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Opting out of EU Criminal law: What is actually involved?

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EXECUTIVE SUMMARY

Protocol 36 to the Lisbon Treaty gives the UK the right to opt out en bloc of all the police and criminal justice measures adopted under the Treaty of Maastricht ahead of the date when the Court of Justice of the EU at Luxembourg will acquire jurisdiction in relation to them. The government is under pressure to use this opt-out in order to “repatriate criminal justice”. It is rumoured that this opt-out might be offered as a less troublesome alternative to those are calling for a referendum on “pulling out of Europe”.

Those who advocate the Protocol 36 opt-out appear to assume that it would completely remove the UK from the sphere of EU influence in matters of criminal justice and that the opt-out could be exercised cost-free. In this Report, both of these assumptions are challenged. It concludes that if the opt-out were exercised the UK would still be bound by a range of new police and criminal justice measures which the UK has opted into after Lisbon. And it also concludes that the measures opted out of would include some – notably the European Arrest Warrant – the loss of which could pose a risk to law and order.

The Report makes a detailed assessment of the implications of the block opt-out, in which all of the 130 or so instruments that would be affected by it are examined. It concludes that, if the opt-out were exercised, practical considerations would force the UK to seek to opt back into many of them – and that the ones from which the UK could safely remove itself permanently are ones which impose no practical constraints on the UK, from which a UK opt-out would serve no practical purpose.

The Report also discusses the so-called “Danish option”. The Lisbon Treaty gives Denmark a special status whereby, when the Court of Justice at Luxembourg acquires jurisdiction in relation to these measures, Denmark has the right to remain exempt. However, exercising the Protocol 36 opt-out would not put the UK into this position. To do that, it would be necessary for the UK to negotiate a Treaty change, a step which is significantly different.

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Opting out of EU Criminal law: what is actually involved?

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1. Under Protocol 36 to the EU Treaties, as amended by the Lisbon Treaty, the UK is entitled to withdraw from a range of EU measures concerning police and criminal justice at any time before June 2014. As the present year has progressed, so political pressure has been increasingly applied by those who wish the UK to exercise this option. Stimulated by a paper published by the think-tank Open Europe in January,¹ in February a group of over 100 MPs wrote a letter to the *Daily Telegraph* urging the government to take this course² - a move which attracted favourable comment in certain sections of the press.³

2. We believe that, to date, the debate has been proceeding on the basis of a misunderstanding, both as to what the opt-out would achieve, and as to the consequences that would follow from its exercise. As to the first, it seems to be widely believed that exercising the opt-out would (in effect) enable the UK to “liberate itself” from the influence of EU law in matters of police and criminal justice, and in particular, from the jurisdiction in these matters of the CJEU – the EU court of justice at Luxembourg. And as to the second, it also appears to be widely believed that the opt-out could be exercised without any adverse consequences for the UK. This paper is designed to correct both of these impressions.⁴

¹ Booth, S., Howarth, C. and Scarpetta, V. (2012) “An unavoidable choice: More or less EU control over UK policing and criminal law”, Open Europe.

Online at <http://www.openeurope.org.uk/Content/Documents/PDFs/JHA2014choice.pdf>

² “Sir – The EU Commission’s ambitions for a pan-European code of Euro Crimes highlight how Europe should be about co-operation rather than control. We need practical co-operation to fight terrorism, drugs, human trafficking and other cross border crimes – not harmonisation of national criminal laws. We do not wish to subordinate UK authorities to a pan-European Public Prosecutor. We do not want to see British police forces subjected to mandatory demands by European police under the European Investigation Order. We have deep concerns about the operation of the European Arrest Warrant for our citizens. We want the UK Supreme Court to have the last word on UK crime and policing, not the European Court of Justice. The recent study by Open Europe offers a pragmatic alternative. Britain should exercise its “opt out” from 130 measures under the EU’s crime and policing plan by 2014. The UK would retain the right to opt back in to any specific policies deemed vital on a case-by-case basis. Yet, as British co-operation with Norway after its recent terrorist attacks and our longstanding intelligence relationship with the US shows, we do not have to cede democratic control with close partners in order to co-operate effectively with them. We should maintain our national standards of justice and democratic control over crime and policing – but let other nations integrate nire closely if they wish.”

