such cases are brought on earlier than other cases, domestic cases, and also the use of imaginative conditions. For example, in Cambridge, taking the lorry driver example, they ask the employer to lodge a bond with the court. As to a need, I think we agree in principle that there is clearly a need for a practical solution to this problem. We are not talking about huge numbers here. The Home

Office has supplies some figures. There are 572 EU nationals in UK prisons at the moment.

Q68 Chairman: Are there 572 EU nationals in UK prisons awaiting trial?

Mrs Bowring: I am not clear about that. I think it is awaiting trial but I can clarify that and write to you.

Lord Mance: One would have thought that must be.

Q69 Chairman: Absolutely; there must be many more than that already standing convicted.

Mrs Bowring: The figure becomes slightly muddier when you look aboard. The number of UK nationals who are remanded in custody but are awaiting sentence is 840; they are not awaiting trial but awaiting sentence. Those are the figures we have. We are not talking about huge numbers here but clearly there is a need. It does throw up problems. This is just really about the correct instrument that the CPS is looking for in order to ensure that there can be some pre-trial supervision.

Q70 Chairman: Are you ever consulted in order to assist with regard to UK nationals who are subject to trial, remanded in custody awaiting trial in some other Member State?

Mrs Bowring: No, I believe we are not.

Q71 Chairman: Clearly one of the important questions that arises, and this arose very prominently when we took evidence a month ago from Stephen Jakobi, of whom I suspect you will have heard, was: what is involved in what might be said to be the main rival proposed scheme, Eurobail, which is obviously one of the other policy options open to the Commission. I do not know whether you have the Commission Impact Assessment, paragraph 5.2.5. That describes the scheme under Eurobail as involving the trial court making a preliminary assessment whether the offence is "bailable". Certainly Mr Jakobi understands that, and I want to know if you share his understanding, as meaning simply whether as a matter of law the offence charged abroad is amenable in any circumstances to bail.

Mrs Bowring: That is our understanding. It is purely looking to see whether it is capable of bail. For example, in the UK, all offences attract bail. I know there are the limited exceptions under section 25 of the Criminal Justice and Public Order Act which says that if you have a previous conviction for murder, attempted murder, rape—

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Mrs Amanda Bowring, Mr Brian Gibbins and Mr Peter Hall

Q72 Chairman: And if you are charged with that same category of offences again, then it is not bailable but everything else is?

Mrs Bowring: The court has to be satisfied that there are exceptional circumstances to release you on bail, even though the offences are technically bailable, we would say, under Eurobail.

Q73 Chairman: If that scheme applies and we have a foreign national awaiting trial here, say for murder and he has not committed murder before, as far as we know, under this scheme we immediately have to send him back to his national country. Is that right?

Mrs Bowring: That is our understanding, yes.

Q74 Chairman: It is for them either to keep him in custody awaiting trial or to bail him, is that right, and eventually to return him when we would be ready to try him?

Mrs Bowring: That is correct. That is our understanding of Eurobail.

Q75 Chairman: Is that a scheme in which you see merit?

Mrs Bowring: That is our preferred option because it is very simple if you compare it to the ESO. It is very clear that the issuing state makes that preliminary assessment. They send him/her back to his/her state of residence and then it is just a matter of that state applying its legislation, its bail proceedings, for the normal appeal procedures to take place. There are no parallel jurisdiction problems; there are no problems about information sharing and risk assessment. Then when the time for trial comes, that person is then sent back, which the executing state pays for, and they can stand trial in this country or vice versa. It seems to be very straightforward.

Q76 Chairman: It means that all those remanded in custody would be remanded in custody at least in their own country. If in fact they are bailed and are made subject to travel restrictions, that in the same way would be in their own home state. They would have to surrender their passport in this country with a view eventually to them being returned to France, Germany, wherever, to stand trial. Is that right?

Mrs Bowring: That is correct and they could continue working.

Q77 Chairman: What do you understand to be the central objection to that in the Commission's assessment, or indeed in your understanding of any other state's view of this? Do you understand what is regarded as the reason not to adopt that proposal, to favour the ESO instead?

Mr Gibbins: My Lord Chairman, I am not sure that we do understand the difficulty with Eurobail because it seems to us that it has very clear

advantages because it separates the proceedings in the issuing and the executing Member States. It does not, in our view, risk the confusion and duplication that we think is inherent in the European supervision order. It is for that reason that we have expressed a preference for Eurobail. I am not sure that we can assist on why the Commission went down the road that it did.

Q78 Lord Mance: It is probably right, is it not, that the objection is political? Although all European countries within the European Community and Union are expected to operate on a basis of mutual trust, this is a proposal which requires unanimity and in reality, perhaps this may not therefore be a matter on which you can comment very much, some countries are likely to object to a situation which will put bail in the hands of other legal systems, which they do not know about and may not have complete confidence in.

Mr Gibbins: I think the position is that we have not been party to the negotiations and we would not be in a position to comment on that.

Q79 Lord Mance: The other aspect, I suppose a practical one, is that there must be some impact on the prison population. Whether it is an adverse impact or a beneficial impact, it is a little difficult to know without more statistics. We would have a whole lot of EU nationals in this country who would not be in custody here; on the other hand, we would acquire some British nationals from other countries who would be put into custody. I do not suppose you could say one way or the other which way the impact would be?

Mr Gibbins: I think there is a general sense, and we cannot put anything more scientific than that, amongst practitioners that we have discussed this with that the UK would be more likely to be on the receiving end of European supervision orders than it would be issuing them. I say that for these reasons. As it is currently drafted, there is no precedence over European arrest warrants, extradition requests, ICC (International Criminal Court) surrender requests or domestic proceedings. What that would mean is that if I was a prosecutor in an English court and I was opposing bail and the court was considering whether to issue a European supervision order in respect of a foreign resident, I would I think be within my rights to alert it to the fact that if it did grant a European supervision order and let him go back to his country of residence, there would be the possibility that the European supervision order, in its current draft, could be trumped by any one of those four types of proceedings that are mentioned as having precedence. That would clearly be something that I think the court would want to take into account, particularly if it looked at a defendant's antecedents

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and saw that he had a significant criminal record so that it would not be beyond the bounds of possibility that some other country might have a European arrest warrant waiting in the wings for him. For that reason, we suspect that our courts might be reluctant. However, the other way round there is an important distinction and that is this. It would be available for countries that, for example, used the investigating magistrates' system where the offence was only at the investigative stage. One can imagine the situation where a British national is being investigated by an investigating magistrate in a European state for an offence; it might not be a particularly serious offence and the inquiries might not be at a particularly advanced stage. The investigating magistrate may, at some stage, wish to talk to him again, and indeed may at some stage want to charge him, or whatever the equivalent would be. The European supervision order would be a very attractive proposition in those circumstances because it would involve supposedly little cost by way of detention, which would be the alternative in that country's courts. Send him back to the UK and you would, as it were, have put your marker down on him if you needed him in the future. That analysis leads us to believe that there is at least the potential for us to be on the receiving end of significantly more than we would send out.

Q80 Chairman: The receiving end of the supervision orders?

Mr Gibbins: Yes, in our capacity as executing Member State.

Q81 Chairman: These people would not be in custody therefore by definition; they would be at liberty?

Mr Gibbins: Our understanding is that in European states it is possible to remand somebody in custody at the investigative stage.

Q82 Chairman: Under the ESO, as I understand it, the scheme only works if the trial state is prepared to release the foreign accused back to his home state on bail?

Mr Gibbins: Yes, my Lord.

Q83 Chairman: I am saying that if we receive more of these orders, we are receiving the people back but we are receiving them back on bail. What we have to do then is to supervise the terms upon which the trial state has made him subject to conditions of bail. Is that not right?

Mr Gibbins: We suspect that actually the process of doing that is rather more complex than may appear on the face of it. One of our big concerns is that effectively this will lead to the development of a jurisdiction very similar to that in extradition cases, but in fact it will be more complicated because you

will have functions carried out by both the issuing authority and the executing authority and we can see the possibility of effectively twin-track, if you like, appeal processes in both the issuing and the executing Member State. It is that I think that leads us to favour the Eurobail option, which draws a very clear distinction between the functions in the issuing Member State, which are effectively those of the trial court, and the functions in the executing Member State, which are those of monitoring and, if necessary, enforcing bail conditions.

Q84 Chairman: I do see the attraction of the Eurobail scheme and the simplicity of its operation and effectively, not least because of ECHR constraints on pre-trial custody, almost every offence will have to be regarded as bailable and therefore almost every foreign accused will have to return to his home state for the home state to decide whether he should be remanded in custody to await his trial abroad or whether he should be released on bail to await his trial abroad. That I can entirely see but when it comes to the ESO, the central decision is taken by the trial state on the face of it. There is no express provision at that stage for any liaison with the home state at all. Is that not right?

Mr Gibbins: Respectfully, I do not think we agree with that.

Q85 Chairman: When you say you do not agree with it, you mean you would not like that to be so but that is at the moment how the proposal stands, is it not? There is not any express provision to get in touch with the home state before the trial state decides yes or no whether to make one of these orders.

Mr Gibbins: If one looks at the relevant Articles, it may be that it is not as clear-cut as that, would that it were.

Q86 Lord Mance: You are referring to Article 6, paragraph 2, and the opening phrase which seems, on the face of it, to read in the air 'may or may not relate to Article 12'?

Mr Gibbins: My Lord, yes.

Q87 Chairman: 6.2: subject to agreement between the issuing authority and the executing authority, they can impose a variety of these obligations. It might be said to be implicit in that that there should be some machinery for discussion between the two states in advance of the decision but there is not any explicit provision for it in so far as you can read it into 6.2.

Mr Gibbins: We would say that it would be extremely important for that consultation to take place. It might be at the purely administrative level as to the suitability of an address or the availability of a

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particular police station; it might be on much more complex matters.

Q88 Chairman: I see one of the conditions may be that he undergoes specialised medical treatment. On the face of it, one would really need to discover whether that sort of treatment is available, how easily it can be provided for, and that sort of thing.

Mr Gibbins: Indeed, but once the initial decision has been taken to issue a European supervision order in the issuing Member State, it is then sent back to the executing Member State to make a decision as to whether it is going to run with it.

Q89 Chairman: But it only has very limited grounds for declining to run with it. Is that not right?

Mr Gibbins: I am not sure that that is necessarily the case. If by analogy one looks at the process under the European arrest warrant, and there are very clear parallels between the two framework decisions that your Lordships are looking at, before a court in this country can return somebody pursuant to a European arrest warrant, it has to be satisfied that to do so would be compatible (which I think is the word that the Extradition Act uses) with his ECHR rights. Of course it is that that opens the door to all sorts of arguments on fairness of trial, defendant's personal situation and so forth. We think, whether explicitly or implicitly, that our domestic legislation in having to comply with the ECHR would necessarily involve that kind of process in dealing with a European supervision order.

Q90 Chairman: I have to say that you do rather surprise me. Article 9 here says: "... the executing authority shall recognise a European supervision order... without any further formality being required, and shall forthwith take the necessary measures for its execution". Then Article 10 tells you under 10.1 the one basis on which you must refuse to do that. You must not have double jeopardy, the *ne bis in idem* principle, and then 10.2 sets out three circumstances in which you have a discretion to refuse. Those apart, with the best will in the world, it seems to me that under this scheme you are bound then to recognise and execute it, are you not? Speaking for myself, I must say, as to your analogy with the European arrest warrant there is very, very limited scope, in my view, not to execute a European arrest warrant on human rights grounds.

Mr Gibbins: The possible objection that I raise of course does not simply apply at this initial phase of recognition and enforcement. In our submission, it would apply throughout the whole life of a European supervision order so that, for example, if one looks a little bit further down the line, imagine that a defendant had breached his European supervision order—I know we are getting into different

territory—and the issuing state had said, "Right, please revoke it and transfer him back to us", he is entitled under Article 18 to be heard by the authorities in the executing Member State.

Q91 Chairman: That is provided for under 18.1.
Mr Gibbins: Indeed.

Q92 Lord Mance: What I do not understand at the moment is why these are particular objections to the European supervision order. It may be a more complicated procedure but these types of objections, in so far as they are good, could also be raised in relation to a Eurobail scheme. One would have thought that the language of the Eurobail scheme would also make, or try to make, it pretty clear that sending back for trial was automatic or pretty automatic, but if there is the sort of argument you mention, surely it could equally be raised in relation to Eurobail?

Mr Gibbins: I accept that there is an element at which it could come in. The substantive difference is of course that under the Eurobail system, you do not have two courts dealing with the process of enforcement and so you do not have a court in the issuing state and a court in the executing state having to make decisions into which process the defendant has an input, both in the issuing and the executing Member State. Similarly at the breach stage or at whatever stage it happens to be, you have the potential for proceedings in both the issuing and the executing Member State. We think that that is not a situation that would apply under Eurobail. There is a slight difficulty here because the Eurobail proposal is perhaps much more tenuous in terms that it has not evolved as far, and so it is difficult to compare specifics because there is no framework decision on Eurobail.

Q93 Lord Mance: One might think that is a pity. One criticism that can be made of the present scheme is that it is extremely badly drafted. I wondered whether there had been any input from experts, like yourselves, in its drafting. We have already drawn attention to a phrase which hangs in the air and invites further elaboration, but there are a large number of aspects of this document which seem to be very problematic.

Mr Gibbins: We have not been involved in the drafting of the framework decision itself.

Q94 Lord Mance: Has the UK had involvement, as far as you know?

Mr Gibbins: Our understanding is that there are certainly negotiations going on in which the UK is clearly involved. I am afraid I cannot assist as to whether the UK was involved in the original drafting.

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Q95 Chairman: I think in the ordinary way it probably would not be. This is a Commission proposal. It is only at that stage that it comes for consideration. That is part of the process of scrutiny on which we are presently embarked.

Mr Gibbins: I think, if I may make this observation, the practical difficulties that arise from implementing this as it stands we think derive, to a very considerable extent, from what I might term a mismatch between adversarial court proceedings that would inevitably occur in the United Kingdom as opposed to the continental model, which is much more inquisitorial, almost an official sitting in an office who is much better able to pick up the phone and confer directly with his opposite number in another Member State. That of course poses enormous problems for our adversarial system if one looks at the difficulties for us, and I suppose there would be similar difficulties for Ireland as well, being the other common law jurisdiction that would be involved in this.

Q96 Chairman: Really they are such different schemes, Eurobail which as you say is not yet worked out in detail but the basic provisions of which are clear as we have already discussed, and this scheme. It is rather difficult to think of actually importing ingredients of one into the other to make it better than either. You have got to just make your choice between one or other as to who takes the basic decision and where, if it is a refusal of bail, is the accused to be remanded in custody. Eurobail says that is the home state; this says that is the issuing state, the trial state.

Mr Gibbins: Can I mention one aspect of Eurobail that I think would be usefully introduced into this scheme and that is the ability to arrest immediately upon a breach or indeed if there is an imminent breach suspected.

Q97 Chairman: That is, rather than having to consult with the issuing state and to ask them whether they want to do anything about it under the proposal here?

Mr Gibbins: Yes, because the reality is that if somebody is on the brink of absconding, they are not going to wait around while this process, as it is set out, is gone through.

Q98 Chairman: I am grateful for that and I follow that entirely. Can we then turn to the question of cost? The CPS has concerns on that. Where do these questions of cost come in? What are the particular concerns there?

Mrs Bowring: We have broken it down. We have noted what the impact assessment says, that there will be no additional operational expenditure. We are slightly unclear as to how this conclusion was

reached. As we see this, there will be real costs in training of the judiciary, court staff, CPS, defence practitioners and the police at the moment. Mr Gibbins can give you more detail if you need it. Obviously, when it comes to extradition, there are very few courts, skilled practitioners and police officers who deal with this. Clearly, with the European supervision order, it is open; it can be applied in any magistrates' court by any prosecutor; any defence practitioner will come up against it; and more police officers will have to understand it. There are real training issues which obviously have costs attached to them.

Q99 Chairman: That is just simply setting up a new system. That is training our people to operate the scheme with a view to sending abroad foreign suspects due for trial here, rather than receiving back on bail and supervising our nationals who will eventually have to be returned for trial abroad. There are two separate aspects.

Mrs Bowring: That is right. Obviously there is the cost attached to the latter group of people coming back and being supervised. There is the liaison aspect, as my Lord Chairman has touched upon, that when we receive the European supervision order from the issuing authority, for certain conditions they need our agreement. We do have to look at it. It is complex and you need the people there to deal with it in a skilled manner. Obviously there is a cost in manpower hours as well as in the training involved. We consider that will be a huge cost particularly for the CPS.

Q100 Chairman: Those would be costs for the CPS because you will be the people involved. Would you be the people having to supervise those who are bailed over here, our own nationals subject to bail? Would the CPS be involved in that?

Mrs Bowring: We think the court will be the authority, based on past experience. We do not see ourselves having a direct role.

Q101 Chairman: Your role would be in foreign suspects applying for the UK to make an ESO so that they can be sent back on bail to France, Germany or wherever. Is that it?

Mrs Bowring: That is correct. There is an issue which Mr Gibbins will deal with on this.

Mr Gibbins: There is obviously a role in the outgoing European supervision order. Obviously it would depend on domestic implementing legislation but we could see us having a very similar role to the role that we enjoy under section 191 of the Extradition Act where we act on behalf of the requesting authority or the requesting state in proceedings before the courts in this country. We would see a very similar role involving this. The distinction of course is that with

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the European arrest warrant, or indeed any extradition proceedings, those proceedings can only take place in certain designated courts whereas, by its very nature, this is something that would fall to be enforced across the country. There would be a very significant resource impact I think for us in equipping prosecutors across the country as opposed to a small cadre within headquarters to deal with these quasi extradition arguments that may occur during the life of the European supervision order. There is also—and Mr Hall will be able to explain this better—inevitably a liaison role that is contemplated in this, whether it is facilitating the transmission of the information about police stations or whether it is transmitting and obtaining information about double jeopardy, which might be an extremely complicated issue. We could see considerable merits in that process being facilitated by a central authority. Your Lordships will know that in the European arrest warrant the Serious Organised Crime Agency is designated as the central authority for the receipt and transmission of dealings on European arrest warrants and the like. They have language facilities available. They have a 24-hour capacity. Bearing in mind the turnaround times that the framework decision contemplates, we think that is very important if we are to stand any chance of meeting these deadlines.

Q102 Chairman: Although you are right, you would have to service magistrates' courts countrywide, you could have a central CPS unit doing this and if necessary there could be individuals in the team who could travel out, could there not?

Mr Gibbins: Yes, clearly it is technically possible but of course one is talking countrywide. Separate considerations would apply to Scotland and Northern Ireland of course.

Q103 Chairman: But the scheme would hopefully free up a lot of prison places and they are very expensive, with £35,000 to £40,000 a year being the present cost of keeping somebody in custody.

Mr Gibbins: What we would say in respect of that is that certainly if we are preparing to implement this, we would very much welcome a UK-specific resource impact assessment to ensure that all the agencies are covered, not just CPS but the police and a central authority if there was to be one, and we note that there is no provision for a central authority within the framework decision in its current draft; it talks about direct transmission.

Q104 Lord Burnett: Are you proposing to have experts on this throughout however many areas you have? What are you proposing? What is your problem about having one central lot who are experts

on this who could be shifted out to Exeter or Hexham in Northumberland to deal with the case?

Mr Gibbins: Certainly that is possible but in order to cover the whole country, of course one is talking about potentially a very large unit and a very significant commitment of resources.

Q105 Lord Burnett: How many people?

Mr Gibbins: Without knowing how many cases are involved—

Q106 Lord Burnett: You have no idea?

Mr Gibbins: We would simply have no idea at this stage and that is why I say that we would welcome a UK-specific resource impact assessment.

Q107 Chairman: Mrs Bowring told us at the very outset that you think there are 572 EU nationals awaiting trial here—non-British EU nationals. It is not impossible that the bulk of those might wish to make an application for a European supervision order.

Mr Gibbins: My Lord, yes, but of course that is bound to come in. One does not know what one would be at the receiving end of.

Q108 Chairman: How many you would have to supervise?

Mr Gibbins: Yes. Supervision is perhaps—

Q109 Chairman: Less of a burden?

Mr Gibbins: No, we would say more of a burden. For the police of course they are really dealing with the supervision. We would be dealing with the court proceedings and elements of the liaison. The bulk of it we suspect would fall to the police and/or to a central authority that was charged with it.

Q110 Chairman: Your main role would be in deciding for the benefit of which foreigners in this country European supervision orders should be made. In terms of the incoming of UK nationals being returned here subject to foreign ESOs, it would be the police supervising the orders.

Mr Gibbins: Yes, the day-to-day supervision would fall to the police but in any of the court proceedings we would be there to represent—

Q111 Chairman: There would not be court proceedings for incoming ones, would there, unless they had breached their bail conditions?

Mr Gibbins: Either a breach or a challenge.

Q112 Chairman: I suppose, of course, the domestic court on the making of a foreign ESO has to execute it. It will have received a document in the form we have here at page 34, Form A: "This order has been issued by an issuing authority." What do we do? I am

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directed to 12.1: “. . . decide whether to recognise and execute it”. So you would be playing your part in reaching the decision to be taken under 12.1?

Mr Gibbins: Yes, but thereafter of course there is the possibility for review both in the executing and the issuing Member State.

Q113 Chairman: That is after 60 days.

Mr Gibbins: Of course 60 days is the maximum.

Q114 Chairman: I am sorry, within 60 days; you are quite right.

Mr Gibbins: That is the maximum period, and so it might be that some Member States chose a shorter period.

Lord Bowness: Forgive me and I may be missing your point. I would like to focus on this question of Articles 12, 17 and 18. I understood from the evidence we had from a previous witness that if there was a breach of the order, there was absolutely nothing that the executing authority could do about it, and that they could not arrest him. I would like to put to the witnesses whether they believe that to be correct or ought we to be looking at Article 17 where arrest is only referred to in conjunction with transfer—to arrest and transfer. Are there two separate possible processes here: enforcement of the order by arresting somebody for breach of the order; and arresting and transferring? Obviously then Articles 17 and 18 deal with the situation where the issuing authority wants to get the person back. The other question I would ask, my Lord Chairman is this. In Article 18, which I find extremely confusing and it may be the drafting, are we supposed to draw any distinction between a reference to other Member States as opposed to the executing authority? It seems to me that in this draft the Member State, which is the issuing authority, and the Member State that is the receiving authority, the executing authority, are referred to as that almost all the way through, but in 18, and I may be reading it wrongly, there seem to be provisions which apply almost as if somebody has been arrested in a third country. Is that right? Maybe everybody else has understood that anyway.

Chairman: I thought it was a third country in 18.1, and I think there is some support for that in 18.4.

Lord Bowness: In which case, my Lord Chairman, the previous evidence that we had that our courts would have no means of enforcing it because the person had to be heard and consent and all the rest of it, as set out in 18, would not apply, would it?

Q115 Chairman: Perhaps we can ask the CPS for their comments on that. Do you see arrest and transfer, which is explicitly dealt with of course under Article 17, as something so to speak distinct from arrest *per se*, which presumably could be effected by the executing state, for example if the police

supervising bail suddenly get a tip off that the accused is about to cross the Irish Channel? Can they arrest him to stop him doing that before alerting the issuing state and asking what they want to do about it? How do you read this provision?

Mr Hall: I represent the Association of Chief Police Officers. Our understanding on reading this, and I similarly found some difficulty in penetrating some of the way this has been drafted, is that we do have concerns that we would not have the power to arrest someone when contemplating a breach. As the agency there to protect the public and manage the risks associated by these people being at large in the UK, I think that is a cause for some concern. An attendant issue is one surrounding identity. I am thinking here of UK nationals particularly who have been arrested in another jurisdiction and have been released under one of these supervision orders to the UK. If one of those people does not have any previous convictions, then we are going to have no fingerprint data, no DNA data, and there does not seem to be any provision here for that information. I was similarly challenged by the aspect of it you have highlighted, my Lord, and I wonder whether by implication the issuing state can issue in effect an arrest that can be executed in any other Member State as opposed to just the executing state. It is not clear on my reading of this. I do not know whether Brian Gibbins has anything to add.

Lord Bowness: This is interesting. Earlier on it does say that the receiving state makes a decision to recognise and execute. Otherwise, courts are in the position of issuing meaningless pieces of paper. If it does not mean having some power to do something with it, what does it mean?

Chairman: My understanding of that earlier reference to recognising and executing, which is I think under Article 9, is that it actually gives effect to the order. How does it give effect to the order?

Lord Bowness: I was looking at paragraph 1 of Article 12, my Lord Chairman. I appreciate it is also in Article 9.

Q116 Chairman: I am beginning to have doubts myself as to how one does execute it. It gets annex Form A, as I understand it, which is the document at page 23. The proposed regulation is at page 23 of the printed document, the European Supervision Order. This of course is filled in by the issuing state. What, if anything, does the executing state do to this? Do they simply, so to speak, accept it and the execution is simply therefore notification to the issuing state that they have accepted it, recognised it, and they execute it by telling the issuing state, “All right, we recognise this. Send him back”? That, after all, is the object of the exercise. Only when it is accepted and executed does the issuing state send the person back. If it is France that is the issuing state for a British national,

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then they send this document in Form A to us. The court under 12.1 has to decide whether to recognise and execute it. They inform France, if it is an English court that they accept it, at which point France send this Englishman back. The conditions to which he is subject, of which he has already been told, then bite. Is that how it is understood to work?