³ See the article in the *Daily Telegraph* by Philip Johnston, note 19 below, and the *Daily Mail* for 6 February 2012, *passim*.

⁴ The ideas and information it contains derive in part from a closed seminar organised in Cambridge on 14 May 2012 by CELS in conjunction with the European Criminal Law Association UL (ECLA(UK)). The authors would like to express their gratitude to all those who participated in the discussion.

3. The first section of the paper addresses the first misunderstanding by examining the scope of the opt-out, in order to assess how far its exercise would really put UK criminal justice beyond the reach of EU law. The second section addresses the second misunderstanding, by examining what the practical effect would be if the UK exercised the opt-out and denounced all the measures that are covered by it. The third and final section draws the threads together, and in the process, analyses the UK's alternatives to continuing to participate fully in the measures concerned and fully exercising the block opt-out, including a partial opt back in to some of these measures, and the "Danish solution", which proponents of the opt-out are putting forward as the "way ahead" for the UK, once the opt-out had been exercised. The paper concludes with an appendix in which the EU instruments which appear to fall within the scope of the opt-out are listed in chronological order, together with brief notes setting out our views on the consequences (both positive and negative) of withdrawing from them.

Part I

The Protocol 36 opt-out: its limited scope and effect

4. Protocol 36 contains a wide range of transitional provisions and the opt-out under discussion here is to be found in Article 10 (4). This provides that, at any time up to six months before the end of the “transitional period” (which ends on 1 December 2014), the UK may give notice that it no longer accepts “the acts of the Union in the field of police co-operation and judicial co-operation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon”. If the UK gives this notice, all these measures will then “cease to apply to it as from the date of the expiry of the transitional period”. This opt-out is in principle an all or nothing matter: the UK must opt out of all these measures, or none at all. But as is explained later in this paper, having opted out it then has the right, within limits, to opt back into individual measures selectively.⁵

5. The first point to note, from the point of view of the UK “liberating” itself from any EU involvement in UK criminal law or policing, is that the scope of the opt-out conferred by Protocol 36 is limited.

6. First, it only applies to those EU police and criminal justice measures that were adopted prior to the Treaty of Lisbon – i.e., under the earlier legal regime created by the Treaty of Maastricht, usually known as the “Third Pillar”, as amended by the Treaty of Amsterdam and the Treaty of Nice. Thus it does not apply to any new measures which have been adopted since the Treaty of Lisbon came into force, insofar as these apply to the UK.

7. A substantial number of new EU criminal justice or policing measures have already been adopted since the Lisbon Treaty came into force in December 2009, and most of these new measures are indeed binding on the UK, due to the UK government’s decision to opt in to such measures. The normal legal basis for the creation of EU measures in the area of police and criminal justice is now Chapters 4 and 5 of Title V of Part Three of the Treaty on the Functioning of the European Union (alias the TFEU) and in respect of this, Protocol 21 to the EU Treaties puts the UK⁶ in a privileged position, in that no measure adopted under these provisions will bind the UK unless it has made a formal decision to opt into it. But up to now, the UK has elected to opt in to nearly all of those that have been proposed.

8. In this way, the UK has now committed itself to observe five Directives that have already been adopted: two guaranteeing certain minimum rights to suspects during a police investigation,⁷ a new Directive against people trafficking,⁸ a new

⁵ By operation of Article 10(5); see §23 below.

⁶ Together with the Republic of Ireland.

⁷ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings Directive 2012/13/EU on the right to information in criminal proceedings.