Mrs Bowring: It is, apart from one fact that you do have those provisions under Article 6, those conditions which the executing state has to agree to that the issuing state imposes. It is on page 13 of the document.

Chairman: Yes, but those will be already set out in the ESO form, which will then be sent to us, and it is for us then to decide whether to recognise and execute it. Execution in that sense seems to me to mean simply saying, "Yes we accept it" and getting receipt of the individual who at that point is *ex hypothesi* released on bail subject to these conditions, and we undertake then to enforce those conditions.

Lord Mance: May I suggest, my Lord Chairman, that it goes a bit further than that. It is not only receipt but also the obligation to report any breach, however that leads to questions as to how you establish any breach, and furthermore execution clearly means the obligation under Article 17.3, to arrest and transfer the suspect back to the issuing state under Article 18, if and when a decision has been taken by the issuing authority under Article 17 that the suspect should be arrested and re-transferred. Just dealing with Article 18, it is clearly right that Article 18 embraces not merely the executing state but also any other state in which the chap happens to be. That state is in Article 18.4. That is clearly implied there. My view would be that under the scheme as presently drafted that is the limit of the executing state's power and that what has been said by Mr Hall seems an extremely valid point, namely that the police would have no power in the public interest or for public safety reasons to arrest someone without having gone back to the issuing state. Furthermore, as he has pointed out, they might have no means of ascertaining who the someone was.

Q117 Chairman: They would have no fingerprint or DNA and they would not be on the database. Mr Hall, while you are making this contribution, what other if any problems in particular do the police identify with this scheme?

Mr Hall: I think timescales to undertake inquiries: the five days from receipt in order to agree the conditions. I am sure that those inquiries will fall to the police. Our experience with mutual legal assistance requests and also European arrest warrant work indicate that those timescales, the five-day timescale and also the three days and repatriation timescale once someone has been arrested, would prove to be extremely challenging and may not be achievable in every case.

Q118 Chairman: Will they be achievable in the majority of cases?

Mr Hall: It is not my area of expertise but I think in terms of European arrest warrants the timescales have just been increased to 10 days so that might be—

Chairman: I see, no doubt that will be for negotiation. Quite. Lord Bowness?

Q119 Lord Bowness: Can I come back to this Article 18 and just look at it from another point of view. Suppose Germany is the issuing authority, suppose France is the executing authority, the person concerned comes over the Channel to us; on what authority are we going to arrest that person under Article 18? We have not been within receipt of the supervision order. Is there an obligation? There is no obligation to all executing authorities to circulate the other 26. What do we do from that end of it?

Mr Gibbins: My Lord Chairman, may I assist on this? I entirely concur that 18.4 raises a lot of question marks. I suspect it may be done because it is possible to transfer a European supervision order from the original executing Member State to another Member State. I suspect that 18.4 is an attempt to extend the ability to enforce to a state to which an ESO has been transferred.

Chairman: Where is the provision for transfer of the ESO?

Lord Mance: Surely the obligation on a third state, the UK in Lord Bowness's example, is contained in 18.3?

Lord Bowness: My Lord Chairman, I understand that is the obligation but what is our authority for executing it? Do Mr Hall's men go and knock on the door and say, "Excuse me, you are holidaying here. We have received a request from France to arrest you for breaching a supervision order issued in Germany," and he says, "So?"

Lord Mance: We are now supposed to pass implementing legislation to give effect to it.

Q120 Chairman: Article 18.3 is the general obligation and I think, as Lord Mance says, the implementing legislation would need to make provision. However, next week we see the draftsmen from the Commission and it is very helpful to have clarification at least of the difficulties in their existing draft. Mr Hall, I am sorry, had we concluded your answer to questions as to the difficulties that you on behalf of ACPO would see in the actual enforcement of the provision, in other words, the supervision of the very orders that we are contemplating?

Mr Hall: My Lord, it is really just to amplify I suppose the response given to an earlier question by Mr Gibbins and that is that we have concerns about the numbers of these cases that may be forthcoming from other Member States. Certainly the experience in the recent past with mutual legal assistance and the

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European arrest warrant indicates that these are rising significantly and the concern would be that these provisions would also lead to a significant increase in work. I think it is the point that was made earlier, which is that they may be available within inquisitorial systems much earlier in the investigative process and that might broaden the net for European states in a way in which it would not in the UK, so the resourcing implications for policing in the UK may be significant, particularly if there were concentrations of particular ethnic origins in particular parts of the country.

Chairman: I think we have very largely covered matters. Unless any Member of the Committee has any other questions or you feel there is anything you would wish to add to what you have already helpfully told us, I think we might draw this to a close.

Q121 Lord Mance: That last observation might lead to the conclusion that in fact there is a real need for this. If there are a lot of people who are lingering in prison abroad unnecessarily who could be brought back here, and perhaps even if they could be brought back here under the Eurobail scheme in order to serve their time on remand pending trial here, there could be said to be a real need for this scheme?

Mr Hall: Absolutely, my Lord. I merely make the observation that we are unclear as to the scope and the extent, and I suppose to reinforce the point that the CPS have made, which is that I think ACPO would appreciate some scoping analysis to give some idea as to likely numbers.

Q122 Baroness Kingsmill: May I just for a point of clarification ask, maybe I did not quite understand the point; what have ethnic minorities got to do with it? I did not quite get that point.

Mr Hall: Perhaps a poor choice of language on my part, my Lady, really just the disproportionality that may exist between the way in which the UK system works and the way in which other jurisdictions may operate.

Q123 Baroness Kingsmill: Just expand a little bit what you mean by the difference?

Mr Hall: I think we have seen a significant increase in European arrest warrant activity and also mutual legal assistance from some of the accession countries that have recently come into the EU.

Baroness Kingsmill: Thank you.

Q124 Chairman: Just a final question, the problems of below age criminals, we touched on this as being one of the grounds on which you can refuse to recognise a supervision order. It is under Article 10.2(a). Have you any views as to what our own reaction would be to that? Would we be likely to exercise our discretion not to recognise a warrant for somebody who was below our criminal age?

Mr Gibbins: My Lord Chairman, certainly on the extradition front we have had no experience of receiving European arrest warrants, as it is technically possible to do, for juveniles so it is really impossible to make any sort of guess as to the position we would be in as the issuing Member State. In terms of being the executing Member State, of course one imagines a situation, perhaps a child on holiday with parents in Spain, who would otherwise be subject to detention, and this would of course afford the possibility of then coming home with their parents at the end of what might have been a disastrous holiday, I suspect!

Q125 Chairman: Quite. If you exercise your discretion against it, actually the consequence is not in his favour, the consequence is that he remains in custody.

Mr Gibbins: Indeed, so we acknowledge in the scenario that I have outlined that there would be a benefit.

Q126 Chairman: Yes. Very well, thank you all very much indeed. It has been most helpful and I am afraid we have identified yet more problems for the proposed scheme. As I say, I hope we can resolve at least some of them or set in train a process for dealing with them next week.

Mr Gibbins: My Lord Chairman, there is one matter that I very quickly wish to flag up, I do not want to trespass on your patience, but it is simply this: that of course the issue of a European supervision order is entirely contingent on the person being a resident of the country to which he wants to be sent back and there is nothing in the Framework Decision, it seems to me, to assist in how you determine who is a resident of a particular country. One accepts that this is an umbrella, a pan-European system, but absent any guidance on the Framework Decision there is the possibility of huge variances in national practices.

Q127 Chairman: So residence would need to be defined to give a common meaning to what is within the contemplation of this order?

Mr Gibbins: My Lord, we would be assisted.

Chairman: Thank you very much. That is a very helpful comment. Thank you very much indeed.

Supplementary memorandum by the Crown Prosecution Service

EU NATIONALS BEING HELD ON REMAND (UNTRIED AND CONVICTED UNSENTENCED), AS OF 31 MARCH 2007—TABLE PROVIDED BY THE OFFICE FOR CRIMINAL JUSTICE REFORM

	<i>Remands</i>		
	<i>All</i>	<i>Untried</i>	<i>Convicted unsentenced</i>
All	580	405	175
Austria	1	1	0
Belgium	16	10	6
Bulgaria	6	3	3
Czech Republic	17	14	3
Cyprus	11	7	4
Germany	17	14	3
Denmark	2	1	1
Estonia	4	2	2
Spain	9	8	1
Finland	1	1	0
France	39	31	8
Greece	4	3	1
Hungary	8	8	0
Irish Republic	96	56	39
Italy	17	10	7
Lithuania	40	27	13
Latvia	13	8	5
Malta	1	1	0
Netherlands	32	18	13
Poland	116	86	30
Portugal	57	37	20
Romania	59	48	10
Sweden	6	4	2
Slovakia	8	7	1
Slovenia	1	1	0

Data Sources and Quality

These figures have been drawn from administrative IT systems. Care is taken when processing and analysing the returns, but the detail collected is subject to the inaccuracies inherent in any large scale recording system, and so although shown to the last individual, the figure may not be accurate to that level.

1 May 2007

WEDNESDAY 9 MAY 2007

Present	Brown of Eaton-under-Heywood, L (Chairman) Burnett, L Clinton-Davis, L	Jay of Ewelme, L Lester of Herne Hill, L Mance, L Norton of Louth, L
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Memorandum by The Law Society of England and Wales

INTRODUCTION AND GENERAL REMARKS

1. The Law Society (“the Society”) regulates and represents solicitors in England and Wales. This response is from the representation arm of the Law Society which represents the views and interests of solicitors in commenting on proposals for better law and law making procedures in both the domestic and European arenas. Representatives of the Law Society EU Criminal Law Working Group have discussed this issue and their views are the basis for this response.
2. The Law Society welcomes this opportunity to comment on the European Commission’s draft Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union of August 2006. The European Commission presents the proposal recalling that according to both the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and general principles of law, pre-trial detention shall be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. The Law Society responded to the previous Green Paper on this issue in 2004 and the position is re-stated here.

THE NEED FOR EU ACTION ON PRE-TRIAL SUPERVISION MEASURES

3. We note that at present, there are no international instruments that specifically allow the transfer (recognition) of pre-trial supervision measures from one Member State to another. In its Green Paper the European Commission identified that the excessive use (and length) of pre-trial detention is one of the main causes of prison overpopulation. Owing to the risk of flight, non-resident suspects are often remanded in custody, while residents benefit from bail on the grounds that alternative measures such as reporting to the police or travel prohibition reduce the risk of flight.
4. In responding to the Green Paper we agreed that EU level action to introduce a system of bail transfer between Member States will strengthen the presumption to the right of liberty and reduce the negative effects of pre-trial custody on the individual and their private life. We recognised that although Member States apply the same fundamental principles regarding pre-trial detention, based on international legal obligations and commitments, the way that this is carried out in practice is diverse. Whilst we recognise that the risk of flight may be perceived as greater for a non-resident and that, indeed, other conditions such as a fixed address may be more problematic for a non-resident, the near-automatic denial of bail is unacceptable. By introducing a system of mutual recognition and a European bail transfer scheme between Member States we hope this can be minimised.
5. We echo the European Commission’s belief that any such system is an important development to reduce negative discrimination caused by a defendant’s normal place of residence. The Law Society conducted an EU funded study entitled “Better Bail Decisions” carried out in co-operation with bar associations in the Czech Republic and Spain. During this study local practitioners identified the considerable disadvantage non-resident defendants suffered because of their status.¹
6. We therefore broadly support the European Commission’s intentions in principle. We believe that mutual recognition is the appropriate basis for any measures requiring enhanced cross-border co-operation and certainly in this instance in relation to a European supervision order mechanism. We consider that out of the number of policy initiatives that could have been taken, identified in the explanatory memorandum, this is indeed the appropriate course of action.

¹ <http://www.lawsociety.org.uk/aboutlawsociety/internationalrole/projectsabroad/view=projectdetails.law?DOCUMENTID=174670>

7. However, we have several concerns as to the practical application of such a system as discussed below. Moreover, many of the practical details of the mechanism for transfer and supervision are to be left up to the Member States to set down during the transposition process. Whilst this appears to be sensible from a subsidiarity point of view it may lead to complications, legal uncertainty and wide divergence in the system on a European scale. We consider that further consultation will be necessary domestically, during the transposition phase, as to how this will be implemented in England and Wales and throughout the UK.

LEGAL AND PRACTICAL IMPLICATIONS OF THE PROPOSAL

8. *Timing:* In general we have concerns as to the time the European supervision order (ESO) mechanism will take. Particularly as there appears to be a great deal of delay inherent in liaising between issuing and executing States as to the non-mandatory conditions in the ESO and then taking a decision on recognition and enforcement.

9. *Role of the individual:* One major concern is that during the ESO process there is no requirement for the individual to be allowed to make representations in a decision as to whether or not to recognise and/or execute the ESO—article 12(1). In particular, some of the matters which are set out in Article 10 as grounds for non recognition and non execution will probably only be known to the defendant (for example double jeopardy or an immunity or privilege). It is also not clear from Article 12 when the person will be transferred ie once a decision has been taken on recognition and enforcement or prior to this.

10. *Legal representation:* In the Law Society's response to the Green Paper it was argued that it is imperative that any European bail transfer order is issued with the informed consent of the defendant. This would require the provision of competent legal advice about the transfer process and its impact on the individual. The Law Society is concerned that the approach under the draft Framework Decision is merely to ensure the suspected person is informed rather than securing his consent.

11. Moreover, it is noted that in the preliminary draft Framework Decision (presented for discussion at an experts meeting in 2005) included an article on consent of the suspected person. An article was included which stated that: "before issuing a European supervision order, the issuing authority shall hear the suspected person as to whether he or she consents to the issuing of a European supervision order and the obligations imposed on him. The suspected person shall be informed that . . . consent may not be revoked."

12. Similarly the preliminary draft framework decision included a provision that stated that "each Member State shall adopt the measures necessary to ensure that consent . . . is established in such a way as to show that the person concerned has expressed it voluntarily and in full awareness of the consequences. To that end, the suspected person shall have the right to interpretation and legal counsel." The Law Society would be interested to know why these provisions were removed.

13. *Competing obligations:* Article 15 deals with the situation where the execution of an ESO shall be "without prejudice to the executing Member States obligations under a European Arrest Warrant, request for extradition presented from a third country, or in relation to proceedings before the International Criminal Court." This article is not clear. There is no guidance given as to how the matters set out in this Article will interact with any ESO.

14. For example under Article 18(3) it appears that the only basis for non transfer is if there is a current prosecution for the same facts as those on which the ESO is based. What would be the situation if a person is unable to comply with the terms of their ESO because they are being prosecuted in another EU Member State for a different offence and are therefore unable to comply with the ESO? This would seem to leave them in the situation where they would then be arrested and transferred for breach of ESO. This will need to be clarified.

15. The Law Society has not prepared any drafting amendments at this time, but would be happy to supply to the Select Committee further information as they should require during the inquiry on this issue.

1 March 2007

Examination of Witnesses

Witnesses: Ms LOUISE HODGES, MR ANAND DOOBAY and Ms JULIA BATEMAN, Law Society of England and Wales, examined.

Q229 Chairman: Good afternoon and welcome. Ms Hodges, I know that you have given evidence to the Committee before and I am glad you have not been deterred from returning on this further occasion. I know that all of you have received copies of the oral and written evidence that we have already received in the course of this inquiry. As I think you know, you are on air, public, you will get a copy of the transcript and an opportunity to make minor corrections and perhaps supplement it; in the meantime, it will be on the web. Of course, we have already a brief statement from the Law Society in our bundle, indicating, so to speak, your preliminary views about this proposal, and from that it appears that you do think there is a need for some EU measure to deal with trying to procure pre-trial liberty for those members of Member States who are suspected and face trial in a different Member State. That is right, is it; that remains your view, that there should be a measure? Have any of you much experience of the sorts of problems that we would run into without such a measure?

Ms Hodges: I am Louise Hodges and I am a criminal practitioner, dealing with mainly fraud and white-collar crime cases but general crime as well. I think maybe just to set out that we have very much discussed this and looked at this in terms of very practical help, how practitioners deal with this on a day-to-day basis. Of course, bail is an issue which encompasses all suspects, whether they are UK residents or non-UK residents, in the UK courts, bail is an issue which is dealt with every day, in every court in this country. Bail is available for almost all offences, and the restrictions or the risks that are perceived for us not to have bail are re-offending, interference with evidence or witnesses, or the risk of flight. Obviously, when we are looking at non-UK citizens it is the risk of flight that is in excess, because there is not seen to be the community ties in the UK; not necessarily, because sometimes it may be that somebody is naturally a resident in another Member State but maybe they are a student here, or they have a job here, so that actually there are community ties. It is not automatic if you are not a UK resident then you are not going to be able to—

Q230 Chairman: You are less likely to have close ties and are less guaranteed, therefore, to be available for trial?

Ms Hodges: That is correct. I think there are two issues, or two areas of evil, that this instrument is trying to overcome. Firstly, whether you get bail at all, or if you do get bail but you have bail only in the UK and it is somebody for whom it is not their

natural home and so there could be complications if they cannot go back to work, or they have not got anywhere to live here, although they have actually been granted bail in this country. We have discussed earlier some examples, and I think Mr Doobay had some very interesting examples of experiences where that has happened.

Q231 Chairman: These are paradigm examples, are they; they are the sorts of things that recur?

Mr Doobay: I am not so sure that they are paradigm. I would put them all in the category of anecdotal examples, but certainly they show, in practical terms, how it can be a difficulty. In one particular case—I am also a defence practitioner—we were dealing with a defendant who was ordinarily resident in Belgium and the UK court indicated that they would be willing to grant conditional bail but only if they could impose a residence condition, which is a very ordinary condition of bail here, that “You live and sleep at a defined address.” We encountered a very mundane problem, in that he did not have an address here, he did not have the means to be able to rent a hotel room for an extended period of time to use that as an address, and there was just no practical way to secure an address to allow him to have that as a condition of his bail. Therefore, the court said, “We’re not willing to release you on bail without having that basic condition in place,” and it took us a lot of time. In fact what really did change the picture, in terms of the court, was that he was held in detention for nine months, and at that point they began to realise that, it was a Serious Fraud Office investigation, it was going to be a long-running investigation and trial process and so in fact they did allow him to have bail without the residence condition and allowed him to return to Belgium and he was able just to come back to the UK as and when required for the trial process. Certainly, at the initial stage, we had difficulty in fulfilling what is an ordinary, practical, simple condition, which is one, in the vast majority of conditional bail cases, that the court will insist on.

Q232 Chairman: In one sense, that might be said to be an illustration of why there is no need for a new scheme at all, because they released him on bail and he went to Belgium anyway?

Mr Doobay: I think that could be said, but it is a peculiar case in the sense that not every case will allow you to have nine months and he did spend nine months in prison.

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Q233 Chairman: Absolutely, and they might in fact have refused him, in the event, completely.

Mr Doobay: The other examples are more in terms of the European Arrest Warrant and how I do not think that has helped, necessarily, in addressing the issue. There was a suggestion that with the introduction of the European Arrest Warrant UK courts would be more willing to grant bail, even if the person was normally resident in another EU Member State, because the court would feel that if they did abscond there was a simple mechanism, the European Arrest Warrant, to ensure their return. Certainly, in practice, we have not seen that acting as a benefit for defendants; again, these are purely pragmatic reasons why it is not working. Extradition is an area which is dealt with by a specialist division within the Crown Prosecution Service, it is dealt with by a limited number of judges at designated courts and it is dealt with by a relatively limited number of defence practitioners. At a bail hearing, as a defence practitioner, if you suggest to the court that their concerns can be met because we have this new European Arrest Warrant scheme, firstly the court will not be familiar with it, the prosecutor will not be familiar with it, and even if you can familiarise them with the scheme they will still be concerned that there are grounds for non-execution of a European Arrest Warrant. It is not automatic that you will be returned under a European Arrest Warrant, so they will still have a residual concern that, in reality, they may not be able to secure the return of somebody who does abscond. I was just going to add that as a separate class of cases where the EAW has not really helped in assisting non-UK resident defendants to obtain bail.

Q234 Chairman: Personally, I found that extremely helpful. Just give me an illustration of a situation in which the European Arrest Warrant would fail to secure the person's return because of some discretion or provision under that scheme, because I am not really aware of any?

Mr Doobay: There are various grounds which can be raised, for example, an argument that the prosecution is on the basis of political opinion, or gender, or race; there are various threshold criteria, in terms of the minimum penalty which has to attract to the sentence, if it is not one of the 30 categories of offences set out in the Framework Decision and this issue of double criminality as a general concept. It is very difficult to argue to a court and a prosecutor that it is clear-cut in a particular case.

Q235 Chairman: It is not clear enough the other way actually to secure you bail when strictly you should be getting it?

Mr Doobay: Absolutely.

Q236 Lord Jay of Ewelme: I entirely understand that last point. I must say, I was surprised by the first point you made, as I understand it, perhaps I did not, that the European Arrest Warrant was not sufficiently understood by practitioners. I would have thought it had been around long enough now for people to know what it is about and to be able to understand it and make use of it?

Mr Doobay: My Lord Chairman, perhaps I did not make it clear enough. My main point was that, although people have a general understanding of what it is, in order for a court and a prosecutor to feel secure in allowing a defendant to be released on bail, knowing that they bear the risk that if the defendant does not return for trial they will be criticised themselves, they are not familiar enough with it and how it operates in practice, because generally they will not ever have dealt with a European Arrest Warrant case to have the comfort to allow them to take what they may see as a bold step of granting bail where there is a risk of absconding.

Q237 Chairman: It just has not really caught on around the country, the European Arrest Warrant, to an extent that courts are now sufficiently sure of its working to grant bail, when otherwise, beforehand, before it came into being, they would not have done?

Mr Doobay: My Lord Chairman, I think that is entirely right, because all of the EAW cases are dealt with at the City of Westminster Magistrates' Court, so any judge outside of that court will never have seen a European Arrest Warrant in its operation.

Q238 Lord Jay of Ewelme: Would you say that the same difficulties on that point arise in other Member States, or are other Member States and their judicial processes better able to make use of it, as it were, because they are more familiar with it, there is a clear relevance here as to the suitability of the Commission's scheme?

Mr Doobay: To be perfectly frank, I am not sure how beneficial it has been in other EU Member States in allowing secure bail. I take from the Commission's proposal and the research which it has done that obviously it has not cured the problem as a whole, otherwise I would assume that in the statistical analysis the Commission has done they would not have found the figures that they have, in terms of EU nationals which are still being detained. I really do not know, in a scientific way.

Q239 Chairman: As you will have noticed, most of our witnesses in fact seem to have preferred the original Eurobail concept of actually returning the decision whether to grant bail to the home State rather than the trial State, but that is not, I think,

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your view; the Law Society I think find this a better scheme. Can you indicate, just very briefly, why?

Ms Bateman: The position of the Law Society was, in a sense, to take the difficult choice, to say that the European supervision order was the most appropriate instrument. It has a number of flaws, principally on the practical details, which we will elaborate on over our discussion. I think one of the reasons that we preferred the European supervision order is that, like it or not, mutual recognition is the basis upon which the area of freedom, security and justice, judicial co-operation, whatever you want to call it, is being built. The European Arrest Warrant is obviously the key instrument, but the forthcoming Evidence Warrant and other instruments, so, in the interests of coherence and establishing a model, we prefer the mutual recognition side. It was very helpful to read the previous evidence because it has become clear that Eurobail versus, if you like, the European supervision order was one of the things that you discussed in detail. I think one of the problems is that the Eurobail concept is not actually a proposal, it has not really been tried and tested or put through the scrutiny procedures that the European supervision order has, be it at pre-draft stage, with Commission consultations, or indeed the inquiry that you are holding as well. I think Eurobail itself works, as far as we understand it, a lot on the theoretical nature of bail, so does a particular offence attract bail in law and therefore is it bailable and will send the person to the second Member State, the executing Member State. Whereas again the individual's community ties, his circumstances, are not really addressed when that decision is taken, and to me that seems to be the core of what the decision is based on, the facts of the case, the individual, his community ties, so we felt that the Eurobail procedure was too theoretical, in a sense. We do see the merits of the executing State, the second Member State, having more input, in a sense dealing with a lot of the detail. Rather than choosing the Supervision Order or the Eurobail, we think there should be a hybrid, if you like, between the two and that you use the recognition model but the issuing State and the executing State communicate a lot better at the time the decision is made, and you have almost a three-way hearing between the issuing State, the executing State and the suspect. We did take the position that the Supervision Order was preferable, but we can see that there are lots of improvements which need to be made.

Q240 Chairman: One feature of the Eurobail scheme, had it gone ahead, as I understand it, would have been this, that in those cases where actually bail was to be refused, where there was after all to be pre-trial custody, it would have the merit that custody would actually be in the home State, with the advantages that would bring, in terms of being able

to be visited by relatives, and all the rest. Is that a consideration which you think is worth having in mind?

Ms Bateman: This is something we were discussing before coming here; that, in a sense, being in custody in your home Member State has its advantages, of course for the reasons you outlined. Equally, in discussions on Eurobail, there have not been discussions on the detail of how you would be transferred, when you would be transferred, would the Member State actually consent to you being returned, in a sense, would the second Member State wish to receive that person back; so again I think it is not the tried and tested model.

Q241 Chairman: Before we go any further, can I just be clear about this; do you understand this proposal to operate in all cases, or will it remain open to a State to say to a foreign national, "Right; we'll grant you liberty without going through this whole business, you can go back to your home State, but we won't do it through them, we'll simply tell you when to come back"? Will that remain at least an option?

Ms Hodges: Certainly the way that I have understood the order is that it captures only those people where it is an issue whether they are bailed or not, and what is preventing having bail is not having conditions that the issuing State is able to make sure are secured. I leave that really to the EU Commissioners to confirm.

Q242 Lord Mance: Can I just go back to what Ms Bateman was saying, and I was interested in your comment about a possible hybrid, but just speaking generally again because we may come back to this. Is there not merit in a hybrid which actually separates the original decision stage and the execution stage; in other words, one which gives the executing State much greater control than this proposal would over enforcement, a determination as to whether there has been a breach of alternative sanctions amendment? In that connection, I do not know whether you are familiar with it but we happen to have on our agenda today proposals relating to the treatment of suspended sentences. I note that at least the UK Government there is arguing strongly for very substantial powers of supervision enforcement amendment and handling of alternative sentences, as well as the imposing of them, in the event of breach of a suspended sentence on the part of the State of residence to which the person is sent back. It just seems to me, logically, that there is a case for saying that is the best State to deal with that area?

Ms Bateman: I think, in a sense, I am being swayed by the Commission arguments, that the investigating State, the issuing State, has the evidence, the issuing State will decide and determine how often the suspect will have to be returned for pre-trial investigation,

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particularly in the continental system of the investigating magistrate procedure. Equally, I think that, again under the Eurobail procedure, while you do separate the determination between the issuing and the executing, will the issuing State have to transfer all the evidence, all the files, to the second Member State to make that determination?

Q243 Lord Mance: Can I just interrupt to say that really I was focusing on the situation once somebody had been transferred, and at that stage all the evidence relating to matters like breach is going to be in the hands of the executing State and not the issuing State?

Ms Bateman: I think this is why, although accepting the mutual recognition model, we would like to involve the executing State in more detail at that stage, but rather than it just being once a decision had been taken, so the issuing State takes the decision that somebody is bailable and then transfers them, we would prefer to have the executing State, for the very reasons you outlined, involved in the decision with the issuing State.

Q244 Lord Mance: Both in the decision and, you would agree, would you, in the enforcement?

Ms Bateman: Yes; exactly.

Q245 Lord Lester of Herne Hill: JUSTICE, in their evidence to us, have suggested that there is quite a serious issue under the European Human Rights Convention, because Article 13 of the Convention says that everyone has a right to an effective remedy before a national authority for breaches of his, or her, Convention rights. Here, obviously, the Convention right is the right to liberty under Article 5 of the Convention. JUSTICE suggests that the Commission's scheme would breach Article 13 because it would mean that the obligations, or requirements, under the supervision order, which are being enforced in the executing Member State, will not provide an effective remedy in that State when the review of the conditions is being undertaken, if you follow. Therefore that there must be an effective remedy in the executing State and, in looking at the Framework Decision and amplifying what they say, one must be sure that the Commission are not proposing something which is not compatible with the European Human Rights Convention. I do not know if you have seen JUSTICE's evidence on that; you have? I wonder if you could respond to those points?

Ms Hodges: I think one of the fundamental flaws that we have identified with the order is that it is silent in terms of the role of the suspect until quite late on in the process. I hope that could be remedied by the initial hearing being, as Ms Bateman pointed out, a three-way hearing which has informed involvement

of the executing State, the issuing State and the suspect. By doing that, the decision will be a tripartite, for want of a better word, decision and that can be challenged or agreed at that stage, so the remedy would be potentially in the issuing State. Once the person is transferred, and then we are getting into the review regime, then again any hearings of substance would again, in our view, require those three parties to be involved in those decisions.

Q246 Lord Lester of Herne Hill: For my benefit, because, on the face of it, it seems to me unworkable, can you explain, with a hypothetical case, how you think it would work under your tripartite scheme? If someone is in State X and is taken to State Y and then there is an issue of liberty that arises in State Y, the executing State, what do you see happening, step by step? There will still be a need for speed because this is like *habeas corpus*, it is the right to liberty.

Ms Hodges: Yes. We are looking at a situation where the initial State has decided that it is a situation which is appropriate for bail in normal conditions, as long as sufficient obligations with which they are satisfied can be guaranteed. We would see that the video link, which is envisaged in terms of the review stage, could be used at that early stage in order to get an agreement both from the issuing State and the executing State, so we have both the legal decision but also the practical decision about how those obligations are going to be dealt with. The danger, if that was not done, is that obligations could be imposed which just cannot be complied with by the suspect. It is almost like you are encouraging a breach because you are putting in place obligations that either the executing State will not be able to supervise or monitor or that the individual themselves, if they are not involved in that process, will not be able to identify if there is something that they just are not able to comply with.

Q247 Lord Lester of Herne Hill: At that stage, you are saying, it is vital that there be full, speedy co-operation, I think you are saying, between the courts of both countries to decide the initial question of bail or no bail, and you are saying it is fundamental that should happen. Then what happens when the individual goes to State Y and an issue arises about variation of conditions in State Y; under your idea, what would then happen?

Ms Hodges: In terms of variation, the mechanism that they currently have is, in terms of the review, that is the only identifiable section where they are talking about there may be any change in those conditions, which can be requested either by the suspect or the executing State, this actual document is silent on whether the issuing State can actually review the obligations, which seems slightly perverse to me.

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Again, in order to have legal certainty and make sure that all the parties agree to that variation and that there is no risk that there could be an inadvertent breach, it seems to me that those parties, the issuing, executing State and the suspect have to be involved in that decision, and I do not think it is necessarily as alien as it may seem. We are talking cross-border here, but it would be the same if you had a suspect who lived in the north of England and they were being bailed from a court that was in the south of England. Those issues are dealt with over the telephone. I know that there are not the language problems but those are still issues that are dealt with over a telephone to make sure that whoever is supervising it in that locality agrees that they will conduct the supervision, or whatever the conditions are which are being requested. The suspect will be presumably at the court and the court will make the final decision. There is generally that sort of matrix where more than one person is being involved in bail decisions where there are conditions or obligations which are being required.

Q248 Chairman: Really, as I understand it, is this a fair summary; you are saying, at the initial stage, when the question arises in the issuing State “Shall we or shall we not grant bail subject to conditions, we’re certainly not going to do it without it being subject to conditions, shall we do it, however subject to conditions?” That is the initial stage. At any subsequent stage, once the Order has been accepted by the executing State, when a question of the revision of the conditions falls for consideration there has got to be a tripartite hearing, in some shape or another, first to set the conditions initially and thereafter to set any revisions to them. Is this right?
Ms Hodges: Yes.

Q249 Chairman: In the issuing State then somehow the executing State, at that initial hearing, first has to agree to the conditions, that is specified under Article 6.2, in any event, but also, I think the Law Society would say, should at that stage be considering the Article 10 grounds for non-recognition, whether there is anything in those, and all those same matters should also be engaging the attention of the suspect, he should have an input in all that. Then, at the subsequent stage, if the Order has been made, he is in his own home State, the questions of revising the conditions of bail arise, similarly. What I would like to know is, take stage A, assume an Englishman in France is accused of rape, the French court then have a hearing, the Englishman is there, and somehow you have got to bring the English authorities in on this to discuss whether they accept the proposed conditions, whether they should recognise the proposed Order yet to be made; how does it work? Video is all very

well but who do you talk to, who precisely, in England, is the person to consult in that situation?

Mr Doobay: I think that is one of the questions we have, in that the Framework Decision leaves it to each Member State to appoint their own executing authority, and obviously it would be desirable to have a central executing authority in the UK so that there was a nominated agency which was a point of contact. To take a domestic example, this can be practically a great difficulty, because if you need to consider domestic conditions of reporting to a police station, the court will have to call police stations to work out which ones are suitable, which ones have the right opening hours, if there are residence conditions or sureties, each of these things has to be done individually by the court. Obviously, it would not be desirable to have that same process occur in France, to deal with a number of different agencies. You might, in fact, be practically responsible for the various conditions. We think it is an important issue as to whom the UK would put forward as the co-ordinating executing authority, but assuming that one was appointed we would see that authority as being the participant from the UK which would be able to say “These are conditions which we can practically deal with.”

Q250 Chairman: I see; so the French court would get hold of whoever under Article 4 we have told the Council is our competent authority and that competent authority, whoever it may be, it may be SOCA, or somebody like that, who are now doing, I think, the European Arrest Warrants, SOCA would then—assume that the English rape suspect in Paris comes from Croydon—SOCA presumably would, what, liaise with somebody in Croydon, in order to discover what would be an appropriate police station? How would it actually work?

Mr Doobay: In practical terms, My Lord Chairman, I can see it working in this way, that the French court would say “We would be willing to grant bail only with a European supervision order; these are the conditions which we would wish to impose, as part of the European supervision order.” SOCA would say “These are conditions which generally we are able to impose;” then we would have to consider exactly how they were practically applied, but SOCA would act as the co-ordinating agency in the UK. One of the difficulties we have seen, in terms of the study the Law Society did about bail across the EU, is that there is no standardisation in terms of conditions which courts impose for bail, and therefore the French court may have in mind conditions of which SOCA are able instantly to say “These are not conditions which the UK could ever impose or supervise.” Obviously, if they are then, to take that example, SOCA would have to liaise practically to work out the detail of how they would be imposed.

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Q251 Chairman: During these discussions, the suspect himself has an input somehow?

Mr Doobay: We would suggest that it is important the suspect does have an input, because, to take a very mundane example, if one of the conditions is a residence condition in a specific locality and the suspect does not have a house there then that condition is not one which should be made. We are not saying the suspect would necessarily dictate conditions but, in the same way as in the UK, bail conditions are proposed by the court, the suspect, through his lawyer, is able to point out practical difficulties with conditions the court has in mind, we would suggest it would be sensible to have that same input.

Q252 Chairman: As a matter of interest, are you able to give us a typical condition that some particular Member State imposes as a condition of pre-trial release which we do not accommodate, so to speak?

Ms Hodges: I think it is more the other way round actually. In terms of restriction of movement or residence, there are some Member States who see that as a restriction of freedom of movement.

Q253 Chairman: Do you mean, if we say “You can’t go to Newcastle,” or whatever it may be, as a condition of bail, they would not be in a position to reciprocate that, or they would not be in a position to apply that locally?

Ms Hodges: That is my understanding.

Q254 Chairman: Obviously, it is a restriction of movement but the question is surely whether it is justified?

Mr Doobay: Certainly my understanding is, My Lord Chairman, to take a different example, passports, it is a very common condition of bail in the UK that you surrender your passport. In some countries, I understand, it is a constitutional right to have your passport, and it is just not permissible—

Chairman: I thought you were going to say, in some countries, because of Schengen, you do not need it anyway?

Mr Doobay: My Lord Chairman, that may well be right but I think in some countries there is constitutional protection, so there are practical difficulties, in terms of common conditions and how they can be applied throughout the EU.

Q255 Lord Lester of Herne Hill: My Lord Chairman gave the example of France. I suppose I could just about imagine the translating problems being tackled in this country, which is so insular about languages. Let us suppose it was Hungary, or Poland, or the Czech Republic, or Greece, where are the resources going to come from that will enable translating facilities to be speedily available, given that this is

about liberty, I wonder? Secondly, has anyone done a study of the actual position in all the Member States of the EU as regards the kinds of conditions they do impose, or do not impose, as regards what we would call bail?

Ms Bateman: I do not think anybody actually has done a study. The Commission conducted, I would say, quite a vague impact assessment in terms of collating statistics, but one of the problems with this proposal is it is good in principle but, as you suggested, there is not really a study of what are the conditions, are there standard conditions. As Mr Doobay has referred to, at the Law Society we did an EU-funded study, with the Czech Bar, the Law Society of England and Wales, the Spanish Bar; essentially, it was practitioners who were doing their own impact assessment of what was happening in those jurisdictions and where the problems lay. I do not think there has been an official study or an impact assessment on the different conditions. In terms of translation and interpreting, if you do use our, I would say, optimistic model of the tripartite negotiations, if you like, there is obviously a cost issue, a resource issue. Also there will have to be resources made available for the transmission of the European supervision order, so the authorities, be it SOCA, be it the French Ministry of Justice, are going to have to find translating budget for transferring these suspects and for transferring the proceedings from one to another, so we would argue that budget needs to be bigger to incorporate discussions at the early stage.

Q256 Lord Lester of Herne Hill: For 23 languages? I am familiar with only one Member State in this area, which is not within the EU but the Council of Europe, it is called Azerbaijan. I have read the whole of their Criminal Code, sad life that I lead, and I can tell you, as an expert in Azeri law, that in that Council of Europe country, which subscribes to the European Convention, you cannot, in fact, apply for bail in our sense and the conditions on releasing someone under house arrest, or anything else, are onerous and the courts do not exercise effective judicial control. That is a Council of Europe country. My question really is whether we can be satisfied, under this system, that all the Member States of the EU will have functioning systems that will be able to respect the right to liberty in a proper way under the scheme, because that seems to me to be a proper consideration for everyone in considering the scheme as a whole?

Mr Doobay: Perhaps I can just make a comment here, because I was one of the Task Force members for the study which was undertaken by the Law Society, and I must say that even though this was a partial study of a limited number of jurisdictions the differences between them were very stark. The Law Society, throughout this process, has been advocating a

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study, pan-EU, to at least try to identify the basic common conditions which no EU Member State would find alien to its system and therefore all Member States would find easy to implement. The Commission has not chosen to follow that route, but certainly we see the force in having such a study, because it is very difficult to argue that each Member State has trust in the other Member State's legal system when we cannot even have a common definition of the basic conditions which are applied throughout the EU for bail. I wonder if I can just comment in terms of the interpreting, in the sense that although there are a large number of EU languages we would not anticipate, from the statistics which are available, that this would be a fantastically large number of cases which would require this type of interpreting. Therefore, to have on call an interpreter for each of the languages for a finite number of cases would not seem, to me, to be a great practical difficulty, given that we have to have that at the moment for foreign defendants in the UK who are subject to domestic criminal proceedings, who may need interpreting to have their own Article 6 rights safeguarded.

Lord Mance: We are in a context, are we not, in Europe, where, for various purposes, all members of the Community, or Union, are expected to develop central bodies, and the European Arrest Warrant is one, but mutual assistance in criminal matters is another, I think. It may be a fact of life that not all of them have achieved the same standard but that is a question of more resources, is it not?

Chairman: Whatever imperfections there may be and remain, the fact is that you will have achieved, hopefully, something; at least there will be some EU nationals who will be granted bail who under the present scheme are not?

Lord Mance: If I can pursue that, in relation to Lord Lester's problem, I think you gave an answer which related to the earlier stages again. The tripartite system such as you were suggesting does not seem to work at the last stage, that is, enforcement in the case of some alleged breach. I think you need to have one court or another, do you not, and at the moment the proposal is the issuing court? I asked you that previously and suggested it might not be the better court. I think Lord Lester's point was that maybe it had to be the executing court and that there was a flaw, in principle, because of the Human Rights Convention. I am not sure any of us has really researched that, but I wonder whether the Human Rights Convention really insists that your effective remedy before a national authority has to be before the national authority where you happen to be resident, if, by international treaty, another authority is given competence and the place where you are resident has to recognise its decision. That may not be a question on which any of us can comment.

Lord Lester of Herne Hill: Can I perhaps explain what I was posing, because my question may not have been understood, because of the way I expressed it. My question really is the same as the JUSTICE question, which is, you are being deprived of your liberty in State X, that is the State which has responsibility for ensuring that you have an effective remedy and a fair hearing in testing whether your liberty is or is not being curtailed properly and proportionately; State X cannot delegate that decision to the courts of State Y if it is in State X that they are exercising a detaining or custodial function over you.

Chairman: This is recalling to custody for breach of bail conditions.

Lord Lester of Herne Hill: Or whatever; it does not matter—

Chairman: Yes, but that is the particular scenario which I think you are envisaging.

Lord Lester of Herne Hill: Yes, and that seems to me it would be very odd if the State which has control of the individual is not obliged to give an effective remedy and a fair hearing in determining that question. It can say it is for another State, its courts, to do so. I am not sure I know of any case law which says that.

Lord Mance: Without entering into a debate too much among ourselves, the difficulty about that is that the same principle might apply to the original decision, in other words, you would have to have more than just a decision made by the issuing State after consultation about practicalities with the executing State, you would have to have, effectively, two decisions, a joint decision by both courts, of both States. It would not be just a question of contacting a central authority in the UK, it would be a question of actually getting a UK court to rule before the—

Chairman: I am not sure; these are deep and difficult jurisprudential questions and they lie outside the scope of these witnesses' assistance.

Lord Lester of Herne Hill: They do at least arise out of the JUSTICE submissions, rather than their own heads.

Chairman: Lord Jay, I think you have a question.

Lord Jay of Ewelme: It was a comment, going back a little bit, on a language problem; in fact, it is exactly the same point that Mr Doobay made. I can see there is an issue of resources in the sense of money, but unless there is a sudden influx of Estonian criminals I cannot see that there is going to be a problem in terms of getting the interpreters or the translators to do the work, because they are around, in this particular field.

Q257 Chairman: Can we turn to one or two questions under the head of 'recognition and enforcement'. We know that under the present proposal there is a discretion in the executing State to

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decline to recognise an order on the grounds that the accused has not attained the age of criminal responsibility in its State. As I think will be clear, if it does exercise its discretion in that way, that is not actually going to be of much help to the under-age suspect, because, by definition, it will follow that he will be kept in custody in the trial State; so the question arises, should there be that discretion? It is a different situation, obviously, from that arising under the European Arrest Warrant, because there it would be to the advantage of the under-age child not to be returned, but here it would be to the disadvantage for the State not to receive that child, in order that the under-age person may enjoy liberty pending trial?

Mr Doobay: My Lord Chairman, we entirely agree that should not be in there as a discretionary ground for non-recognition; but we understand, certainly I understand, from the meetings I have attended, that this is a matter of great political sensitivity in some EU Member States and it is at their insistence that they do not wish to be seen to be supervising a measure to allow the under-age person to be released, because they are assisting in the prosecution process of the person who is under the age of criminal responsibility in that State.

Q258 Chairman: I see. They see it as, so to speak, in some way condoning a system whereby this person is actually being prosecuted when they say he should not be?

Mr Doobay: That is my understanding. Certainly what I can argue is that there is no principle reason why that should be in there.

Q259 Chairman: Does exactly the same approach follow in respect of dual criminality—should there be some provision as to dual criminality, in other words, should you have a discretion to refuse to recognise an Order, if the prosecution is for an offence not recognised by the executing State?

Mr Doobay: Again, My Lord Chairman, in terms of our view, we would not welcome such a ground for non-recognition, simply because it would operate, as you have suggested, against the defendant's interest. Whereas in the European Arrest Warrant it is a safeguard, here it would actually hinder the defendant being released prior to their trial.

Q260 Chairman: On that one, there does not seem to have been, so to speak, the political resistance that the under-age ground has? I absolutely follow all that. Should there be, however, more mandatory conditions, notably a reporting obligation so that you do have, at least, periodically, a scheme for recognising that the suspect has not absconded, I think that is the wrong word, has not been lost of track of, gone to ground, and indeed an obligation to return to the State of residence, the executing State,

when there has actually been an ESO made in his case?

Mr Doobay: My Lord Chairman, we would not support more mandatory conditions, for some principle reasons, which are that, as in every case, bail is very particular to the individual's circumstances. One thing which we feel may be missing from the Framework Decision is a requirement that only those conditions which are both proportionate and necessary are imposed, and therefore to have mandatory conditions may impose conditions which a court does not, in fact, feel are required to meet their concerns about releasing the defendant pursuant to a European supervision order.

Q261 Chairman: It is quite difficult to suppose that you do not actually need an order that he does come to the executing State?

Mr Doobay: My Lord Chairman, I entirely agree that, as I understand it, that is a part of the Framework Decision as it stands.

Q262 Chairman: Is it? It is not made a condition, it is not an Article 6 condition, at least I did not understand it was: have I missed something?

Ms Hodges: Article 6.1 refers to: "The issuing authority shall impose an obligation on the suspect to make himself available for the purpose of receiving summons for his trial and to attend the trial when summoned to do so."

Q263 Chairman: With respect, I am not talking about when he is ready for trial, I am talking about in the illustration we have been using, when France have said, "Okay, you can have an ESO so that you can go back to England to await trial;" but then you need to get him back to England. There may be such an Order made, he is released from the Paris court, but he thinks instead, "Oh, well, I'll go and have a holiday in Thailand." What is to stop him doing that?

Mr Doobay: My Lord Chairman, I think that there would be nothing to stop him doing that, unless the court imposed a condition which stopped him from doing that, in the sense that 6.1(a) allows the issuing authority to impose an obligation to attend preliminary hearings for the offences for which they have been charged.

Q264 Lord Mance: What about 6.2(a); that is the obligation, where you can impose an obligation to travel at a particular time and on a particular date; but how you are going to enforce this is the difficulty?

Mr Doobay: It simply seems to us that the flexibility which should be inherent within the granting of bail would not be assisted by having mandatory conditions, because the court ultimately is the best place to judge which conditions are required to meet its concerns about releasing an individual.

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Q265 Chairman: I follow that. If I may say so, I think it is a perfectly sound answer.

Ms Bateman: My Lord Chairman, if I may add, I think the whole question of the issuing State and the return of the individual, if you like, to his home State, this is one of the major, practical details that have not been thought out. At a number of experts' meetings in Brussels this was discussed and, without being too flippant about it, I think it was one of the issues that, "Oh, we'll deal with that later," or "We'll deal with that on implementation." This is one of our major concerns with the instrument as drafted, that it does not think through these key issues. It makes some reference that the individual may bear the costs of their return, but it does not actually impose obligations, it does not actually impose practical details, and that is one of the key examples.

Q266 Chairman: That return though is return from the executing State back to the trial State; it is not the return to his home State in order to enjoy bail. Who is to fund that; say, quite likely, he has got no money at all in the foreign State?

Ms Bateman: It is a very good question.

Q267 Chairman: To which as yet there is no answer? This is for the implementing provisions, is it?

Mr Doobay: My Lord Chairman, one would think that, looking at this in purely economic terms, individuals otherwise would have to be detained at the State's expense, that they would prefer to pay the transportation costs of sending him back to his Member State of residence, rather than have the substantial costs of keeping him in detention.

Chairman: Absolutely.

Q268 Lord Mance: That would depend on how many people they were receiving in the opposite direction?

Ms Bateman: Indeed.

Q269 Lord Jay of Ewelme: What happens now, if somebody commits a crime in Scotland but lives in Cornwall; who pays for him to get back?

Ms Hodges: It is the suspect's responsibility.

Chairman: Really? Is there no scheme whereby, take Lord Jay's illustration, plainly he should be given bail but he does not actually have the wherewithal to return from Scotland?

Lord Jay of Ewelme: It would be a lot more expensive than getting back from Paris!

Q270 Chairman: Absolutely. Well, so be it. What about the timetable? All we have is, of course, the five-day provision, to some degree a moveable feast, in respect of a decision on whether to recognise, but certainly we have been envisaging a process of co-operation, particularly if it is tripartite, which must

inevitably take some time. Should the Framework Decision itself condescend to any detail as to this?

Mr Doobay: My Lord Chairman, certainly we think it should. It is very noticeable, if you compare this with the Framework Decision on the European Arrest Warrant, which has absolutely concrete timetables for all stages, that there is an urgency which comes across with the Framework Decision of a need to deal with it speedily, whereas certainly it appears to us there is less of an urgency made clear in this Framework Decision. Obviously it is operating to the suspect's disadvantage to have this process take a lengthy period of time, when it is not clear what will happen to the suspect, will they be kept in detention until and unless you can have the tripartite hearing and a European supervision order can be agreed? We would certainly welcome at least aspirational timings for the initial hearing to decide on the European supervision order and timescales for the periods thereafter, because, as you have rightly commented, there are only two finite timescales set out, one is the five days for enforcement and the other is three days for transfer after arrest. Apart from those two, our Framework Decision is utterly silent.

Q271 Chairman: In a sense, it is a more difficult problem than with the European Arrest Warrant, is it not, because there you do not actually at that point need any input, or probably you do not need any input, from the issuing State of a European Arrest Warrant; there it is, they have sent the Arrest Warrant, it is up to the executing State to get on and return the person back to the requesting State? Here you have got the whole process, as we have discussed, of agreeing conditions and indeed having the input from the suspect on that issue?