⁸ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

Directive against child sexual abuse and pornography,⁹ and a new Directive creating a procedure called the European Protection Order, which is intended to help trans-border battered wives.¹⁰ And in addition the UK has already opted into three further new measures, the details of which are still under negotiation: a proposed new Directive on the rights of victims;¹¹ a proposed Directive on cybercrime¹²; and a proposed Directive for a European Investigation Order, which would enable the judicial authorities in Member States to issue search-warrants, and other types of order for the collection of evidence, which are enforceable across borders.¹³ The UK has also opted into treaties in this area between the EU and third States, namely: treaties with the USA and Australia on passenger name records; a treaty with the USA on the transfer of banking information; a mutual assistance treaty with Japan; and treaties on the surrender procedure, mutual assistance and the application of the “Prum” rules on the exchange of policing information with Norway and Iceland. Furthermore, it has opted in to a proposal to establish the EU’s internal security fund as regards policing for 2013-2020. By all of these new criminal justice measures the UK would still be bound, even if it later exercised its right under Protocol 36 to denounce the earlier ones. The same is true, *a fortiori*, of any further measures created under Chapters 4 and 5 of Title V of Part Three of the TFEU which the UK decides to opt into in the future. In particular, the Commission has announced plans to propose during 2012 legislation concerning counterfeiting currency, Europol (the EU’s police co-operation agency, currently with a UK Director) and the European Police College (the EU’s police training agency, currently based in the UK), and in 2013 on Eurojust (the EU’s judicial co-operation agency, which has had two British Presidents).

9. Nor is this all, because the EU may, in certain cases, adopt measures affecting criminal justice on the basis of other Articles of the TFEU which fall outside the scope of Protocol 21 – and if any of these are adopted the UK will be bound by them, with no question of a right to decide if it wishes to opt in. One of these is Article 325 of the TFEU, under which the EU is entitled, by following the ordinary legislative procedure, to “adopt necessary measures in the fields of the prevention of and the fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies”. It was on the legal basis of this Article, rather than Chapters 4 and 5 of Title V of Part Three of the TFEU, that in July 2012 the Commission put forward a proposal for a new Directive which would require the Member States to “clarify, harmonise and strengthen” their criminal law as regards frauds related to the EU budget. Another such measure is the proposed Directive on data protection in the area of policing and criminal law, which is based on Article 16 TFEU and which will replace a third-pillar Framework Decision on this issue; the UK has no general opt-out from this proposal, although Protocol 21 states that this measure will not apply to the UK to the extent that the UK opts out of other measures on the exchange of information between police and judicial authorities.

⁹ Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

¹⁰ Directive 2011/99/EU on the European Protection Order.

¹¹ http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_275_en.pdf

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0517:FIN:EN:PDF>

¹³ <http://register.consilium.europa.eu/pdf/en/10/st09/st09288-ad01.en10.pdf>

10. The final limitation to the opt-out right conferred by Protocol 36 is that it applies only to those “Maastricht measures” which, at the time the right is exercised, are still in their pre-Lisbon form. If a measure adopted under Maastricht has been amended after Lisbon, the fact of the amendment cancels out the UK’s right under Protocol 36.¹⁴ But so far, this situation has not arisen.¹⁵ Although a number of Maastricht measures have been, or are in the course of being, replaced by completely new measures in respect of which the UK has opted in, there are none which, to date, have been amended. So as things stand at present, this further limitation has no practical significance.

11. A further and related point to note is that if the UK were to exercise the opt-out right conferred by Protocol 36, this would not remove the UK from the jurisdiction of the CJEU in all matters relating to police and criminal justice. In the first place, insofar as the UK is bound by any post-Lisbon measures relating to these subjects, it is – like any other Member State – also subject to the jurisdiction of the CJEU. So when the UK elects to opt into a new measure, it opts into the Luxembourg court structure as part of the deal; and *a fortiori*, the UK is also subject to the jurisdiction of the CJEU where new criminal justice measures are created under those provisions of the TFEU to which Protocol 21 does not apply. In addition to that, if having exercised the opt-out the UK then opts back in again to any of the Maastricht measures, the opt-back-in-again carries with it an acceptance of the jurisdiction of the CJEU. Unless there were a Treaty amendment on this issue, it is not open to the UK to exercise the opt-out, and then opt back into measures subject to a reservation that the jurisdiction of the CJEU is excluded.

12. If the limited nature of the Protocol 36 opt-out seems surprising at first sight, it makes good sense when viewed in the context of the aims the UK had in mind at the time the Treaty of Lisbon was being negotiated. At that stage the UK was not looking for an escape-route from the whole area of EU criminal justice. Instead, it was seeking to ensure that, so far as criminal justice was concerned, the UK’s position in relation to EU criminal justice – unlike that of other Member States – remained the same as it had been under the Treaty of Maastricht. At the risk of over-simplification, the UK’s “game plan” at the time was to preserve Maastricht, not to destroy it.

13. The Maastricht Treaty, it will be recalled, had created a mechanism – the “Third Pillar” – by which the Member States could (within limits) enact measures about criminal justice¹⁶. But (i) these measures had to be agreed to by every Member State – with the result that no Member State could be bound by a measure for which it had not voted, and (ii) breaches by Member States of their obligations in this area, unlike breaches of their obligations under “normal” EC law, could not result in condemnation by the ECJ at Luxembourg. Over the years, expansion of EU membership made the unanimity requirement increasingly unworkable; and the fact that Member States could agree to measures and then break their word with impunity was also the subject of increasing criticism. So too was the fact that Member States

¹⁴ By reason of the final sentence of Protocol 36, Article 10(4): “This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.”

¹⁵ However, if the proposed Directive on a European Investigation Order is adopted, the 2000 EU Mutual Legal Assistance Treaty will be amended, and likewise the Framework Decision on Freezing Assets and Evidence, discussed at §§119-122 below.

¹⁶ Contained in Title VI of the pre-Lisbon version of the Treaty on European Union (TEU).

could decide whether or not they would allow their courts to send preliminary references on the validity and interpretation of EU measures in this area to the CJEU, which most did but some – like the UK – did not; a situation which created inequality throughout the EU and also meant that the EU was not always in a position to control the legality of the measures it had created. In light of this, the architects of the Lisbon Treaty sought to reverse both aspects of this state of affairs, with future measures in this area being decided by a qualified majority vote rather than by unanimity in most cases, failures to implement the new measures – and indeed any of the earlier measures previously adopted under Maastricht – now subject to the possibility of the Commission bringing enforcement proceedings against the offending Member State, and making it possible for all of the national courts of all Member States to make preliminary references.

14. All of these changes were unwelcome to the UK, which therefore sought to avoid their application to this country. From the first change the UK – in company with Ireland¹⁷ – managed to insulate itself by Protocol 21, under which neither State is bound by any new measures created under Chapters 4 or 5 of Title V of Part Three of the TFEU except where it expressly chooses to opt into them. From the second and third changes the UK – this time going it alone – sought to insulate itself as well, its line of argument being (in effect) as follows: “Under the Maastricht arrangements we agreed to those earlier measures on the basis that we could not be brought before the ECJ if we broke them. Had we known that this would change, we might not have agreed to them. So before this change takes effect we want a chance to change our minds, retrospectively.” And that, in effect, is what Article 10(4) of Protocol 36 provides. (The “all or nothing” nature of the opt-out was not – it is thought – exactly what the UK negotiators wanted, but was insisted on by the other Member States: in order to discourage the UK from exercising the opt-out lightly, and also to avoid recurrent disruptions from the UK opting out of measures one by one. Though as previously mentioned, the “all or nothing” rule is qualified by the possibility for the UK to opt back into measures it has opted out of.)

15. It seems that the limited scope and effects of the Protocol 36 opt-out have not been fully understood by those who are most vigorously encouraging the government to exercise it.