Mr Doobay: My Lord Chairman, I do agree that if you look at that in terms of the European Arrest Warrant you have an input from the suspect who is able to resist the European Arrest Warrant, and there are stages within the process, because it is not simply an automatic recognition, and then a physical return. In the same way, we cannot see why there could not be the same attempt to define periods.

Q272 Chairman: The other complication, I have to say, which strikes me is, it is all very well, but, again, if you take the case of the rape suspect in Paris, you have got to give the French court some time to look into the case, to decide whether actually it needs to go down the ESO route at all. When is this timetable going to start: arrest? In a sense, that is advancing it well before the period at which the proposal currently is dealing with it.

Mr Doobay: I think, My Lord Chairman, we have in mind not from that earlier stage because, obviously, the obligations at that early stage, in effect, are dealt with by Article 5, the ECHR. It is, in fact, from the

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stage when, and this is a relatively arbitrary decision but when the French court says “We would be minded to grant you provisional liberty but we are only prepared to do so if we impose a European supervision order.” It is at that stage that the court has taken the decision that they would be willing, in principle, to release you, subject to a European supervision order, and it is then, it seems to us, that the Framework Decision would kick in.

Q273 Chairman: That itself might be a considerable length of time after initial arrest?

Mr Doobay: My Lord Chairman, I entirely agree that it seems to us that is perhaps going outside of the scope of what is envisaged by this measure and that will be dealt with instead under the general rights available to a suspect under Article 5.

Q274 Chairman: Turning to breach of bail conditions, we have already, not least with Lord Lester’s question, touched on this, how will a breach be established, should there be a hearing and, if so, where. Do you feel that, consistently with the mutual recognition principle, it is still the issuing State who have got to take the final decisions on these things; is this right?

Mr Doobay: My Lord Chairman, there are a couple of comments, and, in fact, I would like to perhaps go back to one of the questions asked earlier, in terms of this, because we see this not just in legal terms but in terms of the workability of the proposal. It seems to us that if the issuing State is not involved, in terms of a decision on breach, then the confidence of the issuing State in being willing to use European supervision orders may well be undermined and they may simply not grant them in the first instance. It does seem to us essential, and something which is not dealt with at all within the draft Framework Decision, that there is a determination as to whether there has been a breach and that the suspect has a right to be heard in the determination of whether there has been a breach, and that the executing State itself is part of this decision-making process because the executing State is obviously the State which has the primary information from the other side. We do feel that the issuing State must be involved as well, simply because if they are kept out of that process then it may undermine their confidence in allowing an ESO to be granted in the first place.

Q275 Chairman: If we look at Article 16.1 and Article 17.1, the first saying: “The executing authority shall, without delay” report anything, the second saying: “In the event of a breach,” these Articles are drafted really on the supposition that whether or not there has been a breach is going to be self evident, that there is not going to be an issue as to whether there has been a breach, either there is a

breach which has to be reported, and in the event of which there are certain rights then in the issuing State, or there is not. It really does not grapple with, it seems to me, the question as to how you decide, in a contested case, whether or not there has been a breach?

Mr Doobay: My Lord Chairman, it seems to us, that is entirely right and also it avoids, to take one example, that there may have been a breach of a condition of the ESO through no fault of the suspect. To take an example, assuming the police station is closed, because there has been a fire on the day when they are due to report, there will have been a breach of the European supervision order, and the mechanism in the Framework Decision does not allow for any flexibility or materiality or any discussion.

Q276 Chairman: Unless retrospectively you could modify under Article 6.4?

Mr Doobay: It does seem to us that the process for assessing whether there has been a breach and what the consequences of such a breach should be have not been thought through at all, and the process certainly is not a fair one as set out there.

Q277 Chairman: Really does it come to this; there is a lacuna in the proposal as it stands, one could fill it by provision for the establishment of any breach, and indeed for the blameworthiness involved in any breach, and logically that should be a decision within and for the executing State?

Mr Doobay: My Lord Chairman, I am not sure that personally I would go that far, because I do think there is an important point about the confidence of the issuing State. I do think that it is not an issue which should exclude the executing State but, as the issuing State is the one which has decided to grant bail in the first place, on the conditions within the European supervision order, I think perhaps it would be difficult then to exclude them from the process of determining what happens after the breach and whether there has been a breach.

Q278 Chairman: After the breach, of course you are right, but as to whether there has been a breach it is less obvious?

Ms Bateman: I think, My Lord Chairman, it is, dare I use the word, commonsense, but I think the executing Member State will make the preliminary determination ‘has there been a breach’. They will then have to take the decision whether to report the breach and then it is the responsibility of the issuing Member State to deal with the consequences of the breach; so, again, this is our co-operation model, if you like. There is the example that Mr Doobay used, was the police station shut, was there some legitimate mistake, did people get the day wrong; in a sense,

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there needs to be a bit of flexibility, a bit of leeway, a bit of commonsense. If we could work it in, as I say, our co-operation model that the executing Member State makes a preliminary decision as to the breach, whether it is a material breach, but the decision on the consequences still rests with the issuing Member State as to whether they want the suspect to be returned or whether they will modify the bail order, the European supervision order.

Q279 Chairman: Under the proposal as presently drafted, do you understand that the executing State does have, or does it not have, a power to arrest, without, so to speak, instruction from the issuing State to do so for breach of condition?

Mr Doobay: My Lord Chairman, I think we understand that it does not, without the issuing State having given it the instruction to do so.

Q280 Chairman: What about if they anticipate a breach, if they get information that X has packed his bags and he is looking as if he is off to China, or whatever?

Mr Doobay: Again, My Lord Chairman, we do not see anything within the current draft which would allow for pre-emptive action to be taken.

Q281 Chairman: It could not fall under the obligation to execute? I think the Commission suggested there might be rights under Article 1. There are various possibilities. Article 1, the second paragraph: “under the condition that he complies . . . in order to ensure the due course of justice and, in particular, to ensure that the person will be available to stand trial . . .”. Then there is ‘3’: “Member States shall execute . . . on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.” Then there is Article 9: “forthwith take the necessary measures for its execution.” None of those would you regard as a foundation for a power to arrest in order to ensure that he cannot thwart the intendment of the order?

Mr Doobay: My Lord Chairman, I can certainly see how an argument might be made, but I think perhaps that simply exemplifies the problem; that would be quite a significant power, and if one were envisaged then it would seem preferable, to us, that it be explicitly set out within the text of the draft Framework Decision.

Q282 Chairman: Would you think it ought to be there?

Mr Doobay: My Lord Chairman, I can certainly see good, sensible, logical reasons why it would be there, otherwise it would undermine the efficacy of the European supervision order. We would obviously have the same reservations about having a speedy

hearing actually to determine whether such pre-emptory action was justified or not.

Q283 Lord Mance: I was going to pick up the suggestion you made, Ms Bateman, about breach, that the executing State determine whether there is a breach then report the breach, leaving the issuing State to deal with the consequences. May I suggest that normally guilt and sentencing go together and it is wrong, in principle, to have them dealt with by different people? On your theory, in fact, there would be a ping-pong, there would be a determination of breach in an executing State, report to issuing State to deal with the consequences, but the issuing State would then have to consult with the executing State before imposing any consequences. The better thing would be to have it the other way round, the executing State determines breach and consequences after some form perhaps of consultation at most with the issuing State?

Ms Bateman: I think my process was dealt on the premise that if it is the issuing State who, as we understand it, is the State who has the power to determine whether there should be an arrest, that was why I thought that the decision as to the consequences of the breach should be made in the issuing Member State as to whether they would instruct the executing Member State to arrest and transfer the suspect back.

Q284 Lord Mance: If you are talking about something like varying the conditions, imposing an additional condition, *par excellence*, surely that is something that the executing States should assess and decide?

Mr Doobay: My Lord Chairman, I will perhaps look at this in a slightly different way, in terms of, determining whether there has been a breach would seem, to me, to be an issue of fact, and, in the same way as in the UK the jury determines issues of fact and the judge determines issues of law, it would seem, to me, that it would be right perhaps that the executing State determines an issue of fact, whether there has been a material breach, also any breach at all, not least because they are closest to the application of the ESO in their State. In terms of the consequences, to take a specific example, if the executing State decided to simply impose another condition within the ESO, the issuing Member State might well say, “In fact, this doesn’t meet our concern. Now that you have established there has been a breach, we are not satisfied with the additional condition you feel would meet the risk of absconding,” or whatever the risk might be, and that could lead to the issuing State saying, “In fact, no; we no longer believe that the ESO is appropriate for this case.” It just seems to us that perhaps it would become more complicated.

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Q285 Lord Mance: That seems to postulate a lack of trust between States, which we are not allowed to assume?

Mr Doobay: My Lord Chairman, I am not so sure it is a lack of trust, as opposed to which State believes it has the ability to set the conditions, in the sense that the issuing Member State is protecting its position to prosecute the person it wants to be returned, whereas the executing Member State is simply fulfilling a function given to it under a mutual recognition instrument.

Q286 Lord Mance: If someone determines a breach, it is extremely unhelpful to receive in the foreign country a bald statement “There’s been a breach; he failed to report.” In reality, for the issuing State to be able to deal with this fairly, that is its task, you would have to send a substantial judgment, or possibly the whole transcript of the evidence, and that is going to be very cumbersome, is it not?

Mr Doobay: I think, My Lord Chairman, that is why we are suggesting the tripartite hearing. If, in order to determine the breach, you have—let us take a practical example—a video link, there is a physical hearing in the executing State, which the suspect attends, is represented, there is a video link to the issuing State, there is evidence given as to whether a breach has or has not occurred, a finding is made as to whether there has been a breach, there is then consideration as to the consequences of the breach.

Q287 Chairman: Who makes the finding?

Ms Bateman: The findings of fact would be the executing Member State; the findings of law would be the issuing Member State.

Q288 Lord Mance: You are actually contemplating two concurrent sets of legal proceedings in different countries, which I think would be a unique and interesting idea that we might consider?

Mr Doobay: My Lord Chairman, I am not so sure. I think we are entering complicated areas of jurisdiction here, because the physical hearing would not necessarily have to be proceedings in the executing Member State, in the same way that you can have evidence given via video link in the UK from another jurisdiction. I am not sure that it is helpful perhaps to go into the jurisdictional; it is more a question of principle. Without the three parties being involved in the determination of this issue, it seems to us to be unfair and potentially unworkable.

Chairman: It is all very well saying that we must assume mutual trust and recognition but, the fact is, unless there is built into this proposal sufficient to inspire confidence in enough Member States it is not going to get off the ground anyway.

Q289 Lord Lester of Herne Hill: I cannot really improve on the questions that Lord Mance has put. I just want to supplement that because of my own puzzlement. I think it is your evidence that under Article 16 there has to be a hearing before the breach of the Order is determined factually; there must be a hearing, even though Article 17 is only contemplating a hearing in relation to an Article 17, ‘consequences of breach’ stage. I think you are agreeing, are you not, that, initially deciding whether there has been a breach, the executing stage must have some kind of hearing for the person to be able to make representations before that decision is taken; is that right?

Mr Doobay: Yes.

Q290 Lord Lester of Herne Hill: You agree that is not what it says?

Mr Doobay: Absolutely.

Q291 Lord Lester of Herne Hill: And tends to be contradicted by the way in which it is drafted in relation to Article 17, which gives the impression that the only hearing is with regard to consequences of breach?

Mr Doobay: Absolutely. What we described is what we would like to see for the Framework Decision rather than what is actually in there.

Q292 Lord Lester of Herne Hill: We are told by the Commission that this cannot be amended by them, because this is their final word; that is why I am keen to look at it as it is now. It is meant to be an instrument to enhance mutual recognition, comity and trust across Member States in this area, as well as facilitating transfer and the enjoyment of the right to liberty, where possible. Let us assume it is Hungary or Poland, just to make it slightly more exotic than France. How can it encourage comity and mutual recognition and trust if you have two courts, one Hungarian and the other English, that are meant to reach some kind of mutual decision, with the ultimate decision taken in Hungary, that being the issuing State, and arguments going on, once the breach has been determined, as to what should happen in what you call a tripartite hearing? Is it not going to be extremely difficult to avoid conflict between the two courts when they are both expected to take a joint decision, with one court being able to trump a decision in relation to the other? That is what I find very puzzling. It does not seem to me that this is a practical way of enhancing trust. I know that you have said you place great store on the need for the issuing State to trust what is happening in the executing State, but what I do not understand is how that can be done under this scheme without actually causing more mistrust in the conflicts that will inevitably arise between the courts of both States

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with shared responsibility. That is a very clumsy way of expressing what Lord Mance was saying in his own questions to you before, I think. Is not that a very serious problem about the scheme as it stands at the moment?

Mr Doobay: My Lord Chairman, I think the way we would see it is that, the conflicts which may arise between the two courts, if we step back slightly, the issuing court's aim is to secure the attendance of the suspect, as and when required, for the trial process; the aim of any court in the executing State is simply to comply with the terms of the European supervision order. In the sense of looking again at the breach situation, our suggestion that the executing State be involved within that process is, firstly, as I think we would all agree, factually they will be in a better position to provide evidence as to what has happened. Also, so that if there is to be any amendment to the European supervision order they are in a position again to give their agreement to any amendment to the European supervision order, because any revision to the conditions will necessarily involve them having to say, "Yes, this is a workable addition," or condition, or "This is a workable revised condition within the ESO as it is." I am not so sure that there would be a conflict, because the executing State is simply looking to see that it can comply, in practical terms, with what is proposed under an ESO, and the issuing State is looking to see that it is satisfied that the ESO, on an ongoing basis, will allow it to bring back the suspect for trial and engagement within the trial process.

Q293 Lord Lester of Herne Hill: Are not both States concerned to ensure that the right to liberty is not unnecessarily infringed, in breach of the European Convention on Human Rights, and that there are fair hearings? Both States are concerned with that, they are both bound by the Convention, they have shared responsibility and they both have that wider consideration, do they not?

Mr Doobay: My Lord Chairman, I agree, but that seems to me to be not a reason for causing conflict but a shared concern which will inform the hearing process.

Chairman: I wonder if we have really understood this correctly. Sometimes, of course, it will be obvious if there is a breach or not, there will not need to be any hearing about it. We have been discussing the lacuna, namely the assumption that that will always be so, but, in fact, of course, it will not, sometimes it will be contested. The way, simplistically, the proposal is drafted is, there may well have been a breach, you report it, it is then for the issuing State to decide whether to arrest and transfer. When under Article 18.1, if that decision is taken, it seems to me that at that stage there is indeed a hearing before an English court

and the English court must themselves decide whether that is an appropriate response to the breach.

Lord Lester of Herne Hill: That is so, but that arises after the cumbersome procedure in Article 17 has been gone through.

Chairman: Certainly. Certainly, *ex hypothesi*, there will have been a decision to arrest and transfer, but at that juncture he is entitled to a hearing before, on the hypothesis we have been discussing, an English court, and the English court will be able to say, "Well, this is a venial breach and frankly, Strasbourg would not regard arrest and transfer as justified."

Lord Mance: May I suggest that Article 18.1, certainly as I have read it, is really only a prelude to Article 18.2 and 18.3 and is subject to that. In other words, the purpose of the hearing is a very limited one, to find out whether there is consent and if there is not consent to find out whether one of the grounds in Article 18.3 is an excuse for not transferring, otherwise you would have to transfer.

Q294 Chairman: Do you read 18.1 as giving any discretion in the Member State, the executing State, to decline to treat the breach as sufficient to justify an arrest and return, or not?

Mr Doobay: My Lord Chairman, I do not read it in that way, as it is drafted.

Q295 Chairman: No; you may well be right. It was a thought that occurred to me and I think that probably that hare has been chased far enough.

Mr Doobay: Perhaps I can make a supplementary comment, which may assist. In terms of the implementation of the European Arrest Warrant Framework Decision, there is no specific obligation that when deciding whether to execute a European Arrest Warrant a judge considers whether the execution would risk a violation of the defendant's rights under the ECHR. I can certainly see before an English court the suspect making an argument that, regardless of what it says in Article 18, if he can show that his detention is arbitrary or in some way disproportionate, you cannot oust the ability of the English court to take into account those arguments, but I am not sure that is in any way a sufficient protection, given the issues which we are talking about.

Q296 Chairman: It ought to be put there explicitly?

Mr Doobay: That is exactly what the Government has done with the European Arrest Warrant's implementation and the Extradition Acts.

Q297 Chairman: Can we move then to Article 15; this is the one which, on its face, would seem to give priority to the other forms of process there specified under a, b and c. Is that your reading, too?

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Mr Doobay: My Lord Chairman, I am not sure that is our reading. Part of the reason why we have raised this, along the whole of this process, is that, it appears to us, “without prejudice” simply allows the option of a Member State choosing to which out of their number of competing obligations it wishes to give effect. It seemed to me that, in the Commission’s evidence to your Lordships, that was entirely what they were saying, that this could be the subject of informal discussions, or your Lordships could be involved.

Q298 Chairman: The executing State is responsible for somebody under an ESO and then in comes a European Arrest Warrant from another Member State; it is up to the executing State as to which to give effect to?

Mr Doobay: My Lord Chairman, that is how we read it.

Q299 Chairman: That, I suspect you would agree, would be a more sensible approach?

Mr Doobay: My Lord Chairman, the only comment which I think we would wish to make is that this is not a dissimilar situation from a European Arrest Warrant, and there again the Framework Decision is silent as to what would be done with competing European Arrest Warrants, or a request outside the EU under an EAW. The UK, in implementing it, has set out, in fact, a list of criteria to be considered by, in this case, the Secretary of State, if there are competing requests, and has also decided that domestic prosecutions will take precedence over European Arrest Warrant proceedings. I am not sure necessarily we would say it was a matter to be dealt with in the Framework Decision but we do feel that there should be some criteria and/or certainty as to which process is to be dealt with first.

Q300 Chairman: Under the European Arrest Warrant, automatically a domestic prosecution takes precedence, does it?

Mr Doobay: Yes.

Q301 Chairman: Even if the European Arrest Warrant is for terrorism and the domestic prosecution is for shoplifting?

Mr Doobay: My Lord Chairman, in terms of competing requests then the Act specifies that those types of circumstances are to be considered; the relative seriousness of the offences, the place where they were committed and the time.

Q302 Chairman: It must be for consideration as to whether these criteria are introduced into the Framework Decision?

Mr Doobay: Or, alternatively, into the implementing legislation; but certainly we would not support an informal model where it is simply left up to an executing Member State to take soundings, or not, if they desire.

Q303 Lord Lester of Herne Hill: You cannot leave it to the Member States to implement without sufficient criteria in the Framework Decision otherwise you get just a complete lack of harmony. There must be reasonable legal certainty in the Framework Decision itself as to what Member States are meant to do in implementing?

Mr Doobay: Actually, certainly I would agree with that; but having seen what has happened with the European Arrest Warrant, which is entirely silent on this, and therefore the only way that it has been dealt with is through the UK’s implementing legislation, I would not disagree with that, as a principle.

Q304 Chairman: Can we then come finally to the question of procedural safeguards. I rather think the Law Society regret the fact that the Framework Decision on procedural safeguards in criminal proceedings has not achieved success. Is that correct?

Ms Bateman: Yes, certainly; and may I say, at this point, My Lord Chairman, we really welcome and appreciate the attention that this Committee has given to this issue, because it has kept the debate alive, so I would just like to add that. Certainly, ‘disappointment’ is a weak word in this sense, that the ‘procedural safeguards’ has not gone forward.

Q305 Chairman: You would like to see more safeguards explicitly brought into the Framework Decision?

Ms Hodges: In the absence of any overreaching procedural safeguards instrument.

Q306 Chairman: I think that absence is pretty plainly going to continue?

Ms Hodges: I think, yes. Our understanding is that there is an outside hope that it may be applicable to European Arrest Warrant measures only, and only for those surrender proceedings, but again that may have moved on since the last information that I received. In those circumstances, I think it is essential that procedural safeguards are recognised within this instrument, and at each stage where, in our view, the suspect should have an active part in the process. Obviously, the key ones are to have legal advice so that they can understand and appreciate the process that they are involved in, and interpretation, for exactly the same reasons. Those would be the two key procedural safeguards that we would identify need to be within this Framework Decision.

Chairman: Thank you all very much. Thank you all for your enormously helpful evidence. Thank you for coming, we have really been most assisted.

WEDNESDAY 23 MAY 2007

Present	Borrie, L Bowness, L Brown of Eaton-under- Heywood, L (Chairman) Burnett, L Clinton-Davis, L	Lester of Herne Hill, L Lucas, L Mance, L Norton of Louth, L
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Examination of Witness

Witness: SENIOR DISTRICT JUDGE TIMOTHY WORKMAN, City of Westminster Magistrates' Court, examined.

Q307 Chairman: Judge, thank you very much indeed for coming along to help us on this inquiry. Have you ever actually given evidence to one of these committees before?

District Judge Workman: Only, as it were, in the other House.

Q308 Chairman: Ah, yes. You will find us very civilised in comparison! You know the form then. We are on air. There will be a transcript available for your correction. I know you have seen the evidence we have taken to date, both oral and in writing, and you have had notice of the sorts of areas of questioning we would like your assistance on. Your experience, of course, is really second to none in this general area, because as the Senior District Judge I think you have sole responsibility in court for operating the European Arrest Warrant scheme?

District Judge Workman: With five of my colleagues, yes.

Q309 Chairman: With five of your colleagues, but you are the Chief Magistrate?

District Judge Workman: Yes.

Q310 Chairman: And extradition, too?

District Judge Workman: Yes, that is right.

Q311 Chairman: Those are the only areas, so to speak, within your sole preserve?

District Judge Workman: There is another jurisdiction in relation to terrorism, but that is slightly different.

Q312 Chairman: I see. This proposed European supervision order scheme is based, as of course we all appreciate, on the principle of mutual recognition, mutual trust between Member States and procedures, which is of course the same principle underlying the European Arrest Warrant. Has it, in your experience, been working with the European Arrest Warrant?

District Judge Workman: It has, and I think it has speeded the process up in many cases. There has been a number of difficulties with the Act which has kept the Court of Appeal busy.

Q313 Chairman: But are they difficulties really just in the mechanics of the scheme or do they cast doubt on the mutual trust which is supposed to underpin the scheme?

District Judge Workman: No, I do not think it has affected the mutual trust that is given.

Q314 Chairman: That has been working? People have been trusting each other, and so forth?

District Judge Workman: Yes.

Q315 Chairman: Do you expect the same level of trust? Do you think this scheme will attract the same degree of mutual recognition, or do you foresee difficulties on this?

District Judge Workman: My approach would be that the principle, I think, would be sound and it would be respected. I think the detail is the problem, and if the detail is not sufficiently well worked out then I think we will find that it is not relied upon.

Q316 Chairman: Quite. You have seen from our earlier evidence sessions that we have had some discussion of this proposal compared with an earlier rather more rudimentary scheme, Eurobail, which had not been worked through in any detail and which was never the subject of any specific proposal. Have you any views as between the two, or do you think this is the right scheme?

District Judge Workman: I think this is the right way forward. Eurobail, being rather an optional exercise, was not going to be very effective, whereas if this comes into being I think it will be binding on all and will be respected as such.

Q317 Chairman: Yes. Can we move on to the question of consultations? With the European Arrest Warrant scheme, with which you are, of course, particularly familiar, is there much which has to take place in the way of consultations, discussions between the respective authorities of the Member States involved?

District Judge Workman: In practice I find this a little difficult to answer because as between the judicial authorities of the requesting State and receiving State

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there is very little contact initially. We receive the warrant and we get on with it, but I do know that before that it passes through the Serious Organised Crime Agency and I believe there are a number of occasions when those warrants are examined by the Agency and further questions which arise from them are answered. So I think there is an element of consultation –

Q318 Chairman: Informal cooperation before it formally comes before you?

District Judge Workman: Before it actually reaches us, yes, but at the point that it reaches us there is no initial consultation. We deal with it as the defendant arrives. Thereafter, there is provision within the framework document for asking for further advice and guidance from the issuing authority and occasionally we have done that.

Q319 Chairman: Clarification of questions which remain outstanding?

District Judge Workman: Yes.

Q320 Chairman: There is a case called *Laporte*, which I think both Lord Mance and I were on in the House here not long ago, but overall my impression is that that scheme would be a much simpler scheme than the European supervision order which we are now contemplating. With an arrest warrant, you get the arrest warrant and basically you have to execute it. He is arrested, brought before you, and unless he has got an argument—and there are not many available to him—the order is made and off he goes. So there is not, on the face of it, as long as all the paperwork is correct, much need to discuss things. It is supposed to work in clear, simple terms. But with this, because the whole thing depends upon getting conditions which will satisfy both the issuing court and can be operated by the executing court, it is a slightly more complicated scheme and, on the face of it, one would have thought it requires rather more in the way of cooperation and consultation. Is that fair?
District Judge Workman: It is certainly fair on the basis which it is being looked at at the moment. I do wonder whether it is necessary to go down that road, because I think there are certain conditions which could be regarded as common in all Member States, and provided those were the conditions which were imposed I think it would be reasonable to assume that any executing state would be able to acknowledge them.

Q321 Chairman: So you are looking at a sort of common set of conditions which you expect to be agreed upon?