16. The letter to the *Daily Telegraph* referred to three EU criminal justice measures which disturb the authors of the letter and which, at least by implication, they thought the opt-out would bring an end to, or preclude. These were the European Arrest Warrant, the European Investigation order, and the European Public Prosecutor. Of these, the European Public Prosecutor does not exist yet, and if it ever is created the UK has disabled itself from having anything to do with it by provisions in last year’s European Union Act which prohibit our participation without a referendum¹⁸. (And even without this, the UK could simply opt out of any proposal on this issue.) The European Investigation Order is a post-Lisbon measure, currently under negotiation, and the UK has already opted into it. Thus the only item on their list which is actually covered by the opt-out is the European Arrest Warrant. As will appear below, of all the “mutual recognition” measures that were agreed under the

¹⁷ And with Denmark removing itself from this sphere even further by means of Protocol 22; see §161 below.

¹⁸ European Union Act, 2011, c.11, s.6 – and in particular, s.6(5)(c).

Maastricht regime this is in practice the most important; and because of this, it is at least possible that, if the Protocol 36 opt-out were exercised, the practical necessities of law enforcement would force the UK to opt back into it.

17. Similar misunderstandings about the scope and effect of the opt-out appear to lie behind some of the coverage of the matter in the press, which sees the Protocol 36 opt-out as liberating the UK from the jurisdiction of the CJEU in these matters¹⁹ and thereby “repatriating” criminal justice.²⁰ The authors of the letter to the *Daily Telegraph* attacked the EU Commission’s supposed “ambitions for a pan-European code” and said that what was really needed in its place was “practical co-operation to fight terrorism, drugs, human trafficking and other cross-border crimes”. As will become clear when they are analysed below, a large number of the Maastricht measures which would cease to apply to the UK if the Protocol 36 opt-out were implemented are exactly that: practical measures of co-operation designed to aid the fight against the worst types of crime that tend to be committed across borders.

18. The letter’s reference to the Commission’s “ambition for a pan-European code” shows a further misunderstanding – because notwithstanding what is repeatedly asserted in certain sections of the press and in eurosceptic blogs and websites,²¹ the Commission has no such project, nor does any other European institution. The notion that the Commission does have such a scheme in mind, whether openly or covertly, is a “euromyth”²² – the result, it seems, of distorted and alarmist press-coverage of the Corpus Juris project: a proposal, put forward by a team of academics, to deal with the problem of fraud on the Community budget by creating a European public prosecutor with authority to prosecute frauds of this type, with the help of a uniform code of budgetary fraud offences and some uniformly-applicable procedural rules.²³

19. Since the Tampere conference in 1999, the EU has, in fact, been pursuing a policy of “mutual recognition” which is exactly the opposite of a “pan-European code”, being a scheme designed to make it possible for the Member States to combat trans-border criminality in Europe using their own separate criminal justice systems. Should the UK exercise the Protocol 36 opt-out, a group of these mutual recognition instruments would be among the list of casualties.

¹⁹ Philip Johnston, “We have European opt-outs, so why not use them”, *Daily Telegraph*, 6 February 2012.

²⁰ The headline which the *Daily Telegraph* gave to the MP’s letter, see note 2 above.

²¹ See for example the article by “The Corpus Juris and the end of British Law”, published on the website of The People’s Pledge: <http://blog.peoplespledge.org/2011/04/21/colin-bullen-corpus-juris-and-the-end-of-british-common-law/>

²² For a comprehensive list of “Euromyths”, see the website http://ec.europa.eu/unitedkingdom/blog/index_en.htm

²³ An accurate account of the aim and scope of the project is to be found in *Prosecuting fraud on the Communities’ finances - the Corpus Juris*, House of Lords, Select Committee on the European Communities, Session 1998-99, 9th Report, HLPaper 62; available online via the UK Parliament home page at www.parliament.uk See also “The Corpus Juris project - has it a future?” (1999) Volume 2 Cambridge Yearbook of European Legal Studies 355, and “Who’s afraid of the big, bad European public prosecutor”, Volume 14 Cambridge Yearbook of European Legal Studies (forthcoming). Though it has no plans for a “pan-European Code” the Commission continues to be interested in the idea of a European Public Prosecutor, with the power to prosecute for budgetary frauds. A formal proposal to this limited effect is expected from the Commission during 2013.

20. In the opinion of most people, and particularly practitioners, instruments that further practical co-operation are essential to confront the fact that crimes increasingly have cross-border elements: victims, perpetrators, witnesses and material evidence located in different countries, and in some serious cases, organised criminals operating across borders. The fact that such situations arise with increasing frequency stems partly from freedom of movement, a cardinal policy of the EU, and partly from the increasing ease of communications. Freedom of movement means that (in sharp contrast to the situation only 50 years ago, or only 25 years ago in the case of Eastern Europe) the citizens of all EU Member States are now at liberty to travel anywhere in the Union – even if, when visiting the UK and the Republic of Ireland, they must still negotiate border controls. There are some who are opposed to this and who would prefer to solve the problems that free movement brings for criminal justice by “leaving Europe” in order to reverse it, rather than by adjusting the criminal justice system to deal with them. But given the huge numbers of British citizens who take advantage of free movement – by travelling to Europe,²⁴ owning second homes there,²⁵ or even going there to live²⁶ – turning the clock back in this respect would be politically difficult, even if it were desirable. And even reversing free movement would not reverse the technological changes that now make communication across borders instantaneous, cheap and easy, even for those who do not wish to travel. We are now so used to direct dialling, faxes, mobile phones and emails that it is easy to forget that they are all relatively recent. In 1973, when the UK joined the EEC (as it then was), the only practicable way to communicate with those in Europe – or indeed anywhere else in the world – was by post, because even telephoning abroad, though possible, was not easy.

21. A final misunderstanding that appears to be influencing the public debate upon this topic concerns the status and function of the courts. According to Open Europe, the central reason for resisting the incoming jurisdiction of the CJEU is that, unlike the UK’s own national courts, it “is not directly accountable to Parliament or to the UK voters.” Behind this notion lies a serious misapprehension about the nature of the courts in countries that respect the rule of law and the separation of judicial and legislative powers. Our national courts apply the laws that are made by Parliament – and also those made by the EU, where these are applicable. But in no other sense are they “directly accountable”, whether to Parliament or to the voters – any more than are the courts at Luxembourg.

²⁴ According to figures published by the Foreign and Commonwealth Office website <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/europe>, each year some 19.3 million Britons travel to France and over 12 million to Spain. And Eastern Europe also attracts many visitors from the UK. In the case of Poland, the figure is now some 350,000 per annum; of whom many go for “stag nights” and “hen parties”, conveniently arranged for them by organisations like the delicately-named *Pissup.com*

²⁵ According to newspaper reports, some 200,000 British citizens now own second homes in France; a figure which seems surprisingly large when compared with the total number of second homes (c.260,000) – whether owned by British residents or others – which are said to exist in the UK.

²⁶ A study carried out by Channel Four in 2010 concluded that around a million British citizens now live in the EU – as against around 1.6 million citizens from other EU states resident in the UK. See <http://blogs.channel4.com/factcheck/does-number-of-europeans-here-equal-brits-abroad/2322>

Part II

The practical consequences of exercising the Protocol 36 opt-out

22. Before discussing the practical consequences of using the Protocol 36 opt-out, and addressing the second misunderstanding about its use, there is a preliminary point that must be stressed. As previously mentioned, in exercising its right to opt out of the Maastricht measures the UK cannot pick and choose: it must, at least as a starting point, opt out of all of them, or none.