District Judge Workman: Yes. I think we could identify five or six common conditions which could properly be imposed in any state and it would be a

matter for the issuing authority to decide which (if any) of those they wished to impose by way of conditions or whether they wished to impose them all. I would not have thought it would be necessary to contact the executing judicial authority. It may be, perhaps, necessary to establish the practicalities of which police station they might have to report to, or whether the address is a valid one, but as between the two judicial authorities I would have thought that if you had a set of conditions which applied throughout the European Union there would not be too much difficulty about approaching it in that way.

Q322 Chairman: Under Article 6(2), except for certain specific obligations under 6(1) which the issuing authority may impose without more, it has got to get the agreement of the executing authority to impose a variety of conditions. I think that would include, for example, reporting to a police station?

District Judge Workman: Yes.

Q323 Chairman: But I agree that if you have a common set of conditions which all Member States are prepared to say in principle they are happy to accept, then it is just the mechanics of which police station, what times of the week, and all the rest of it?

District Judge Workman: Yes. I would have thought that was a fairly simple way to approach it. I am afraid I am rather simplistic about these matters.

Q324 Chairman: The simpler the better, I expect you will find.

District Judge Workman: It does not avoid a number of points being taken.

Chairman: Quite. Thank you very much.

Q325 Lord Mance: Just a couple of questions. You have said that you can ask for further guidance under the European Arrest Warrant, and have done. How long does that take before you get the answer?

District Judge Workman: It takes quite a long time. I would say it measures in weeks rather than days, but probably not months.

Q326 Lord Mance: Secondly, on the question of conditions, one needs to bear in mind, perhaps, that the definition of “executing authority” includes not merely a court judge and investigating magistrate but also a public prosecutor. Are you suggesting that some of the conditions could be worked out without judicial involvement, e.g. with the Crown Prosecution Service, or the police even?

District Judge Workman: No. I think if we follow the procedures which we would normally adopt here, it would be for the court to decide the conditions, even though the framework does in fact allow others to carry out that task. They do not in this country.

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Q327 Lord Mance: You have mentioned one, police station reporting, but I would imagine, thinking of domestic bail applications, that residence and district restrictions, restrictions on activities and medical treatment are all matters which would normally be discussed in court?

District Judge Workman: Yes.

Q328 Lord Mance: That sort of discussion could take quite a long time if it had to be done between two different countries?

District Judge Workman: Yes. I do not quite understand why it is necessary. I was trying to imagine that if France was wishing to bail somebody resident here, if they decided in the light of the circumstances of the offence and the circumstances (as they knew it) of the defendant that a condition of residence, security if necessary, a curfew, reporting to the police station was the appropriate order, I do not think it would be for the English court to try and second-guess that.

Q329 Lord Mance: But even the basic question of how frequently and at which police station are matters where normally, in a domestic situation, there is some input from the police as well as from the court, perhaps?

District Judge Workman: Very little. If, domestically, I conclude that I need to have a person report to the police station daily at whatever particular hour, I fix it without asking anybody.

Q330 Lord Mance: How does the French court in Montpellier know which police station, or what hours they are open, or whether they would welcome daily reporting, which they certainly would not, and so on?

District Judge Workman: I assume that if the order was made and it was made under these provisions then the police would have to follow that decision, but in terms of which police station, I imagine it would be on the basis we do it now, which is to ask the defendant which is his local police station. There may be a need to remand the case for a telephone call to be made to the police station by the prosecutor or the court, or somebody, but for it to come through a court in this country and for us then to say, "Well, actually the police station is Charing Cross," or whatever it is, I am not sure that that is really necessary.

Q331 Lord Lucas: What would the five or six bail conditions be that you would choose?

District Judge Workman: I would choose security as one, if only because I think the finance for this might prove a little bit difficult to manage in terms of who pays to get people to and from different countries, but security, residence, curfew, reporting to the police, surrender of passport and probably not to contact

any specified victim or witnesses if there was concern about that. I think all those are fairly standard conditions imposed around the country which I would have no difficulty with if somebody said to me, "This has been imposed by a court in Paris."

Q332 Lord Lucas: So Winchester Police Station, when I present myself there, will be expected to take its instructions from Paris?

District Judge Workman: If that is embodied in the law, yes.

Q333 Chairman: Do all Member States have facilities for all these conditions?

District Judge Workman: I am afraid that I do not know.

Q334 Chairman: You have never had to be involved in such things in the past? You have never had the possibility of conditions abroad?

District Judge Workman: No, never.

Q335 Chairman: You have not been involved in any of the discussions leading up to this particular scheme?

District Judge Workman: No, not at all.

Q336 Lord Lester of Herne Hill: I am trying to think of a very diplomatic and tactful way of putting my question without causing embarrassment in other countries. My experience is that even between us and France there are profound differences in the way the criminal justice systems operate and French judges are less European than British judges in certain respects in their criminal justice system. Whether I am right or wrong does not matter for my question, but my experience also is that the further you travel beyond France the more one enters problematic areas when you think of mutual judicial cooperation, including European Arrest Warrants. My question is, what experience do you and your colleagues have of dealing with the kinds of matters we are now considering under the European Arrest Warrant, not in a jurisdiction we all take our holidays in and know quite well, called France, which we are familiar with, and words like Montpellier which we are familiar with, but when you get to jurisdictions we are less familiar with and whose languages we do not speak or understand, and whose legal systems may be more remote from ours? I do not know whether that is a diplomatic way of expressing it, but I hope you understand what I am trying to say?

District Judge Workman: I do entirely. We have, under the European Arrest Warrant, received requests from throughout the European Union. I would say that probably our biggest customer is Latvia. So there is a broad spectrum of judicial authorities around the European Arrest Warrant. We, of course, start from

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the principle that we are obliged to acknowledge that there is this mutual trust and we work from there effectively. There has been a number of cases where there have been challenges to the jurisdiction which we were being asked to return people to, for example particularly in relation to Romany ethnics who fear return to certain countries, and the Bar provides us with a lot of information about those countries, but on the whole in the end we have usually been satisfied. There have been one or two cases where we have not made returns because we have been anxious about some issue, but I do not think ever because of confidence in the judicial process. Again slightly delicately, it comes to mind that there are, of course, some countries (which are not actually in the European Union so perhaps it is not relevant) where the European Arrest Warrant does run, but I have personally had to be cautious about returning people.

Q337 Chairman: Where does the European Arrest Warrant run outside the Union?

District Judge Workman: The Part 1 cases, and Part 2. For example, Russia is one of those where the Extradition Act will apply under Part 2, which is very similar to the European Arrest Warrant.

Chairman: I see.

Q338 Lord Lester of Herne Hill: Just suppose hypothetically a country (we will call it Ruritania) issues a European Arrest Warrant for punitive, political or baseless reasons. It is issued in that country and then the name of the person concerned enters the European information system, so that throughout all Member States Citizen X is then branded as somebody to be arrested, as it were. There are no safeguards, are there, against the issue of the warrant in the first place where it is an abuse of power, at least not a uniformly effective one?

District Judge Workman: Not as to the issue of the warrant, no, but as to the execution there is.

Q339 Lord Lester of Herne Hill: Yes, but then on the execution it very much depends upon the scrupulousness and care of the national court in the way it approaches its limited discretion in deciding whether to give effect to the warrant or not?

District Judge Workman: Yes, that is right.

Q340 Lord Lester of Herne Hill: Would it be fair to say that some countries are more strict about these matters, perhaps, than others?

District Judge Workman: I do not think I can answer that with any confidence, but I suspect you are right.

Q341 Chairman: We are talking about not the European Arrest Warrant here but the supervision order, and in a sense it is going to serve the nationals of this country if in fact the scheme worked to bring

people back and we do accept what we are asked to accept?

District Judge Workman: Yes.

Q342 Lord Borrie: I was a little puzzled earlier when you, Judge, in answer to questions from Lord Mance suggested that there would not be any need for particular approaches to authorities or courts in other countries in either direction. I think you said that when you were exercising jurisdiction here in London under the European Arrest Warrant you did not find the need to make inquiries abroad on the general matter of whether any of the conditions, which you later specified to Lord Lucas, should be imposed. I take it that it is your understanding that because everything is to depend on mutual trust then whether it is a court like yours with the same jurisdiction in Latvia or France, or wherever in the European Union, mutual trust requires that if it is a British resident in one of those countries who is perhaps to be returned here there is no need for those courts to get in touch with the British authorities, or the other way round, in most cases. I am rather surprised at that because I thought—and I therefore ask you to develop the point—that there would be quite a lot of occasions where contact was needed, not only for the human rights reasons outlined by Lord Lester of Herne Hill but even just on the basic practicalities of what conditions of residence or reporting to police stations would be appropriate, conditions of employment, perhaps, and so on and so forth. Surely there is a need for some contact between the judge making the decision to return someone and on what conditions? Surely there would be very often a need for cooperation between the judge and the authorities in the other country to which the individual is to be returned?

District Judge Workman: Yes, you are quite right about the contact between the court and the authorities because clearly if the court imposes a condition to report to the police, the police have got to be aware that that condition has been imposed and so the court will notify the police station.

Q343 Chairman: That is a domestic court and the domestic police.

District Judge Workman: But it would have to be done from the Paris court to the local police station in England. We need to devise some method of dealing with that, because there is no easy way of doing it, but it should not really, I feel, need a reference to the court in England to do that.

Q344 Lord Borrie: That is where I was a bit surprised.

District Judge Workman: If one thinks of an ordinary domestic case where you are actually imposing conditions, the condition of bail to report to the

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police, one does not actually have to advise the police or ask them whether they are content with that. One makes the order and the order is conveyed to that police station, usually through the police officer at the court. Then they are aware that somebody is required there between 4.00 pm and 6.00 pm on Fridays, whatever it may be. That information has obviously got to be conveyed to the police station from whichever court actually makes this order, but on the basis of mutual trust and understanding about this I assume that the court in France has the same authority to be able to tell the police, “Here is a man coming to you. He is to report to you,” on whatever day is specified.

Q345 Lord Clinton-Davis: I speak from a position of appalling inexperience in this situation, but in the domestic courts the suspect does have a right of audience, does he not? He can say what he likes through his representative or himself?

District Judge Workman: Yes.

Q346 Lord Clinton-Davis: Would the same apply as far as the situation we are considering is concerned?

District Judge Workman: I am afraid I cannot speak for the various other jurisdictions as to how they deal with their bail applications, but I am assuming that human rights principles apply and that he would be entitled to be heard and, if necessary, represented.

Q347 Lord Mance: That was the point we picked up at previous hearings, that it is not made specific and indeed all that is said is that a supervision order may be made by the issuing authority after having informed the suspect of his obligations. It does not refer to his right to be heard. But one can assume, I think, that what you have said is required by the Convention. Just going back to the previous points you were making, I think there may be a misconception here in your suggestion that the issuing court, say in Ruritania, would get in touch with the British police. The procedure, as I understand it, is for the issuing court to make an order—whether with or without consultation we have been discussing—and then for it to be transmitted to the executing authority here. That would mean in our book, I think, a British court, and a British court would then decide whether or not to recognise it and would have, I think, rather limited grounds for not recognising it. It may be that the question you were raising about how far there needs to be consultation at the original making rather depends on how far it is open to the executing court to actually modify the order, but again we are told (and it seems correct) that the intention of the language, Article 6, paragraph 4, is to only allow very limited modifications by the executing court. There is

a procedure for review, but that has to be done by the issuing state.

District Judge Workman: Yes. I could not see what I would do if I was presented with this order of the foreign court. I could not alter it, except in very extreme circumstances, and I do not see on what basis I could refuse if it was within the sort of conditions I have suggested. I think there are some more obscure conditions which might be imposed, which might cause us some concern.

Q348 Chairman: Article 6(2) does in terms require agreement between the two authorities, that is you as the executing authority on the scenario we have been positing, and the issuing state. Just assume, because it could happen if this comes into being, that you are faced in your own court with a Polish chap who is accused of rape here and wants to go back to Warsaw on bail. You, therefore, as the issuing authority, have got to consider what conditions you would require to be imposed on him. You would, under 6(2), surely have to secure the agreement of the Polish authority? He would have to have his say on whether any of these conditions were too burdensome and all the rest of it. How would you set it up?

District Judge Workman: I think I would deal with it as a straightforward bail application under English procedure. He would provide such information as he could to persuade me that bail would be granted. Whether I would or not is another matter, but assuming I would, then I would look to see what conditions are appropriate and I feel that if they are the conditions which I mentioned earlier they are the sorts of conditions which I would be looking to—security, his address, residence and curfew at his home—which I do not think require any other court to look at it and endorse them.

Q349 Chairman: Have we not been told by somebody that some states for constitutional reasons do not allow the surrender of passports, for example?

District Judge Workman: If there are conditions which are not acceptable to all the states then clearly that condition cannot be one of those.

Q350 Chairman: I just do not know whether there are facilities for the taking of security, which is, what, from sureties or from your own recognisance? Various possibilities exist in our jurisdiction, but whether they exist in Latvia I simply do not know.

District Judge Workman: I saw that there was a suggestion from the Law Society that perhaps it ought to be explored to see what conditions there are.

Q351 Chairman: You would subscribe to that?

District Judge Workman: I would certainly support that, yes.

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Lord Lester of Herne Hill: Would that not also apply to medical treatment?

Q352 Chairman: I am sure it would.

District Judge Workman: I must say medical treatment is a bit of a worry really, because in my view it requires their consent, because treatment should not really be imposed.

Lord Lester of Herne Hill: Quite.

Q353 Chairman: But you might very well get the consent of the prospective person to be bailed but not have the facility in his resident country to do whatever is required. It may be psychiatric treatment.

District Judge Workman: That is right. It is not one of the conditions that I regard as a common condition to all countries.

Q354 Chairman: If and in so far as there are to be tripartite hearings or even discussions between the two Member States' respective authorities, what proportion of courts in this country have got, for example, video-link facilities? Your court, I imagine, has?

District Judge Workman: Yes, we do.

Q355 Chairman: But then you are one of the great and mighty!

District Judge Workman: I would not put it that way, but we have certainly got a video-link.

Q356 Chairman: Is that common?

District Judge Workman: It is becoming more common and I think one could say that there would be a central court within most areas that would have a video-link. Some of the more country courts perhaps would not, but I do not think that would matter because you could go to the adjoining court. So I think that could be provided. I have to say that our experience of video-links is that it becomes extremely difficult in terms of interpreters. It can be managed, but it is not easy.

Q357 Chairman: Reverting to your own experience in the European Arrest Warrant field, you have indicated that there have been, so to speak, informal early discussions between SOCA (Serious Organised Crime Agency), which is the executing authority here (if that is the right term), and the issuing state but have you yourself ever had to engage, when it has got to your level, in any discussion?

District Judge Workman: Yes.

Q358 Chairman: I do not want chapter and verse, obviously, but what sort of level of person do you talk to and how is it set up?

District Judge Workman: I started by asking the CPS to make the inquiries for me as the representative of the issuing authority, and when that did not prove fruitful I wrote, through the court clerk, to the judge in France about it and eventually got a reply.

Q359 Chairman: This is where you are executing one of their warrants?

District Judge Workman: That is right, yes. I hope I am getting the facts right. It is a case called Vey, which had one of the difficulties that one has with examining magistrates as to what point the process had reached, as to whether it was a prosecution or whether it was still an investigation.

Q360 Chairman: I see. Is this a reported case now?

District Judge Workman: Yes, it is.

Q361 Chairman: I think that probably deals with the consultation area of questioning, but looking at recognition and enforcement, first recognition, have there been equivalent problems in the European Arrest Warrant area with recognition to those that are envisaged here?

District Judge Workman: There have been cases where the warrant itself has been challenged and it has been said that it is not a warrant under Part 1. There has been a number of cases where that has arisen. There are certain defects in the completion of the form, basically, and that is regarded as mandatory and therefore a failure to do that correctly means that the process fails, but I think that is the limit of it.

Q362 Chairman: Are there the sorts of equivalent grounds for non-recognition? I cannot remember, and I ought to, what is the European Arrest Warrant regulation.

District Judge Workman: It comes under the Extradition Act.

Q363 Chairman: That is right, of course it does. Has it got this *ne bis in idem* provision and all the rest of it?

District Judge Workman: Yes, it does. The basic principle is we look first of all to see whether the warrant is valid, then whether it is an extradition offence, and then we move to the bars which are actually in the Act, which are rather wider than the framework decision, and from the bars you move to human rights and then health, mental and physical condition.

Q364 Chairman: Yes, but this is rather narrower, is it not?

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District Judge Workman: Oh, yes.

Q365 Chairman: There is the double jeopardy rule.

District Judge Workman: Double jeopardy, yes.

Q366 Chairman: Then there is a discretion to refuse. One ground of giving a discretion is age. If you are asked, for example, to execute a warrant in respect of somebody who is younger than your own minimum criminal age of responsibility you have got a discretion to say no, but of course the consequence of exercising that discretion to say no is that this luckless young person will in fact therefore remain in custody in the other state, which recognises a lower age of criminal responsibility. So on the face of it, it is not a very good idea, but on the other hand there are, as I understand it, considerations of principle. You do not want to lend yourself to a process which prosecutes people whom you regard as under age?

District Judge Workman: Yes. There is a similar provision in the Extradition Act, but of course that works to the advantage of the child.

Q367 Chairman: Exactly. That is the great contrast to be made.

District Judge Workman: Yes, and I think that is an important distinction.

Q368 Chairman: Absolutely. The other discretionary grounds for non-recognition are, I daresay, ones you would not expect to find very often. Immunity or privilege under the law, what is that? I suppose things like diplomatic privilege?

District Judge Workman: I suppose so, yes.

Lord Lucas: Whoever the Member is for France at the time.

Q369 Chairman: The head of state, quite, and diplomatic. Well, we had better pass quickly on from there. Amnesty—I suppose we do have amnesties, do we, from time to time?

District Judge Workman: I am not sure that we ever had a statutory amnesty. We have a police decision that they will not prosecute cases where you hand your knife in, and that sort of thing, but it is not really an amnesty.

Chairman: With an assurance you will not be arrested for doing it.

Lord Burnett: There is supposed to be a tax amnesty, which has been very widely advertised, which is going to run out very shortly, if that is of any help to Members of the Committee!

Chairman: Quite!

Lord Burnett: Overseas bank accounts.

Q370 Chairman: Can we pass then to enforcement, because a number of our witnesses, I think, have envisaged that there may be problems there. How do you see that?

District Judge Workman: Yes. Could I rather rudely just interrupt in relation to the bars? I am concerned about sending somebody back who may be seriously ill and I think it would be useful to have some provision to give discretion to the court if somebody needs to be returned under the supervision order where they are seriously ill. A power to defer, or something of that sort, would be sufficient, but I think it would be quite difficult at times, if somebody was seriously ill, to have to make the journey.

Q371 Chairman: On the face of it, there is nothing to deal with that at all. There it is, you have got this person under supervision and he has been loyally abiding by the various requirements put upon him, and then suddenly the issuing state says, “Right, we want to try him next week.”

District Judge Workman: Yes, and he is in hospital.

Q372 Chairman: In the ordinary way you would simply say, “Right, off you go.” I am not sure how it does work actually. What happens in that situation ordinarily in the scheme?

District Judge Workman: I do not know quite how it does work, actually. It is not really clear from the framework decision, but I think you could envisage the situation where there is a breach of condition and he comes back before the court and is then going to be transferred back. If at that point somebody is admitted to hospital with a heart attack, or something of that sort, you would not want to start making an immediate order, you would want to defer it until he was well enough to go.

Q373 Chairman: That might happen either because he has breached a condition and therefore, as you say, it is during the course, or it might happen at the end when he is simply summoned?

District Judge Workman: Yes.

Q374 Lord Lester of Herne Hill: In the asylum jurisdiction, an asylum judge would obviously look at the Human Rights Act and decide that someone suffering from AIDS, for example, facing a return to a country where he could not get treatment even if he was a failed asylum seeker might not be returned to that country because it would breach the Human Rights Convention. Presumably in an extreme case that kind of consideration would inform your own jurisdiction, would it not, because it would be inhuman to deprive someone of medical attention where he needed it here and could not get it there and the effect of the order would be to kill him or to subject him to some absolutely gross inhumanity?

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District Judge Workman: Yes. I think the extreme cases would be covered by the Human Rights Act, but I think in the less extreme cases, somebody who is temporarily ill but it is not life-threatening and who could probably receive treatment in the country he was going to anyway, the situation is slightly different and I think most courts would like to have the discretion to be able to say, “We will defer the decision for a week or two until you are well enough to travel,” but that is just a personal view.

Q375 Chairman: It may be that that would just be expected to be worked out between two civilised nations, but certainly there is nothing in the framework decision which appears to address it. Beyond that, there seems to us to be a number of problems, not least the question of how one decides the issue as to whether or not there has been a breach of the obligations. Articles 16 and 17 appear to have been drafted upon the supposition that that will be self-evident, either there will have been a breach or there will not, but there may be a possibility of a breach, an alleged breach, but a disputed breach as to whether somebody has gone within a prohibited area or whether he has failed to attend the police where he has some perfectly good excuse, and all the rest of it?
District Judge Workman: Yes.

Q376 Chairman: How do you envisage those alleged breaches being dealt with?

District Judge Workman: I am afraid I would, I think, apply the principles we use now, which is that if someone is arrested for a breach of the conditions he is brought before the court—and he has to be brought before the court within 24 hours, to the minute—and if he denies the breach of condition then evidence, representations, are heard and a decision made.

Q377 Chairman: Within 24 hours of what?

District Judge Workman: Of arrest. That is the way it operates at the moment. I am bound to say that, on my reading of Article 16, I do not think it is workable because, taking a rather absurd example, if a defendant in England, having been bailed by the French court, is seen to be getting on a plane to South America, it would be no use us reporting the matter to the French Court because by then he will have gone.

Q378 Chairman: You do not read this framework decision as allowing the executing state any power, so to speak, to arrest preparatory to gaining the instruction of the issuing state?

District Judge Workman: It does not appear on the face of it, no.

Chairman: I follow. I think Lord Bowness has a question on this.

Lord Bowness: I think the question has just been asked and answered, thank you.

Q379 Chairman: So you do not actually think that there is any power at the moment to do anything to prevent an apprehended breach of condition?

District Judge Workman: It is not contained in the wording which I have. Obviously at some point if this framework decision is ratified and then embodied into our law, it may well be that our law would contain a provision.

Q380 Chairman: Quite, because we have to give flesh to it.

District Judge Workman: Yes.

Q381 Lord Lester of Herne Hill: I might be being extraordinarily stupid, but if someone is on bail here subject to conditions which have been agreed, or whatever, and then the police tell the judge that the person is about to go to Latin America, do you not have the power here to revoke bail and either just to lock him up or to impose fresh conditions, or whatever?

District Judge Workman: Yes, we do, but the important aspect is to make sure they are arrested before the length of time elapses that it takes to get to a court and make that decision. In my rather silly example, if someone is actually on the plane to South America you want to be able to get a policeman to say, “Excuse me, you’ve got to come off the plane while I take you to court to have your bail reviewed.”

Q382 Lord Lester of Herne Hill: There is no power under English law to do that?

District Judge Workman: There is under English law.

Q383 Chairman: But not in respect of our responsibilities under the European supervision order?

District Judge Workman: No.

Q384 Lord Mance: How often does it arise actually, if ever, that you hear of an apprehended breach, for example someone has bought an air ticket, but you did not get an actual breach and steps are taken, because that does not seem to be covered either?

District Judge Workman: No. It is more common now because the police now have the power to deal with a belief that there is going to be a breach of condition. That is a fairly recent change in our law, but it is quite common now and a useful provision.

Q385 Chairman: But as Article 16(1) presently reads, if there is a dispute as to whether there has been a breach, as I understand what you have told us you would perhaps not immediately report back to the issuing state, you would first make a decision for

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yourself, yes or no, has there actually been a breach which must then be reported? Is that how you would approach it?

District Judge Workman: Yes, I think so. I would quite like to see the court having the power to have before them the alleged offender and then having the power either to transfer immediately or to grant bail again on the same terms or more onerous terms, or to remand in custody pending notification to the issuing state, or possibly even discharging if it came within the provisions of—it is Article 18, is it not?

Q386 Chairman: Discharging what?

District Judge Workman: I think it envisages discharging—it is Article 18(3), “may refuse to the arrest and transfer only,” and then there are the four points. If that arises, presumably effectively you are discharging the defendant. I cannot imagine that is going to happen.

Q387 Chairman: Yes, but as I understand it, at the end of the day there might be some last ditch reason not to go through with the whole process of returning him for trial depending on one or other of these four circumstances?

District Judge Workman: Yes.

Q388 Lord Mance: I am not sure it is discharging in every case. It might be in case one, but in cases two and four you would certainly just continue with the existing regime?

District Judge Workman: Yes.

Q389 Chairman: There are simply circumstances in which you would not just automatically go through with the arrest and transfer back to the issuing state?

District Judge Workman: Yes.

Q390 Lord Mance: Under the existing provisions, as my Lord Chairman has said, the contemplation is that the issuing authority will take any substantive decision about whether there is a breach and about what to do, and that involves the scenario where the defendant is in one country but a report has been made to another country and that other country’s judicial authorities are taking the decision about matters in the first country. How do you view that as a scenario?

District Judge Workman: Provided there is a power to detain the defendant in custody pending that decision, then the decision effectively is one for the issuing State, because it is its case.

Q391 Lord Mance: That is the argument, but how practical is that when you are considering the question whether there is a breach in the executing state and when you are considering how serious that breach is and what action should pragmatically be

taken in respect of it? How sensible is it to hear the evidence remotely and to take a decision in a remote way?

District Judge Workman: What I would have liked to have seen is a power to the court to be able to move in both directions, so that if we had something such as a defendant brought before the court for breach of his reporting conditions to the police station and he had arrived at the police station an hour late because the train broke down, I would want to be able to see that the court would be able to re-bail him, either on the same or more onerous terms, without actually having to go through reporting it all to the issuing State. There may be occasions where there is a sufficiently serious breach of the conditions of bail to warrant a remand in custody, but because we do not know the state of the case in the issuing State a remand in custody in this country pending the information which is required after reporting the breach to the issuing State may well be the way to move forward. Thus, the court has a discretion to deal with the minor breaches but a power to transfer him back immediately or to seek advice from the issuing State if it is more serious.

Q392 Lord Lester of Herne Hill: In my naughty way I keep thinking about the television soap which would describe the conversation between London and Budapest or a more remote area of Hungary on this question, the language differences and the cultural differences, and having this discussion about whether it is a serious breach or less serious breach through a video-link in a court in Birmingham, which happens to be the nearest one to a rural court, and the same the other end. It seems to me comical.

District Judge Workman: I agree, it is.

Q393 Lord Mance: But I think you are suggesting, are you not, that actually the executing authority should take the decision and should be trusted to take a sensible decision as to whether the matter could be dealt with in the executing state or whether it should be, to some degree at least, remitted?

District Judge Workman: Yes.

Q394 Lord Borrie: But that is not the scheme?

District Judge Workman: No, it is not, I am afraid.

Q395 Lord Borrie: Is not the scheme, as I understand it, one which requires the issuing state to be in charge, as it were, throughout, whatever happens, and if something happens which is an alleged breach it is supposed to be reported to the issuing state? But, of course, we have all rightly been concerned, including yourself, Judge, with the reality of practical situations where unless something is done rapidly in terms of apprehending the person concerned then whoever is in charge has no powers in practice

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because the bird has flown literally in the case you gave. Is there not some way which is fully in accordance with the spirit of what we are dealing with whereby the issuing state remains in charge and things have to be reported back there, but the temporary arrangements, including apprehension, are delegated to the executing state and its authority?

District Judge Workman: I am sure with careful drafting that ought to be possible.

Q396 Chairman: Can I then come to the questions arising under Article 15 about competing obligations to surrender or extradite? As the Article is framed, as I understand it, one of these European supervision orders does not stop a European Arrest Warrant being implemented or an extradition request, let alone an attempted prosecution by the international criminal court, or indeed under the final sentence of that Article a domestic prosecution here, so it is absolutely the lowest priority of all?

District Judge Workman: Yes.

Q397 Chairman: Is that a good idea?

District Judge Workman: Could I just take the last one, which is domestic prosecution? I think it would be better if there was some discretion in the executing court, because we get a situation under the European Arrest Warrant where we are unable to return somebody for a very serious crime, sometimes involving child witnesses, and so on, where it is clear that the matter should proceed urgently, and they are facing a court here for no insurance or something like that, and we are barred. We have to stop it.

Q398 Chairman: You have to, under the European Arrest Warrant?

District Judge Workman: We have to, yes. If there are any proceedings pending, domestically, they have to be cleared up first. That is an extreme example.

Q399 Chairman: Under what provision is that? That is most bizarre. Anyhow, let us take that as correct.

District Judge Workman: I would like to see a discretion.

Q400 Chairman: Quite! But I would have thought there is nothing to prevent a discretion here? It merely says it shall not prevent; it does not say it will require the Member State?

District Judge Workman: That is right, yes.

Q401 Chairman: It would seem to me there ought to be a discretion really as to which of these various proceedings to give priority, between, say, if the French want him back to try him for rape as opposed to a request for extradition to take somebody to the States on terrorism grounds. Section 22 of the Extradition Act 2003 is the one which appears to

require, as you say, that he has to be dealt with in one way or another for the UK offence first, even if it is withdrawal or discontinuance. They might do that with the insurance case if he is wanted for terrorism in Spain?

District Judge Workman: Yes. It is surprising how difficult it is to get that across.

Q402 Chairman: Quite! You are absolutely right. But you would welcome a discretion under the ESO scheme which does not exist under the EAW scheme?

District Judge Workman: Yes.

Q403 Chairman: Now can we just come to deadlines? The European Arrest Warrant has strict deadlines. This ESO scheme only has the deadlines, as I understand it, set out in Article 12, five days to decide whether to recognise and execute an ESO. There are provisions for review, but at the early stage when one is trying to settle any conditions under Article 6(2) there is absolutely nothing. If one does not adopt what you say is the straightforward simplistic approach of having in effect a number of common conditions which one almost automatically imposes and needs only scant agreement to do, if you do not have that scheme you have actually got to reach agreement with the issuing state?

District Judge Workman: Yes.

Q404 Chairman: It could take weeks and weeks and this chap is lingering in custody awaiting this agreement?

District Judge Workman: Yes.

Q405 Chairman: Should it be tightened up? Could it be?

District Judge Workman: Clearly, any matter of bail must be dealt with at the earliest opportunity, but if there has to be this discussion between the two judicial authorities it is going to be quite difficult to do. Even if it is by video-link, I think that would still be difficult.

Q406 Chairman: As you say, you have then got the difficulties of interpretation and he ought to be present there, too, anyway?

District Judge Workman: Yes. There is another aspect and that is in relation to the European Arrest Warrant the response from the other states does vary a lot. Some places are very swift and responsive, but others take quite a long time and I do not think we would find it very easy to get control of this unless there was a time limit.

Q407 Chairman: The scheme as a whole strikes me—and I would like to know if it strikes you too—as being actually much more difficult to operate, a more

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complicated scheme than the European Arrest Warrant?

District Judge Workman: I think it is, yes, very much more difficult, in its detail. I think its principle is quite simple and clear and clearly worthwhile, but the detail I think is much more difficult to work out than the European Arrest Warrant.

Q408 Chairman: You presumably have had an awful lot of citizens of other Member States before you as suspects and you have had to consider granting them bail without the benefit of any scheme such as this? Is it fair to say, for the very obvious reason that they would be more difficult to police on bail than a native of this country, they get bail less often?

District Judge Workman: There is, of course, a big distinction between the European supervision order and the European Arrest Warrant.

Q409 Chairman: No, I am not talking about the European Arrest Warrant. I am now talking about our own internal cases. You have got a Polish man who is over here, or a French woman over here done for shoplifting, or whatever it is. Would they be less likely to get bail for the very reason that they do not have community ties here, that they are more likely to go, more likely not to be available when you want to try them?

District Judge Workman: I think the answer must be, yes. I hope it is not a very great impediment to bail.

Q410 Chairman: Why is it not? How do you deal with it under the present scheme?

District Judge Workman: Bail, I think, is very much a matter in the round and if we have somebody who is here permanently resident I do not think any of us would worry unduly about it. If somebody is here temporarily, then there is more difficulty, but if again he has an address and we can ask for his passport, because we can –

Q411 Chairman: An address here, so you would hope to keep him here?

District Judge Workman: Yes. Then I do not think most of us, for most offences, would find that difficult, but clearly I am afraid it all depends upon the case itself, what he is facing and what his circumstances are. But one cannot deny that it is a factor.

Q412 Chairman: Quite. We have discussed a number of difficulties which arise out of the scheme as presently we understand it. Have we failed to spot any? Are there others that we ought to be alert to?

District Judge Workman: I think we have broadly covered the matters that I was looking at.

Q413 Lord Mance: Just one general question. There was reference at the outset to the Eurobail scheme, about which we heard considerable evidence. That would involve an automatic remission to the home state, the state of usual residence, except perhaps in cases which are going to be over quite quickly, and possibly (though one would have to define them) in cases where no bail was conceivable, perhaps pragmatically conceivable. It has been suggested that that would have the merit that the original bail decision, as well as the enforcement, would be dealt with by the home state, and of course if bail was refused once the man or woman had been sent to their home state at least they would then be in prison in their home state?

District Judge Workman: Yes.

Q414 Lord Mance: That really has not been worked out, but does that have attractions as a scenario?

District Judge Workman: I think the best court for deciding bail is the court which is actually responsible for the offence, in principle, because I think that is the starting point. If it were possible to devise a system where, if they were refused bail, they could be remanded abroad then I suppose there is some merit in that.

Q415 Chairman: Remanded in custody abroad?

District Judge Workman: Yes.

Q416 Chairman: That is a different scheme again.

District Judge Workman: Yes. I do not think that is actually feasible in terms of preparation of cases, and so on.

Q417 Chairman: We have been very often looking at these cases in terms of UK citizens being suspects in other Member States, but looking at it the other way round, if you have a suspect for rape who wants to go back to Lithuania and you think you jolly well ought to be in control as to where he is and what he is doing before his substantive trial comes up?

District Judge Workman: I think that would be our view, that it was us who were to be primarily responsible, yes.

Chairman: Lord Bowness.

Lord Bowness: My Lord Chairman, the question of Eurobail has been already dealt with, thank you.

Q418 Lord Lester of Herne Hill: We have not really, I think, asked many questions about this in evidence generally, but Article 13 is dealing with requests for review and the more I read that the more I think about the District Court in Scunthorpe in conversation with the District Court in Budejovice in the Czech Republic, on a review under this mechanism and the need for, for example, consultation, and the more bureaucratic and difficult

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to operate it seems to be. I do not know whether you have looked at any of that, but it does seem to me to be not a very easy system to operate?

District Judge Workman: I agree entirely. I was a little mystified, to be honest, by the review which has to take place within 60 days because some remands on bail are for lengthy periods of time and it may be that everything is all right for the first two months, but after three months there may be a change of address or a change of somewhere to report.

Q419 Chairman: I think the Commission's witnesses explained. It is not very well drafted as it is, but what is intended is that the intervals within which you can complain should not be longer than this. That is

really the point. You must not delay it for more than 60 days. I think it was Lord Mance who first pointed out that as presently drawn it reads ridiculously.

District Judge Workman: Yes.

Q420 Chairman: Are there any other questions? If not, it remains for me to thank you very much indeed, Judge, on behalf of the Committee. You have been enormously helpful. It has been very nice to hear from somebody who (a) has been dealing with European Arrest Warrants, and (b) if this comes in is going to have to deal with this, too. Thank you very much for giving us your time.

District Judge Workman: Thank you very much for inviting me.

WEDNESDAY 6 JUNE 2007

Present	Borrie, L	Jay of Ewelme, L
	Bowness, L	Kingsmill, B
	Brown of Eaton-under- Heywood, L (Chairman)	Lucas, L
	Burnett, L	Mance, L
	Clinton-Davis, L	Norton of Louth, L

Examination of Witnesses

Witnesses: BARONESS SCOTLAND OF ASTHAL, QC, a Member of the House, Minister of State, Home Office, Ms ANN McLAUGHLIN and Ms MELISSA BULLEN, Home Office, examined.

Q421 Chairman: Minister, we are very grateful to you indeed for coming and giving us some of your precious time. We know how limited that is. You have given evidence before so you do not need to have explained how we work. I know you want to make a short opening statement, which would be helpful. Perhaps you would just introduce your colleagues.

Baroness Scotland of Asthal: To my right is Ann McLaughlin. She has responsibility for this portfolio. To my left is Melissa Bullen, who is a lawyer assisting in relation to this. Firstly, can I say thank you very much for asking me to come and talk to you about this portfolio today. I feel I should say at the outset though that it is not altogether clear that the negotiations on this proposal will move forward on the basis of the current drafting, or indeed in this format. There has only been one discussion of the Commission's proposal under the German Presidency and it is not clear that the incoming Portuguese Presidency will give it priority. I understand that the Portuguese have indicated a wish to have an orientation debate to establish whether Member States support the general principle of EU action in this area and whether it should be taken forward or not. I think the Committee should understand that this is really at the very early stages and, although I understand that there may have been quite a lot of work done by the Commission, this Committee knows better than any that the Commission and the Council are very separate and distinct entities and the enthusiasm of one does not necessarily predicate the enthusiasm of the other. Her Majesty's Government though, I should make clear, are not opposed to this measure in principle, and indeed, we welcome the general idea in principle, and we recognise that there are arguments for a measure, whilst we have to say frankly that safeguards would need to be in place to protect our national law and our policies. We therefore, in any negotiation on this, must ensure that the measure would not have unintended adverse consequences or costs. As the Committee has already indicated by its questions, the devil really will be in the detail and that detail has not really been gone through to any extent to date. So we are cautious and will negotiate in that spirit. In that

context, we very much look forward to reading the conclusions of this committee of inquiry and the guidance that you may give. Because we are at the early stages, the powerful indications that you may be minded to give will be of the most help. I know, Chairman, you might have been thinking "Are we a bit late on this?" This is actually an ideal time for you to be expressing your views, because we will want to take them fully into account in formulating any position that we develop in due course, but I think it is fair for me to emphasise the caution with which the Portuguese Presidency seems to be approaching this measure.

Q422 Chairman: Minister, that is an extremely helpful opening. One question, of course, is with what degree of enthusiasm we as a Committee should be recommending that this be progressed. We would like to know whether the Government thinks, whether you think that there is a real need for a proposal of this sort, something to deal with the problem, if you recognise it as a problem, of having foreign nationals, if I can put it in those crude terms, on remand in custody for the very reason that, without some scheme of this sort, there is a greater risk of releasing them on bail and therefore a disproportionate number of them are remanded in custody for trial across the entire Union. How much do you think there is a need for this?

Baroness Scotland of Asthal: I think that is why we are giving this cautious support and, of course, a lot of it will depend on how it would mesh with our own national law, whether we can make sure that those issues which are peculiar to our system are preserved and how it works. That is why I say the devil will be very much in the detail. We have concerns therefore about the possible impact on national bail law and that is something that we are going to have to look at on the detailed drafting to make sure it would not impinge. I think it would be true to say, as one of the questions of the Committee raised, that we would have preferred the Eurobail option, and this was made clear, I think, in the explanatory memorandum of September of last year, but the European supervision order proposal I think is certainly not one which we would say is unacceptable. It is

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something that could, I think, if worked on carefully and well, deliver some real advantages across Europe, but that is predicated on it working well and the negotiations on detail being what we would wish.

Q423 Chairman: Can I come to Eurobail in just a moment. In the mean time, just in terms of the statistics, one document we have from the CPS indicated that as at 31 March of this year the number of EU nationals held on remand totalled 580, of whom 405 were untried, and 175 were convicted but unsentenced. So there is a moment in time at which we hold 580 nationals of other Member States and—because I think you have seen the evidence we have received from Mr Jakobi, and I think actually this is a quotation from the Commission impact assessment—at any given time there are around 4,500 EU nationals in pre-trial detention in EU countries other than their normal country of residence. That is 4,500 at a moment in time but 10,000 in all over the space of a year. On the face of it, that is quite a lot of people and the suggestion is that as many as 80 per cent of those people would be free, would be on bail but for the dimension that it would involve their going out of the trial state into their country of residence. Are those the sort of figures that you would have in mind? Of course, more difficult would be to know how many we would be exporting and how many we would be importing. Has any work been done to consider that?

Baroness Scotland of Asthal: We are looking at the number of our nationals who may be in other countries and of course, you will know that there are some figures that we are able to get from the Foreign and Commonwealth Office, who do spot checks, and I am sure that Lord Jay will remember from his days as to how those are collated. They are never, of course, going to be entirely accurate. They are not always going to be static because there will be ebbs and flows but it gives you an idea, a flavour, of what is likely to come our way and those are issues that we are looking at. All the issues that you highlight, Chairman, are why we are cautiously favourable to it, because if you do have individuals who are not given bail for the sole reason that they are a national from another country and therefore are at risk in terms of what that judicial system sees as being a non-returner, that is obviously very serious and it is also potentially an unnecessary restriction and restraint if through comity and mutual recognition we were able to put in place a safe, fair and cost-effective system to enable this to be done in a proportionate way. In the statement I have just made, however, there are a whole set of precursors or conditions which we would have to be satisfied could be delivered before we could say “Actually, this now will inure to our benefit and to the benefit of the other European countries and their systems too.” That is why I say we are in

favour of this in principle. The question is how it should be delivered.

Q424 Chairman: I appreciate that you are not yourself, so to speak, defending the details in this scheme. Indeed, it is helpful of you to indicate they are very much in a state of flux and could alter substantially. Just a word on Eurobail: I think it would be fair to say that the majority of our witnesses—have you seen the evidence that we have had?

Baroness Scotland of Asthal: I have not seen all the evidence you have had but it may be that my team will have done.

Q425 Chairman: I think it is fair to say that the bulk of the evidence we have had indicates really that it is not a runner, to put it in round terms, not least because the great majority of Member States would really want to remain in control in respect of those accused of offences for trial in their own State, and the trouble with or the consequence of Eurobail is that essentially, because all offences are, at least theoretically,ailable, even murder, the decision would be taken not in the state of trial but in the state of residence, and equally, of course, if bail is refused, they would serve their time in custody on remand in their home state. Would you agree from what you know of it so far that it really does not look as if it is a serious option any longer?

Baroness Scotland of Asthal: I think what there may be are elements of Eurobail which could be conjoined with elements of this order. I think you are absolutely right in saying that Eurobail itself was not without flaw, and the proposal that was made in relation to that was a proposal, and you would have had to work really hard to make it workable. So there may be elements of it which are good, just as there are clearly elements of the suggestion on the table now which are also good. Is it possible that what we might get at the end of the day is some sort of hybrid between the two? Yes, it is, but we have to look to see what is likely to come out. As I say, it has been very interesting that the German Presidency only took one meeting on this and the Portuguese Presidency is saying “Let us basically look very carefully at how enthusiastic everybody else is before we proceed with it.” We will be one of the countries who will be saying, “We think there are some very good things that we could do with this.” How much company we will have we will see once the Portuguese get under way.

Q426 Chairman: Just before I call on Lord Jay, we had a document from the Bundesrat and they, to my surprise, suggest that the Commission’s fundamental assumption that foreign suspects are remanded in custody to an excessive degree is simply not correct. That might colour Germany’s view that there is a lack

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of enthusiasm for any of this but I would not myself suppose that to be the UK Government's approach.
Baroness Scotland of Asthal: No, it is not.¹

Q427 Lord Jay of Ewelme: I found that broad context extremely helpful but my question was going to be whether you had any sense, even from informal contact with other Member States or from the one meeting that took place, as to whether there might be, as a result of this orientation debate launched by the Portuguese, a conclusion that yes, we should go down this path, in which case we would clearly want to steer it in the right direction, or whether you thought there was no realistic chance and it will just be pushed into the long grass and we would hear no more about it.
Baroness Scotland of Asthal: I think it is a really open question. This is not one where I can say long grass territory is definite or that this is something that is enthusiastically going to be taken up. What we have seen taking place more and more is that countries are seeking to concentrate, actually in a very British way, in a pragmatic way, on what works, what will deliver real benefits, how we can get a practical outcome out of this, and it very much depends, I think, on whether it is perceived to be a Europe-wide issue. If you look at some of the things that are now appearing much more successful, like Prüm, there are some clear outcomes that have garnered a great deal of enthusiasm for it through the German Presidency because people see that it has utility on the ground and will have practical resonance. So I think if there is a concentration on practicality and if there are a number of other countries who have come to the cautious but positive view that we have that this is something which has utility and will assist, then I think that is likely to come out of the Portuguese discussion. If, however, the German view, that really this is not necessarily as pressing as others think it to be, then of course it is likely to be more difficult.

Q428 Chairman: I think it would be helpful if we discussed it on the basis that there is some prospect of having some scheme of this character, otherwise we are all wasting our time. It also seems to me that this is the scheme on the table and, whilst it would be helpful to know how it could be improved in the Government's view, it is worth discussing this particular scheme, although recognising, as you have said, that it is not necessarily to be regarded as in its final form.

Baroness Scotland of Asthal: Yes, and I think it is important for this Committee to know that our assessment is that it could have some real benefits in practice.

¹ On examining the transcript the Government added: The numbers affected by this proposal are not certain. The Government position is not affected by this at present but as this develops, a full impact assessment does need to be made to consider the cost/benefits of the proposal.

Q429 Lord Clinton-Davis: Can you, Minister, summarise the representation which has been made to your Department about this proposal by the main participants as far as this is concerned?

Baroness Scotland of Asthal: I do not know whether Ann has some clear details on that. Certainly, my impression is that this has not been an issue which has been hotly discussed at Council by Ministers. It is at the early stages therefore. You will know, for instance, there is JHA council next Tuesday/Wednesday, with a dinner on Monday night, and certainly this issue is not, as far as I am aware, up for specific debate, so it is not at the forefront. I do not know whether, Ann, you have any specific detail about whether we have been lobbied in a particular country.

Ms McLaughlin: No, we have not so far. There has been some informal discussion with the Commission, very brief informal discussions before the working group meeting at the beginning of January but that is it so far.

Q430 Chairman: The notion that there should be some scheme, either Eurobail or this scheme or some variant, has been around now for quite a long time. The Commission of course have now given it voice and crystallised it in this particular form but is there no sense that there is a will for it generally?

Ms McLaughlin: There has not been anything that has come through very strongly to us, no.

Q431 Chairman: Perhaps a few thousand extra people in custody on remand is not a matter of great concern around the Union.

Baroness Scotland of Asthal: I think it is, and I think that is why one of the things that I think is quite difficult for us dealing with it at this stage is to get concrete indications of support or antipathy. If we were further down the negotiation timetable, and if we had gone to Council and if we had had discussions about this between colleagues, I would be in a much better position to say to you "The Italians think this" or "The Germans think that" or "The French under Sarkozy are now changing and this is the picture." What do I think? I think this is an issue which will become of increasing importance, because we are working increasingly closely with our European partners on crime in all its manifestations, whether we are talking about people trafficking, interdiction of drugs, terrorism, a whole plethora of areas where we are working ever more closely with our international partners because the nature of crime is changing. Even our local crime quite often has international dimensions. That will mean that that there will be offenders committing offences in comity with other offenders around Europe who will be arrested in those other states. So this is an issue which has become increasingly important to all of us, and if

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you look at the debates that we have had on prisoner transfers, for example, we know that prisoner transfer issues are real issues between our European partners and have caused quite a lot of debate and concern, and interior ministers across Europe have identified it as an issue which we need to resolve and address. I would reasonably anticipate that they may feel the same in relation to this issue but this Committee also knows it is a question of timing and how many other pressing portfolios are before Council—not that people are not interested but which portfolio will get priority. The fact that so much time, energy and commitment has been devoted to it by the Commission is a clear indication that they believe that this is a pressing European issue that the Council should grip, and I can imagine, by the way in which the papers have been presented, therefore, it is an important one for them and for Europe. So I do not want this Committee to think “We are going to do all this work and it is not going to have any benefit,” because even if it were not used immediately, do I think this is an issue that is going to go away in the longer term? No, I do not.

Q432 Chairman: Can we perhaps have a look at some of the more detailed issues which arise? Even though we recognise that you are not committed to this particular scheme in its present form, under this scheme, would you share the Law Society’s view, for example, that you are going to need some sort of tripartite procedure to set it off? If you are going to have, say, an Englishman in Paris accused of rape and the question is whether he should get bail from the French court as the issuing authority, and if so, on what terms, that would then fall, if an order is made, to be executed over here. Who should be talking to whom about that issue in, say, Paris, where he stands accused? How do you envisage it happening?

Baroness Scotland of Asthal: The first thing to say, I think, is that we believe that we are going to have—I know this is not as clear as you would like—a proper discussion between the Member States that will permit agreement of what the conditions will be. This whole issue is about what the conditions are going to be, who is going to set them, how they are going to be exercised, how they are going to be enforced and ‘what happens if’. So in one sense, part of this becomes quite circular because we have to know where are our partners are going to sit in relation to their likely response to some of this. That is perhaps not as helpful as you would like.

Q433 Chairman: We have a scheme, and, as you say, of course, it deals with these things. Article 6 makes provision for certain conditions to be imposed at the will of the issuing state; others to require agreement with the executing authority. How should this

process be undertaken? It may be that governments simply have not yet formed views on these sorts of detailed questions. I do not know.

Baroness Scotland of Asthal: We have and we have not, first of all, but secondly, there is an issue, is there not, as to who the executing authorities are going to be?

Q434 Chairman: That is indeed a question we come to.