23. If the UK opts out, Article 10(5) does then provide a mechanism under which it may opt back in again, and at this point it is allowed to pick and choose. But that the general opt-out could and would be followed by a selective opt-back-in is not something that can be taken for granted, because it presupposes (i) a will to ask, the existence or otherwise of which would depend on the political objectives of the UK government in opting out, and (ii) a willingness at EU level to accede to the request. Assuming both (i) and (ii) existed, the question would then arise as to which particular measures the UK would wish to opt back into (or would find itself obliged to opt back into for reasons of practical necessity). If the list of measures opted back into were long, and the only measures left behind were ones of little practical significance, the question would arise – even looking at the matter from a eurosceptic point of view – as to what the point was in exercising the opt-out in the first place. (We shall come back to this issue in the third section of this paper.)

24. To understand the effect of exercising the opt-out it is necessary to look closely at the body of measures that would be covered by it. As already mentioned, these are those EU measures on police and criminal justice that were adopted pre-Lisbon under the scheme introduced by the Treaty of Maastricht and which are still in force at the time the UK gives notice that it is opting out. Of these there are something over 130 and they cover a wide range of very different things. In order to evaluate the impact of exercising the opt-out properly it is necessary to consider, in relation to each one of them, what benefit the UK derives from it, what burden (if any) it imposes, and – assuming this is an evil to be studiously avoided – how likely it is to lead to proceedings against the UK in Luxembourg if it is ignored or misapplied. In the paragraphs that follow, a broad-brush approach will be taken and the impact will be assessed with the various measures grouped according to their type; then the Appendix answers the same question in relation to each instrument individually.

25. For the purpose of the “broad-brush” approach to be adopted in the subsequent paragraphs, the measures will be grouped as follows: (i) instruments intended to influence substantive criminal law; (ii) instruments intended to influence criminal procedure; (iii) instruments relating to police co-operation; and (iv) instruments designed to secure mutual recognition.

II(A): Measures intended to influence substantive criminal law

26. This group comprises some seventeen instruments that require all Member States to ensure their codes of criminal law prohibit certain types of anti-social conduct and provide maximum penalties that are sufficiently dissuasive. They include Framework Decisions on terrorism,²⁷ drug-dealing,²⁸ cybercrime,²⁹ bribery,³⁰ money-laundering,³¹ people-smuggling³² and frauds in relation to electronic payments.³³ With the interests of the EU itself in mind, they also include Framework Decisions requiring Member States to make counterfeiting the Euro (and other currencies) a criminal offence, and Conventions³⁴ related to frauds against the EU budget.³⁵

27. From most of these instruments (and new post-Lisbon measures to similar effect³⁶) the UK derives an obvious benefit, in that where these things are done in other Member States against victims who are British citizens or UK institutions, they ensure that prosecutions can result. These measures also aim, like all substantive criminal law, to deter the commission of such acts in the first place. Moving to the other side of the equation, for the UK these measures are not burdensome, because the types of conduct at which they were directed are all criminal offences in the UK, where they already carry penalties at least as severe as the “minimum maximum penalties” that the EU instruments require.³⁷ In every case but one, furthermore, this was already the case at the time the EU instrument was adopted.³⁸

²⁷ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

²⁸ Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking.

²⁹ Council Framework Decision 2005/222/JHA of 25 February 2005 on attacks against information systems. (This instrument is likely to be replaced soon by a new Directive, the proposal for which the UK has opted into.)

³⁰ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.

³¹ Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (repealing Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA)

³² Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

³³ Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment.

³⁴ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [Official Journal C 316 of 27.11.1995]. This Convention (and its associated protocols) will be replaced by a Directive proposed in July 2012, which will bind the UK, if that Directive is agreed.

³⁵ Being a Convention, Member States are only bound by it if they are prepared to ratify it, which the UK chose to do. A Convention was used, because at the time it was created Framework Decisions – which date from the Treaty of Amsterdam – had not been invented.

³⁶ See footnotes 4 and 5.

³⁷ Terrorism is a prominent example. On this, see ““No thank you, we’ve already got one!” Why EU anti-terrorist legislation has made little impact on the law of the UK” in (Francesca Galli and Anne Weyembergh, eds), *EU counter-terrorism offences*, IEE, Brussels, 2012, 117 et seq.