Baroness Scotland of Asthal: Is there a central authority? If there is going to be a central authority, who should that central authority be? Should there be a central authority in each country similar to the central authority we have, say, on the Hague Convention in relation to child abduction? If so, how is that going to be paid for? What are going to be the rules that will operate in relation to how the central authority will work in unison with the executing authority? Should the executing authority be the court? Certainly, that is something that we would be more comfortable with in our jurisdiction because the court has normally been the determining factor in making those decisions. That is why it is all quite complex, and we have not come to a firm conclusion as to which would be the better option, not least because there are certain cost considerations in terms of how it should be done and by whom, and all of those, I think, are things that we are going to have to work through. So much of this detail at this stage has not been consolidated, not least because we are having to respond to what some of our partner countries may wish. When we have done it before, we have done an audit almost in terms of what structures are already in place in other countries, because sometimes there is not a correlation between their system and ours, and we have to identify what would look similar to our system, whether it is going to be acceptable, whether we are going to do it on a mutual recognition basis and, if so, what standard that is going to entail. The questions that you are asking here are going to be very similar to the questions we will be asking, and that is why I say again, it is the devil in the detail, because we want a system that (a) we think in principle this is a good idea and (b) as Brits, we are renowned for pragmatism and our ability to say “How will it work? Who will do it? Who is going to be able to transfer this information? What will I recognise, and if I’m going to recognise it, what have you got in your country which will enable me to feel comfortable that there is a reciprocal arrangement here that is likely to work?” All of that is detail. Do we think that the ideas that are being put forward by the Law Society and others are interesting? Yes, we do. Are they necessarily going to be the ones that we would fly with? We are not sure. It depends on some of the other issues that need to be responded to. That is why I said right at the beginning that we are very interested in the evidence

that has been given to this Committee, very interested in the ideas that you will come up with and the judgements you will make, because they are bound to be (a) of assistance and (b) of influence when we come to make our final determination as to how we will propose to put this forward. It has to be done in a way that does not trespass on our own bail law, which would be deliverable within our system in a way that is transparent, fair, accords with the ECHR and delivers a better outcome than we currently have. Those are the sort of parameters within which we are going to have to work.

Q435 Lord Lucas: May I ask a couple of questions? Firstly, obtaining the suspect's consent to any of these orders is going to make things a great deal easier. If in every case the suspect's consent is required to an order, we will have to worry a great deal less about the appropriateness of the conditions that are applied, because if the suspect agrees to them, that removes a lot of the problems. It becomes his decision as to whether he wishes to return here on those terms.

Baroness Scotland of Asthal: I have to say, Lord Lucas, that that is in itself rather challenging as an idea. Can you imagine in our system saying to a defendant, "We will only grant you bail if that is what you want"? The court here makes a judicious assessment as to risk, as to propriety, before granting or remanding in custody. I am just very doubtful that the idea that consent would be required of a suspect defendant is necessarily going to be the right way forward. It is not in the current draft of the Framework Direction. Our domestic bail processes have no requirement for consent to the imposition of bail conditions and that is what we are talking about. I am just not sure that that is necessarily going to be possible and helpful.

Chairman: Just to nail this, of course, he must have his say as to what conditions are proposed but, those having been settled, why would he ever not consent? He either goes free on those conditions or he stays in prison in Paris. I am not sure that consent, for my part, really adds anything. I am sorry.

Q436 Lord Lucas: I just raise the question. The other speculation that I wish to raise is, in the event that there is a general lack of enthusiasm or difficulties being raised, whether this could not be started in a more loosely coupled sort of way. If a foreign court were able to apply to a central executing authority of some kind to say, "May we bail this person in the UK on these terms?" and the negotiation then proceeded happily, as long as that central executing authority were given the powers to make this happen, there surely do not need to be a lot of other things that go with it because it becomes a system which will evolve by negotiation with individual countries, who will

settle the difficulties in practical cases over a period of time.

Baroness Scotland of Asthal: We come back then, do we not, to who the executing authority is going to be and what the function of the central authority is going to be? For our part, our executing authority is the court because that is the body which is going to be able to make a judicious assessment as to whether the rights of the individual are being catered for properly, that it is proportionate, that the bail conditions, if bail is granted, are not too onerous. All those issues are going to be dealt with, so for us, the court is going to have to probably be the executing authority if we are going to feel comfortable with this process.

Q437 Chairman: And the issuing authority?

Baroness Scotland of Asthal: And the issuing authority, question mark. You then come back to what is the issuing authority going to be? You will know that in some countries they have an administrative system, so the issuing authority may be dependent upon who the issuing authority is in that state. The state addressed may have a different issuing authority, but we come back to whether we have mutual recognition, and there are differences. For instance, if we just take France, some of the things which are done administratively there are done by our courts and vice versa, but if we were to say that, in relation to process X, it is only a court which could do it, we would disentitle those other states from using the system that they then operate, and we are then into whether we are suggesting that we need to harmonise those systems before we can operate it, which we are not. I think that is why it is quite difficult because, if we have an issuing authority which is recognised in that system and which we recognise, is that sufficient?

Q438 Lord Lucas: As I was saying, if we do this much more loosely, if we had an executing authority in this country, a designated court, as we do for traffic offences, and we gave them the power to accept our nationals on bail from foreign authorities, that is all we need do. Then they could negotiate with those foreign authorities as they saw fit, grant bail when they saw fit, and bring back to begin with perhaps a small number but, as we got used to the system, an increasing number of our nationals to serve their bail here. We do not need, at least initially, to have a lot of co-ordination. It is something we could do off our own bat and encourage other countries to do too, and allow a mutual system to grow up over time.

Baroness Scotland of Asthal: I think that would be incredibly challenging because you would have to have a system which was consistent so you would have fairness and, although that is a very interesting

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idea, for myself, I cannot see how it would work in practice.

Q439 Lord Lucas: Why do you have to have fairness? We are looking to provide a benefit to our citizens. If other countries choose not to provide a benefit to theirs, to some extent it is not our problem.
Baroness Scotland of Asthal: I think it would be fair to say that we have always developed policy in this country predicated upon delivering a fair and transparent system. So it is a fundamental premise upon which we have always sought to work. I do not think we are really going to depart from that, if I can say as gently as I can, in relation to this issue.

Q440 Lord Mance: I wanted to follow up the difficulty which arises, which I think you have touched on, from the wide definition of the concepts of issuing authority and executing authority, which, as you have explained, include in some domestic systems non-judicial individuals or persons holding offices which we might not describe as judicial, although they might be described as judicial elsewhere, such as a public prosecutor. I fully accept your point that in this country we would operate a system using a court or a judge, although no doubt that would create problems as to how you channel the discussion to him/her and get the decision from him/her, but we are talking, under this scheme, about the recognition of decisions made abroad by foreign issuing authorities, such as a decision that the suspect must be arrested and transferred back to the issuing state under Article 18(1), such as a decision by the executing authority, which might be a foreign public prosecutor under Article 16 that there had been a breach. We are also talking, of course, about an initial agreement between the issuing authority and an executing authority. It does seem to me that there could be potential human rights arguments here if we are being expected to recognise the decisions of bodies which we would not recognise as necessarily judicial bodies in this country. I think there is a potential problem.

Baroness Scotland of Asthal: That is why I say—and I agree with you particularly in relation to Article 16—that these are issues that we have to look at very carefully indeed to make sure whatever we structure does comply with our ECHR obligations, is transparent and would be therefore sound. All these issues I think would be issues that we would have to look at in negotiating on this particular Framework Decision.

Q441 Lord Bowness: I would like to go back to where we are at the present moment, Minister. You said in opening that this was an opportune time for us to be preparing this report and it was an opportunity to make views known at an early stage.

You have also said that it is an issue which, in your opinion, if not immediately, is going to have to be addressed, and the general proposal is useful. Maybe this is happening but I would, in a sense, be comforted to know: whilst I realise that we are not in control of presidency agendas, is this not an enormous opportunity for the UK to have discussions with our partners to formulate a scheme as we think it ought to be worked, rather than reacting to a proposal which lands on a table at a time not of our choosing, in a presidency not of our choosing and, having done that, to then get it on to the agenda? I hope, Minister, you will be able to say that that is what is going to happen but it does seem to me that it should be happening that way.

Baroness Scotland of Asthal: I think it is happening on a number of agendas. If you look at the way in which we have tried to push the European agenda on JHA forward, it has been predicated on the practical, the deliverable, and those things which will have immediate impact and, hopefully, outcomes for our citizens. We have tried really hard on a whole series of portfolios to do just that. So I can certainly assure the Committee that this is an issue which, as I have said, we are supporting, albeit I have tried to be clear about the caution with which we are giving that support. Some of the issues already identified by Lord Mance are things that we are going to grapple with. You cannot brush those safeguards aside. What we have found—and I use Prüm as an example—is where we have been able to quite energetically engage in discussions with our colleagues, we have been able to garner a reasonable amount of support on a number of items, and we have on occasion been able to influence the shaping of things so that we are together able to deliver something with which we are not only comfortable but that we can feel a deal of satisfaction with. This will be an issue of which, as I have said, her Majesty's Government is cautiously supportive. I do not mean that cautiously supportive to suggest there is any lack of lustre on this but the questions that this Committee have set out are the questions that we would have to internally have answered before we would be able to say "Yes, this is a thoroughly good thing now and we are happy to sign up to it."

Q442 Lord Bowness: I understand that entirely and I accept that the Government may well have had successes in various quarters on different issues. What I am really suggesting is that, if nobody is terribly excited about this at the moment but we think it would be useful, can you, Minister, give me an assurance that we are actually going to go to work on getting it together in a way which solves the problems which are clear from the questions which have been articulated round the table, so that we have something positive to put to our partners when it is

discussed? Indeed, perhaps when we have got it together, we can press for it to be discussed rather than waiting for it to happen at somebody else's initiative?

Baroness Scotland of Asthal: I am trying to be as clear as I can that that is what I believe we are trying to do. We are supportive. We are not negative. We have already engaged in this work. Can I guarantee you that other people will share our enthusiasm? No, I cannot.

Q443 Lord Mance: Can I just ask a general question, without pushing it too hard. I understand that this is a Framework Decision and therefore inevitably intended to be filled out by the national legislators, but there has been a certain degree of criticism of the way in which it has been thought through, or not thought through. Indeed, it was put to the Commission representatives, and it does cause one to wonder whether there should not be some procedure for ensuring that a draft emerges from the Commission—we were told it was a final draft—which actually presents a more coherent appearance and can be readily understood. You touched on the question of enforcement. The draft is entirely opaque, and it is quite unclear that it has the meaning which the Commission sought to attach to it. Indeed, on the face of it, it has the opposite meaning. This is not very satisfactory. I appreciate they do not have parliamentary draughtsmen and they do not, apparently, use their legal department for drafting but it does seem to me it might be a cause for reflection, to use the European word, by governments.

Baroness Scotland of Asthal: I think the Commission constantly give governments cause for reflection, and I think their opportunity to hone what they give to us is, of course, always there and I know that, certainly in the ten years that I have had the privilege of being engaged in some of this work, that has been a constant aspiration of many. I think that is all I should say about that really.

Q444 Chairman: Whether this is a good vehicle to try and revise the entire approach of the Commission to drafting framework decisions will be, no doubt, for consideration. I have to say—and this rather sceptical or cynical thought crosses my mind—Prüm, the European arrest warrant, the exchange of criminal information, all these other things, one can understand the enthusiasm in Europe for all these because it all adds to the fight against terrorism, crime, trafficking, etc. The one thing about this problem here is that it does not do any of those things at all. All it does is to help, if it comes about, those few thousand too many people who are in custody on remand. Do you think that is a possible reason why

it fails to attract some of the enthusiasm of competing projects?

Baroness Scotland of Asthal: I do not think so. Certainly I have had a number of discussions with my counterparts and ministers of the interior and ministers of justice, and the issue of prisoner numbers, the issue of those on bail, and the issue of how we deal with them has been an issue that I know I have had discussions about in the margins with a number of my colleagues. If you were to be uncharitable and turn it the other way, whether it is helping people by giving them their liberty, there is a pressing issue for those who are responsible for imprisoning people that we all have difficulty on numbers, and one of the issues is that we would quite like to look after the citizens who are the nationals of that particular country. There is an issue about making sure that we have our nationals in the right place, if you like, particularly as many of those who offend are not resident offenders; they are, if you like, passing trade, passing through our countries. So I do not think that the fact that this is an issue of liberty for them is impinging adversely on their minds. I do think it is the problem of having a number of very pressing, quite contentious issues with which to deal, trying to get movement on those where you have the greatest amount of assent first and looking to deliver things. One of the problems we have had in the past is not delivering as much as the citizens of our country would like us to deliver as quickly as we would like to deliver for them, and therefore I think in the most recent times the Council has tried to concentrate on what can be delivered the most quickly, and has said, "Let us do that first" and "Of course we want to do these other things but let us get those things that can be delivered quickly delivered." I almost get the impression round the table that there is a feeling that there is not enthusiasm for this or that this is not a positive move. I think it is a positive move and it may be that, if you were to have discussions with me on Thursday, after I have been to the JHA, after I have spoken to my colleagues in the interior ministries, I will be saying "There is roaring enthusiasm. They think it is the hottest thing known to man," but I cannot say that. I have not had those discussions. I have not specifically raised it myself. My colleague, Joan Ryan, has not particularly raised it with me and, from what Ann McLaughlin says, officials have not specifically received those sorts of inquiries. Just to remind the Committee, that is not surprising because, if it has only just got on to the Council agenda and there are a whole load of other things to do, that would be normal and it does not indicate enthusiasm or a lack of enthusiasm. It does not actually indicate anything at the moment. I am certainly happy to say that we could write to the Committee once we know more as to the level of enthusiasm or otherwise there is for this particular Framework Decision.

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Q445 Chairman: That would be very helpful. We would indeed welcome that. We would be interested to know whether it is the intention of her Majesty's Government to try and raise it up the agenda.

Baroness Scotland of Asthal: It is one of the issues, along with a number of others, that we have had in mind. I say to you absolutely frankly that I myself have not had this specific Framework Decision within my purview, but then I have been dealing with other things, like deportation with assurances, Joan Ryan has been concentrating on Prüm. There is a whole plethora of things. It does not mean that this is not one that we should raise up the agenda; it is just not one that, to my knowledge, has been first on the agenda, because there have been so many the other things. I do not know whether either Melissa or Ann can assist in terms of what may be available in the Department about which I am not aware.

Chairman: May I suggest that two of the most obvious selling points, if one were trying to urge other Member States to adopt it with some enthusiasm, would be first, that actually, it works to the extent that it does free up prison places, and Heaven knows they are at an increasing premium, at least in this jurisdiction, as we all know. Secondly, it will actually have the result of releasing on bail people who should be on bail rather than on remand and who may well actually be acquitted in time and have served therefore terms of imprisonment that they should not have.

Q446 Lord Jay of Ewelme: Again, it is a sort of process question, Minister. I can see that in the Department, and in any department, there are issues which absolutely have to be dealt with because they are coming to the Council and they are going to be at the centre of attention, and there are other issues which, in a sense, are voluntary, the sorts of issues in which the Department may be able to influence things at an early stage and there will be a lot of those issues. I guess my question is a resources point because you cannot possibly pick up everything that you would be able to influence and then try to do so. First of all, are there criteria for those issues which you would think "ok" or is there some process for deciding what are the directives, what are the issues, which you think there is a real chance of influencing at an early stage in the British interest and therefore you are going to do that, and is this one of them?

Baroness Scotland of Asthal: I think this is one of them because we do see that there could be real benefits. I hope this Committee is familiar with how unusual it is for us to be able to say that we are cautiously enthusiastic or cautiously welcoming; that is quite a strong statement actually. Do I think this is an issue which would inure to our benefit if we could overcome the difficulties which are clear and inherent in the detail? Yes, I do. Is this something which we

will give support to and, therefore, seek to explore? Yes, it is. Is it something which we will try and garner support for across the board in a way which would enable it to be safely delivered? I think that is right. This has to be looked at with many of the issues with which we are seeking to make progress on, all of them. If you look at the issues on co-operation, and with Prüm we are looking at co-operation between criminal justice agencies, trying to get a better understanding between them, then this is all part of a piece because it is predicated on identifying problems, trying to find practical solutions which will deliver beneficial change to our different European partners. We have to be very realistic that some of these issues will have real benefits for some States but other States may see that there are potential disadvantages just on numbers. Are the countries that have more people abroad than they have of other country nationals at home possibly going to be less enthusiastic than those that have larger numbers at home than abroad? Well, the Committee can make its own judgment about that. There are issues of justice which I think should engage all of us, and being fair to our citizens, enabling them to serve their sentence or remain on bail nearer to their own homes, is something upon which we, in Europe, are all agreed. We have said in terms of prisoner transfer agreements that it is better for a person to serve their sentence, if at all possible and practicable, at home near to their friends and family and that is the more humane option. However, if a proposal was being put forward which would trespass materially against our own bail provisions and make it too difficult for us, would we support such a proposal? No, I am afraid we would not. One has to be realistically pragmatic about these issues. I can see the noble Lord Bowness shaking his head, but I know we have done this on a number of occasions. We have been enthusiastic, we have tried to get our views across, and on many occasions we have succeeded. On other occasions we have not, and if the risks are too great, we have not been able to continue with our enthusiastic support.

Q447 Lord Bowness: Forgive me if I shook my head, I do not disagree with anything the Minister said, I think what I was seeking to ask earlier and, as I understand it, what Lord Jay was suggesting—I would not want to put words in his mouth—all that you say is correct, but are we going to take the initiative on this particular proposal at an early stage?

Baroness Scotland of Asthal: By virtue of the fact that we have indicated our support, we already have. It is not our proposal but we have already indicated that we, the UK, are supportive of this proposal. What we are engaging in now is the detail, that we are not a country that said, "We do not think this is a good idea. We don't think it should be part of the way

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forward. We don't think we should be discussing it, and we are not going to support the discussion on it further", that is not our position. Our position is supportive and our position is we would now want to look at the detail, that is where we are.

Q448 Chairman: Can we look at one or two questions of detail. On the question of non-recognition, are you content with the Framework Decision as presently drafted on that, or should Member States be permitted to refuse recognition on additional grounds, such as dual criminality? Have you any views? If you have not, please, just say so.

Baroness Scotland of Asthal: We have not considered determined views, we are continuing to consider the proposed grounds, for instance, for refusal. In terms of dual criminality, which I think is what you are looking at, is it not?

Q449 Chairman: Dual criminality is not presently there, but should it be?

Baroness Scotland of Asthal: We have not made dual criminality a precondition. You will know that in the European Arrest Warrant, in the Extradition Act, we have had it as dual criminality. It would be fair to say that dual criminality has been an issue which many other states have wanted and we have been happy to agree to in those other situations, but we have not come to a settled position. Our position has always been we look at the merits of the proposal on the table; if those merits can be delivered without dual criminality, we have not let that stand in the way of agreement; and if they cannot be delivered without dual criminality, then we have.

Q450 Chairman: What about age of criminal responsibility? Obviously at the moment that is a discretionary ground for refusing recognition, but is that a good idea? Ought one not possibly to reflect that if you refuse to accept this scheme on that ground you are going to be condemning the under-age to custody when otherwise they might be on bail?

Baroness Scotland of Asthal: We have said that we think age should be a matter for the executing state, that is our view. The reason for that is, you will know, there is a very broad spectrum in the European states as to the age of criminal responsibility. There are only, I think, two or maybe three countries that have a lower age of criminal responsibility than we do. I think one of them is Ireland, the other one is Scotland, because I think one is seven and the other one is eight, and we are ten, but many of the other European States have it as high as 16, so there is a spectrum. That is why we think it should be at the discretion of the executing State because we are not going to necessarily persuade any given State in a short space of time that the age of criminal responsibility is necessarily to be changed.

Q451 Chairman: Can we then look at Article 15, which considers the obligation to return people under one of these European Supervision Orders as against competing obligations under European Arrest Warrants, extradition requests and the ICC statute. It appears to read: "Those all have priority over an obligation to return under a European Supervision Order". Are you happy with that? Should the other things take precedence?

Baroness Scotland of Asthal: We really believe that Article 15 ought to mean that the ESO will not impede other proceedings which may arise after release. We are inclined towards allowing judicial flexibility in the consideration of which obligation should be given priority, depending on the circumstances of the relative case. We believe that the precedence of the European Arrest Warrant, Extradition Orders or domestic proceedings should be determined by the circumstances and criteria set out in each of those processes.

Q452 Chairman: Under the European Arrest Warrant scheme, as I understand it, domestic cases take precedence, so there it is, if somebody subject to a European Arrest Warrant has absconded and may be on trial for terrorism abroad but they are prosecuted for shoplifting here, they have to be either prosecuted or the proceedings discontinued here before they can progress the European Arrest Warrant. Is that a good idea?

Baroness Scotland of Asthal: It depends on the circumstances of the case and the criteria which are going to be applied. The Committee will know, and know only too well, the difficulty we had in the negotiation of the European Arrest Warrant and, having got that European Arrest Warrant, the challenge that it presented to us taking it through Parliament. Therefore, I think it would be right to say that experience should be borne in mind when we look at how we go forward here. That is why we believe the precedence of the European Arrest Warrant and Extradition Orders or the domestic proceedings would have to be determined by the circumstances and the criteria set out in each of those processes.

Q453 Chairman: There should be flexibility?

Baroness Scotland of Asthal: Yes.

Q454 Lord Mance: Minister, is that the effect of the present draft? It does not seem to be. The present draft seems to give priority to a European Arrest Warrant if it emerges or to a request for extradition presented by a third party if one supervenes.

Baroness Scotland of Asthal: I do not want to sound like a stuck record, but to remind the Committee, first of all, that is not necessarily the draft which is going to prevail at the end of the day and, secondly, all I can

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give you at this stage is our preliminary and not our considered long-term view.

Q455 Chairman: This is your aim rather than your interpretation?

Baroness Scotland of Asthal: Yes. In any of the comments which I make, I am not talking about the draft because the draft cannot be and is not the final construct which is likely to be agreed. This is the first preliminary sortie into this area, all of which would be subject to negotiation.

Q456 Chairman: Can we finally have your views on what should be the position, put aside what is the position under the Framework agreement, as to costs, and should there be a UK specific resource impact assessment and so forth? What view does the Government take about the cost implications which will inevitably attach to any such scheme?

Baroness Scotland of Asthal: One of the issues I raised with the Committee right at the beginning was the whole issue of cost because whether this is deliverable at a reasonable cost is obviously going to be a matter of real consideration as to whether we can or cannot deliver it and find it acceptable. The drive must be to construct a system which will be efficient, effective and also cost-efficient and cost-effective if it is going to have any real utility. Therefore, if you were to cost the current structure which is being proposed, it is likely that it would be cost-inefficient, but that is not necessarily the scheme we will be identifying or supporting at the end of the day. It is clear that this scheme is going to have resource implications and it is going to have resource implications for all of the agencies involved in this process. Therefore, I think it is going to be very important for us to undertake, as we would with our own legislation, a full impact assessment to make that validation.

Q457 Chairman: Really you are saying there is not much point in doing that in respect of this scheme because this scheme, frankly, is just a talking point, so there is going to be a different and better scheme. I would like to know what scheme the Government would want to put in its place. Have you got a draft scheme?

Baroness Scotland of Asthal: We have not got a draft scheme.

Q458 Chairman: Any thoughts of producing one?

Baroness Scotland of Asthal: We have started to work on issues in relation to prison plans. We are not certain of how many numbers we are talking about, how many people would have to come back and how many people would be sent. We are looking at the options internally. We are trying to discover what the practical implications would be because once we have done that, of course it better enables us to advocate a

system which we think would work. With our European partners we have done that in relation to other schemes which have been if not similar to this, certainly within the same framework. I do not want to in any way frustrate the Committee, but we are right at the beginning of this process and, therefore, I can only say to you that we are undertaking this work, looking at it, we think there will be real benefits, we think there are real advantages for individuals and this is a good idea, but the practicalities of it are being worked at now.

Q459 Chairman: By whom?

Baroness Scotland of Asthal: This is an issue which is being done both by the Home Office and, now, because of our new configuration, also with the Ministry of Justice. The Office for Criminal Justice Reform, which is the unit that is tripartite, which engages the Home Office, the Attorney General's office and the MoJ, which is responsible for delivering the criminal justice process in a way that makes better sense, perhaps, than it did before, will be instrumental in assisting us in looking at this work and the impact.

Q460 Lord Mance: Minister, as a thumbnail, could you give us any idea as to what scheme of enforcement you might contemplate, assuming the present scheme involves the executing authority reporting a breach on which the issuing authority then acts? We have touched on the problems of delay when urgent action is necessary and that sort of thing, and we have also touched on the question of who might establish the breach. Have you got any ideas as to that? Is it appropriate to have greater involvement in the decision, firstly, as to the facts and, secondly, as to what should happen consequential on the facts being taken by the executing authority rather than the issuing authority?

Baroness Scotland of Asthal: The first thing to say, of course, is if you look at the Framework Decision, they do not seem to have made any provision at all for enforcement, and if there is going to be a practical system put in place, then enforcement is going to be a critical issue. We think a power of arrest does not² need to be available in such circumstances and legislation would be needed to grant the authority for this in the United Kingdom, so that is something we will have to look at. Our current view is the Framework Decision should be explicit in this regard, but, again, we would be interested in what this Committee thought about how we could use enforcement. You are taking a great deal of evidence from a number of different parties and that is going to be important. We are inclined to think there should be a discretion for the executing state to deal

² This comment was corrected in a letter from Admiral the Lord West of Spithead, GCB, DSC (p. 94).

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with the minor infractions of an ESO, but those are issues too which we would have to look at with a great deal of care, particularly in terms of how other Member States would seek to implement it in their jurisdictions. I think, Lord Mance, you have already highlighted the differences there are between us and some of our international colleagues.

Lord Mance: That is very helpful.

Q461 Lord Burnett: Minister, you kindly said that you have just started formulating your views, and you also, I think, said earlier that you would be keen to see our report and it might give some weight to your report. When do you think the Government will have formulated its views, and when will they be available to us?

Baroness Scotland of Asthal: As I have said, this is very much at an early stage. The Portuguese Presidency intend to have their first working meeting in . . . When are the Portuguese going to have their meeting?

Ms McLaughlin: There has not been a scheduled meeting for this particular portfolio which I have heard of. I have not been given an agenda as yet.

Q462 Lord Burnett: Forgive me, are we going to wait for somebody else or are we going to formulate our views?

Baroness Scotland of Asthal: We are formulating our view now. That is going to involve the criminal justice agencies, Customs, the Ministry of Defence, the police and the CPS. The criminal justice agencies' work is going to be orchestrated through the Office for Criminal Justice Reform and we are working with HMT and MoD to see how we implement these procedures. That is the work which is going on now, right at this moment. Part of that work will be looking at the issues this Committee has already identified and looking at the cost issues which we have already explored so that we are in a position, by the time we come to the Portuguese Presidency, to have a clearer idea as to the sort of structure we think would be feasible and which we may wish to advocate to our other colleagues. Are we able at this stage to say that we have a model which we think is ideal and, therefore, should be advocated to other European partners? No, we are not.

Q463 Lord Burnett: When will we have a model?

Baroness Scotland of Asthal: I am not able to tell you that because I do not know the stage which all the work which is being done currently between Customs, MoD, police, CPS and OCJR has reached. What I can say is work has to be done thoroughly in order for us to make the best fist of what we would then propose.

Q464 Lord Burnett: You cannot hazard a guess for us, Minister?

Baroness Scotland of Asthal: I think it would be unsafe and unsatisfactory for me to do so.

Q465 Lord Bowness: This is really an observation. It is obviously going to be quite difficult if we want to get it to the Portuguese Presidency because that starts on 1 July and everybody goes on holiday until September and October, so there is a very narrow window.

Baroness Scotland of Asthal: We do not know the timetable in the Portuguese Presidency when they are going to have their first meeting. We have had one meeting under the Germans, it may be that in the Portuguese Presidency they may not decide to do this early on, and you will know that each Presidency is in control of their agenda. This work has been undertaken by us now, it is continuing to be done and work will, therefore, need to be ready in some form by the time we know of the meeting that they are going to have. You will also know that what we tend to do is our officials talk to their counterparts, often long before that meeting is put on the table, so there will be informal working groups where our officials will be sent off to talk to other people's officials and will come back and report. Is this the only thing we have on our agenda? Trust me, it is not.

Q466 Chairman: No, Minister, I appreciate that. The Framework Decision is just over nine months old, 29 August last year, and your own Home Office explanatory memorandum was submitted on 20 September of last year indicating that you were consulting with the police, the Crown Prosecution Service, other government departments and other interested parties, but the fact is those consultations have not yet produced anything in the way of a coherent alternative plan or critique of the existing decision. Would that be a fair statement?

Baroness Scotland of Asthal: No, in as much as it has produced assent. I could be here saying to the Committee, "We are implacably opposed. We think this is a total waste of time and hell will freeze over before we will do it", that is not the position. The position is we have consulted our different partners and we are all of the view that this is a good idea, that we should be supportive of it, that we should instruct all our officials to work as hard as they can to work it up in order for us to have a coherent position which we will be able to advocate to our other partners. We are delighted that this Committee is taking such a huge amount of interest and taking evidence. Why? Because it is going to be a fantastic assistance to us because we will take all the things which you say and the things which have been said to you into consideration when we come to formulate the final position. I think that is quite a positive position to be

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in. It may be that the Committee feels things are not going as fast as they would like, but then we do have, if I may say so as gently and respectfully as I can, a plethora of other competing important work upon which we also have to deliver which is very, very pressing. I can assure the Committee that we feel this is something which is worth investing energy into and that is why we are working on it and we have told our European partners that we are supportive. Our European partners understand that is something of importance.

Q467 Lord Clinton-Davis: Do you not always have to prioritise whatever the issues of concern are?

Baroness Scotland of Asthal: Yes.

Q468 Lord Clinton-Davis: It is inevitable that you have to do that.

Baroness Scotland of Asthal: Yes, and the truth is this has now become one of our priorities. I cannot say to this Committee it is the first amongst all the other priorities, but it is certainly a priority which we are giving appropriately trenchant energy and support. If it were not so, I would not be saying this to the Committee.

Q469 Chairman: Minister, unless any other Member of the Committee has any question, I think we have exhausted enough of your time and we are very grateful to you for giving us so much of it. Thank you very much indeed. You are our last witness. We will now have to think of where we go from here. Thank you very much.

Baroness Scotland of Asthal: Thank you very much to the Committee. I hope you will show the expedition which you may think others have lacked.

Chairman: Thank you.

**Supplementary letter from Admiral The Lord West of Spithead, GCB, DSC,
to Lord Grenfell, Chairman of the European Union Committee**

I would like to thank you for inviting the Government to attend the Sub-Committee's meeting on 6 June to discuss the Commission's proposal for a European Supervision Order (ESO).

The transcript with suggested corrections of the evidence given by Baroness Scotland is forwarded with this letter. I would also like to take this opportunity to clarify some points made at the meeting and to make you aware of developments since the meeting took place.

First, I would like to address a misunderstanding in Q460 about enforcement of a breach of an ESO. The Government's position on this is that the current draft of the Framework Decision does not provide a power of arrest for a breach of an ESO but that such a power is desirable to enable the effective enforcement of the process. There is, otherwise, a danger that those defendants who are determined not to comply with the ESO could be seen to be flouting the orders of a court and therefore undermining confidence in the bail process generally.

Secondly, I would like to add to Baroness Scotland's assurances that the Government is committed to engage fully with our EU counterparts in exploring the practicalities of the proposal. We are grateful for the suggestion that the UK could draft an alternative proposal on this issue and we shall certainly bear this carefully in mind. However the Committee should be aware that the JHA Council meeting on 17th and 18th September will include an orientation debate on the ESO proposal and that the Portuguese Presidency will be awaiting the outcome of this debate before deciding upon the progress of this Framework Decision. We are currently of the view that it would not be appropriate to put forward further proposals in addition to the Commission's own draft in advance of this meeting.

Finally, we look forward to reading your conclusions to your inquiry into this matter.

10 July 2007

Written Evidence

TAKEN BEFORE THE EUROPEAN UNION COMMITTEE

Letter from the Automobile Association

Thank you for allowing the AA the opportunity to look at this. We have always had concerns about how drivers may be treated abroad when they are suspected of serious traffic offences or are involved in road accidents. That said, our overseas assistance people have no recollection or record of anyone being detained abroad in the manner covered by this document and telling us of their experience.

Accordingly we find the proposal acceptable.

It may be worth pointing out that xenophobia is alive and well among the British press and public. The idea that a Frenchman caught and disqualified for drink driving in Britain can drive on his return to France is abhorrent to most, yet the idea that an offence committed in France could lead to a Briton not being able to drive here is often also unacceptable. I suspect that the same approach would apply to a serious motoring offender—a Briton should not languish in a foreign jail, yet a foreigner who say killed several people in this country would be being treated with laxity if he were allowed home, even under supervision or remaining in custody. To many the acceptability of this proposal would hinge on how it was looked at, Englishman abroad or foreigner here.

13 April 2007

Letter from the Freight Transport Association

Thank you for forwarding to me the details of the European Commission's proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union. Please find in the following paragraphs the comments of the Freight Transport Association (FTA).

1. The Freight Transport Association represents the transport needs of UK industry. Its membership includes manufacturers, retailers, logistics companies and hauliers, many of whom will send their vehicles and drivers into mainland Europe as part of their daily business activities. FTA members possess in excess of 200,000 goods vehicles in the UK. The Association's transport interests are multi-modal with rail, sea and air operators included in membership.
2. FTA has, for many years, acted to help its members run their businesses in compliance with the law through, for example, its many publications, seminars and training programmes. The Association believes that its actions are successful because, considering the number of international members delivering goods abroad, the number of instances reported to us concerning drivers detained in mainland Europe is extremely small, probably no more than two or three each year.
3. Those who are detained by foreign authorities tend, in the main, to have fallen foul of traffic regulations or the rules relating to driving and rest times, as well as the use of the tachograph recording instrument. In our experience, only rarely do cases involve the attempted smuggling of drugs, tobacco or similarly prohibited or restricted goods.
4. FTA believes that drivers who are detained abroad simply because of their lack of knowledge of local traffic regulations must be released at the earliest opportunity. The same is said for those who have no previous record of an infringement of the driving times and tachograph rules in the particular member state concerned.
5. Many transport undertakings comprise of sole traders with just one vehicle or small businesses with no more than two or three lorries. Detention of what amounts to perhaps one third or one half of a small operator's driver employees can clearly lead to serious difficulties for the continuing viability of that business. **For these reasons FTA welcomes the proposal to allow pre-trial supervision of suspects in their own member state rather than pre-trial detection abroad**, wherever possible, and which it regards as compatible with the Freedom of movement of persons within the European Union.
6. However, FTA realises that such a course of action may not be appropriate in all cases, perhaps where a more serious offence or repeated lesser offences have been committed. For example, on the grounds of road safety, FTA supports the mutual recognition of driving licence offences across member states, whereby a citizen convicted of dangerous driving in his normal state of residence may not then continue to drive in another member state. The decision on which course of action to follow would have to depend on the circumstances of each case.

7. Considering the five options proposed by the Commission FTA would not support the do-nothing option (1). As has been stated above, there are circumstances in which improvements can be made and these should be investigated. The disappearance of suspects awaiting trial is a concern but option (2) which specifically includes a “return mechanism” would seem to address that matter. **FTA therefore supports the second option.** If the existing provisions of the European arrest warrant (3) legislation would, in any case, have to be revisited to cover lesser offences, then arguably justice would be better served by the introduction of a new measure. We have no views on (4) or (5) other than to suggest as regards the Eurobail scheme between courts that the system should be kept as simple and as fast-track as possible, and properly funded by Government.

8. In conclusion, fortunately the problem of FTA members’ drivers or any other employees, for that matter, being unreasonably detained abroad is not one that we are frequently called to advise upon. We hope this brief letter will provide you with sufficient insight to the Association’s point of view and should further details be required, please do not hesitate to contact the undersigned.

10 April 2007

Memorandum by JUSTICE

1. JUSTICE is an independent all-party organisation whose purpose is to advance justice, human rights and the rule of law through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.

2. JUSTICE has been extensively involved in monitoring EU judicial co-operation, the development of the mutual recognition programme in relation to criminal matters and the elaboration of EU-wide procedural safeguards. We are very concerned that while greater judicial co-operation is taking place between EU member states, sufficient provision for common standards for suspects and defendants’ rights has not been made. We note that the UK government stated that at the Justice and Home Affairs Council on 18–19 April 2007 it would not support a binding instrument on procedural safeguards in criminal proceedings that applies to domestic cases.¹ This, we believe, is regrettable.

3. In principle, we are in favour of the introduction of measures allowing pre-trial supervision of non-resident defendants in their country of residence in the EU. However, we have the following concerns about the proposed Framework Decision:

- It faces major practical difficulties, especially if it is to avoid discriminatory application;
- It does not incorporate human rights protections and wrongly envisages that member states can “out-source” their human rights obligations to one another.

We therefore recommend substantial amendment to the proposed Framework Decision if it is to be adopted by the Justice and Home Affairs Council.

THE NEED FOR EU ACTION ON PRE-TRIAL SUPERVISION MEASURES

4. EU action on pre-trial supervision measures is, we believe, in principle a positive development since if successfully implemented it may reduce the unnecessary use of pre-trial detention for residents of other EU member states. For example, in England and Wales a defendant may be refused bail if the court is satisfied that there are substantial grounds for believing that if released on bail he would fail to surrender to custody; in considering this the court may have regard to, inter alia, the “community ties of the defendant”.²

THE MAJOR LEGAL AND PRACTICAL IMPLICATIONS OF THE COMMISSION’S PROPOSAL

5. We emphasise, however, that the success of this measure will be dependent on the existence of a high level of trust, not only between courts of different EU member states but also in relation to other member states’ supervisory arrangements for defendants on bail. This proposal differs in an important respect from the European Arrest Warrant in that the latter requires only sufficient trust in another system to surrender a person to allow them to face trial, etc, in that system. This instrument requires a court to trust another member state to carry out functions in relation to its *own* prosecution of a person.

¹ See *Commons Hansard Ministerial Statements 18 April 2007—Justice and Home Affairs Council, cols 7WS-10WS.*

² Bail Act 1976, Sch 1 paras 2 and 9.

6. We are concerned that such high levels of trust may not exist between at least some member states of the Union. We fear that if this proposal becomes law then there is a risk that some states will be trusted more than others, because of actual or perceived characteristics such as: their wealth; the fact that they have high levels of bail supervision in relation to domestic cases; the quality of their police forces; the quality of their judicial system; the prevalence of the rule of law, etc. This could result in defendants from certain member states being granted bail to return to those states while those from others remain in detention in analogous cases. This would clearly be discriminatory; however, because each case has so many variables, reliance on general legal prohibitions on discrimination may not be effective. In order to achieve genuine parity between residents of the issuing member state and residents of other EU member states, specific prohibitions against discrimination in this situation could be needed: for example, the FD could state that a European Supervision Order (ESO) must be made in any case where a defendant would be granted bail if resident in the issuing member state.

7. However, we are concerned that this FD will face the problem that other mutual recognition measures have faced—that they envisage mutual trust in a situation where standards are not equivalent across the EU. In England and Wales, for example, a very high degree of supervision of bailed suspects is available, including curfews, electronic monitoring, reporting to police stations, etc. This degree of supervision may not be common in some other member states due, for example, to resource constraints.

8. If strict non-discrimination criteria were put in place so that an ESO were granted whenever bail would be granted in a domestic case, problems could remain. One problem is that the rates of granting bail in a member state may be based in part on the confidence of courts and others in that state in the quality of the supervisory arrangements there. The following hypothetical example illustrates the potential problems:

In member state A the courts are relatively keen on granting bail before trial because the police are of high quality, electronic tagging is available and a large proportion of bail breaches are noticed and acted upon. The defendant being tried in state A comes from member state B, where bail supervision is relatively poor and it is relatively easy to abscond—in state B the number of defendants being granted bail is relatively low, because of this. The court in state A, however, is forbidden to discriminate and grants the defendant a ESO at the same threshold at which it would grant a domestic defendant bail. The defendant returns to state B, and then absconds. Meanwhile, a court in state B refuses bail to a defendant from state A according to its own domestic criteria, even though the authorities in state A would have been perfectly capable of dealing with the low degree of risk posed by him.

9. The practicability of a ESO in some cases where bail would be appropriate for a domestic defendant is also open to question. The preamble to the FD acknowledges the difficulties posed eg by preliminary hearings by envisaging that video links could be used instead of asking the defendant to travel back and forth to the issuing state. This is sensible but is however dependent upon video link technology being available in all member states. In itself this is not very difficult, but what of cases where the court handling the case in the issuing state is, for example, a provincial magistrates' court and, more significantly, the defendant's residence in the executing state is in an outlying region? This difficulty is not insuperable but arrangements will have to be put in place to ensure it is overcome.

10. While video link in England and Wales is now accepted in relation to preliminary hearings, trials by video link are not, although the Police and Justice Act 2006 provides for the accused to give evidence by live link in certain circumstances.³ Not only does a defendant have a right to be present at his or her trial by virtue of Article 6 ECHR; it is also important that the court (in particular in jury trials, the jury) sees the defendant and can assess his or her reaction to evidence, etc. Since the FD lays down no criteria for when a ESO should be granted, some states may be happy to grant a ESO on the basis that trial will take place by video link, whereas others may not be.

11. Article 6(1) of the FD also appears to contradict the preamble by stating that the issuing authority shall order the defendant to “attend the trial when summoned to do so” and may order him “to attend preliminary hearings” and “to reimburse the costs for transferring him to a preliminary hearing or trial”. “Attend” may refer to video link but this is by no means clear. Secondly, the discretion to order reimbursement could result in impecunious defendants being denied an ESO because they would clearly be unable to pay the costs of their return. This would contradict Article 14 ECHR, which states that the Convention rights (including the right to liberty under Article 5) shall be secured without discrimination on the grounds of, inter alia, property or other status.

³ Police and Justice Act 2006 ss47-49; see also *S v Waltham Forest Youth Court* [2004] EWHC 715 (Admin).

12. There is a further danger of discrimination in Art 6(2): the requirement that both states must agree to the supervisory arrangements imposed leads to a danger that states will be more reluctant to grant an ESO to a suspect whose state will not agree to certain obligations such as those listed in Art 6(2). Further, the possibility envisaged in Art 11 that the executing state may insist that a defendant serve their sentence there could also create the danger that where a state insists upon this an issuing state may therefore refuse to issue a ESO.

THE ADEQUACY OF THE SYSTEM PROPOSED, AND IN PARTICULAR WHETHER ONE OF THE OTHER OPTIONS CONSIDERED BY THE COMMISSION WOULD BE PREFERABLE

13. Our major concern in relation to the system proposed is that, beyond the bare statement that it “respects . . . fundamental rights” in the Preamble there is no mention of human rights, and that the proposed FD offers no real protection for fundamental rights including the right to a fair trial; to liberty; and not to be made subject to torture or inhuman and degrading treatment or punishment.

14. We are also concerned that the system that has been proposed by the Commission could operate in parallel to the European Arrest Warrant (EAW) but evade some of the protections in the EAW system. In the EAW FD there is partial double criminality (in relation to offences other than those in Art 2(2) of the FD), and the EAW only applies to offences over the different sentence thresholds set out in Art 2. Provision is also made for life-sentence cases in Art 5(2) of the EAW FD: execution of the warrant may be subject to certain conditions in these circumstances. No such provision is made in the ESO FD, despite the fact that some defendants facing trial for offences carrying a life sentence do get bail. Further, there are no speciality provisions in the ESO FD. Further, while Art 1 of the EAW FD states that the FD “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”, this is by no means clear in the ESO FD.

15. The ESO FD does not give human rights protections in relation to the return of a defendant to the issuing state to face trial. It does not allow a state to refuse to return—even its own national—to another member state on the grounds that they would risk inhuman or degrading treatment there; that they would receive an unfair trial; or that other of their rights would be violated; nor does it allow an executing state to refuse to execute an ESO on the grounds that the prosecution is, for example, politically motivated. Moreover, since there is no requirement that the defendant apply for, or consent to, a ESO, it would arguably be open to the issuing state under the FD to send a defendant back to his state of residence if he was at risk of persecution there.

16. The European Convention on Human Rights requires that a state refuse to remove a person to another member state where there is a real risk that he would suffer treatment contrary to Article 3 ECHR.⁴ Further, other Convention articles can also be engaged by removal:⁵ for example removal is unlawful if there is a clear risk of a “flagrant denial” of the right to a fair trial. Before a defendant is removed to either an executing state or an issuing state, therefore, under this proposed FD, it is necessary that a hearing be held where the making of the ESO or the arrest and transfer of the defendant can be challenged.

17. Further, the requirements and obligations imposed under the ESO may also engage Convention rights; while the executing state’s agreement is required for obligations to be imposed under Art 6(2) of the FD, there is no requirement that such obligations are imposed proportionately. Indeed, the FD envisages ESOs that could contain “limitations of . . . [a defendant’s] . . . freedoms of a degree comparable to deprivation of liberty”. Not only is this ambiguous (does “comparable” mean equivalent or near-equivalent?) but it also confuses bail with detention. Once the threshold of deprivation of liberty is passed, then the reality is that the court would be ordering detention in the executing state, rather than merely supervision, and the protections of Article 5 ECHR must be afforded to the defendant, in particular the procedural obligations under that Article. Further, since other conditions may engage “civil rights and obligations” the procedural guarantees of Art 6 ECHR should also apply to the making of a ESO.

18. The ESO raises novel jurisdictional issues: the important point of principle is that, in relation to human rights obligations, each state bears responsibility for violations that occur on its territory and it cannot simply abnegate responsibility to another EU member state. Article 1 ECHR states that High Contracting Parties shall “secure to everyone within their jurisdiction the rights and freedoms” in Section I ECHR. The proposed FD risks allowing EU member states to become complicit in human rights abuses by other member states—for example, by enforcing restrictions on liberty attendant upon a politically motivated prosecution in another member state, or returning a defendant to face an unfair trial in that member state.

⁴ See *Chahal v UK* App no. 22414/93, judgment of 15 November 1996.

⁵ See *R (Ullah) v Special Adjudicator* [2004] UKHL 26;

19. In particular, if obligations/requirements under a ESO are being enforced in an executing member state, a person must have a remedy in the courts of that state in relation to those obligations/requirements. Article 13 of the FD, however, requires that any request for review of the conditions must be directed to the courts of the issuing member state. This, we believe, would contravene Article 13 ECHR, which provides that anyone whose Convention rights have been violated shall have “an effective remedy before a national authority”.

20. One of the most worrying aspects of the ESO FD is the proposed procedure in relation to breach of an ESO’s requirements. The FD envisages in Articles 16 and 17 that the executing member state would report the breach to the issuing member state (it is said nowhere how the facts of the breach are to be established) and then the issuing member state could take action on the basis of that report, including arresting and transferring the suspect. Further, the FD envisages that the hearing deciding what action to take as a result of the breach would be held by the courts of the issuing state (in Article 17).

21. Since breach of the ESO can result in deprivation of the suspect’s liberty or in the amendment of the ESO’s obligations in a way such as to engage Convention rights or civil rights, it is necessary that a fair hearing be held to establish that the ESO has been breached and determine the consequences. The executing state cannot devolve this responsibility to the court of the issuing state and then simply carry out the judgment of that court. In relation to arrest and transfer, the FD to an extent acknowledges this, saying that in Article 18 that if the decision is made to arrest and transfer then there must be a hearing before the court of the state in which the suspect is located. However, the obligation to have a fair hearing does not only apply to cases where the decision is made to arrest and transfer. At the least the defendant must have the opportunity to challenge the legality of any action taken on the basis of the hearing in the courts of the executing state. This, however, raises difficult conflict of law questions.

WHAT AMENDMENTS MIGHT BE MADE TO THE PROPOSAL TO IMPROVE THE PROCEDURE

22. We therefore recommend that the following changes are made to the proposal:

- A member state must refuse to issue or to execute a supervision order if to do so would be incompatible with the ECHR; the defendant has the right to a fair hearing before such a decision is made;
- In Art 6(1)(c), any reimbursement requirement should be made subject to the defendant’s means; inability to reimburse, or reimburse in full, these costs should not be a ground for refusing to grant a ESO;
- In Art 6(1) and (2), it should be stated that a member state must not issue, or agree to execute, any obligation or measure that would be incompatible with the ECHR; the defendant should have a right to a fair hearing before such a decision is made;
- In Art 13, the defendant must have the ability to challenge the obligations and measures in the jurisdiction in which he is at the time ie in the executing member state;
- In Art 17, the breach of the ESO should be established, and decision on further action to be taken should be made, in a hearing conforming with Arts 5 and 6 ECHR; if this hearing is held in the issuing state then the defendant must have an effective remedy in the executing state to challenge the legality of any action taken on the basis of the hearing that engages his civil or Convention rights;
- Further, in Article 18 a state must refuse to arrest or transfer a defendant if to do so would be incompatible with his ECHR rights. The defendant must have the right to challenge his arrest and/or transfer in the courts of the member state in which he is arrested;
- The Art 14 ECHR principle of non-discrimination should be emphasised in the FD.

April 2007

Memorandum by the Magistrates Association

We agree that the motive—to reduce the possibility of people accused of crimes abroad being locked up abroad instead of coming home and remaining under some sort of supervision—is a good idea in principle. However, the practical difficulties appear huge. To begin with there would have to be fairly major primary legislation and the numbers, according to the document signed by Baroness Scotland, do not appear to be large. The proposal not only covers recognition by each state of a judicial decision in another—a big change in itself—but goes on to envisage the “other” state being able to order arrest and extradition of a subject from his or her ‘own’ state in the case of breach. This could open up the possibility of numerous and grave complications and

we do not think that we can offer any useful or informed comment on this. We are also unsure whether this would be a matter for magistrates courts. However, of the five policy options we would definitely be against option 3 (involving extending the European Arrest Warrant for all offences) and option 5 (Eurobail).

1 June 2007

ISBN 978-0-10-401129-4



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Printed in the United Kingdom by The Stationery Office Limited
7/2007 370738 19585