³⁸ An exception was bribery, where English law was questionably compliant with the EU instruments at the time they were adopted – as indeed it was with various other international instruments: see the Law Commission, *Reforming Bribery*, Consultation Paper No. 185 (2007), p. 206 et seq. It has since been comprehensively reformed by the Bribery Act 2010. At the time a further exception was people-trafficking, but as the current EU legislation is a Directive which falls outside the scope of the Protocol 36 opt-out, we have not discussed it here.

28. One instrument that has caused eurosceptic eyebrows to be raised is the Framework Decision against racism and xenophobia,³⁹ but as this only requires the Member States to criminalise those expressions of racism and xenophobia that are likely to provoke hatred or acts of personal violence, and these are already punishable under the laws of the different parts of the UK,⁴⁰ even this does not require the UK to take legislative action that it could otherwise avoid.

29. This is so not only as regards the types of behaviour and the maximum penalties, but also the range of persons whom the instruments require the Member States to bring within the purview of the offences. A feature of all these instruments is that they require Member States to ensure that criminal liability extends to incitement, aiding and abetting and attempt, and also that they extend to “legal persons” – i.e. corporations. Though contrary to the traditions of the criminal law of certain Member States, these particular forms of extended criminal liability are well-established features of the criminal law in all parts of the UK, where they existed long before the EU was created; indeed, far from being examples of “Brussels” forcing the alien traditions of continental criminal justice on the Common Law, their presence in these instruments appears to be a cultural transfer in the opposite direction. Pulling the other way, another standard provision in these instruments is an article requiring Member States to create extra-territorial jurisdiction over these offences when committed by their nationals – a feature common in the continental systems, but rare in the UK.⁴¹ However, even this does not constrain the UK to depart from its traditions when it did not wish to do so, because the instruments usually permit those Member States that do not wish to comply with this obligation to avoid it by giving notice to the General Secretariat of the Council and the Commission.

30. As previously mentioned, the benefit the UK obtains from these instruments is the protection they provide for UK citizens and institutions when the offences they require all Member States to render criminal are committed against UK citizens and institutions in other Member States. In the light of this, if the UK “withdrew” from these instruments it would matter little, because the laws of Member States would continue to punish the types of misbehaviour they are aimed at (as indeed would ours). So as regards these instruments, exercising the Protocol 36 opt-out would indeed appear to be “cost-free”. But equally, withdrawing from these instruments would give the UK nothing by way of benefits. As the criminal law of the UK already does all and more than these instruments require, our continued acceptance of these instruments poses no risk of compliance proceedings in the Court at Luxembourg. At a purely theoretical level, withdrawal would provide the UK with a benefit, in that it would then be free to decriminalise the various forms of conduct they are aimed at, or to reduce the maximum penalties applicable. But that the UK would ever wish to decriminalise terrorism, drug-trafficking, bribery, VAT fraud, cybercrime or any of

³⁹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. This instrument is singled out by Open Europe – see note 1 above.

⁴⁰ See in particular Part III of the Public Order Act 1986.

⁴¹ Though not wholly unknown: The Offences Against the Person Act 1861 s.9 provides that murder and manslaughter, when committed by “any subject of Her Majesty”, is punishable in England or in Ireland. And s. 7 of the Antarctic Act 1994 makes it an offence for a UK national to do various things there, including disturbing nesting penguins.

the other forms of conduct at which they are directed, or would wish to reduce the maximum penalties applicable, seems improbable, to put it mildly.

31. But even this hypothetical “liberation” to decriminalise such acts would be very limited in practice, because as regards almost all of the offences in question the UK would remain bound by a number of treaties of the Council of Europe, the United Nations and the OECD which it has ratified, which require the UK to criminalise essentially the same activity which the EU measures require it to criminalise (terrorist-related acts, drug trafficking, counterfeiting currency, corruption/bribery, people-smuggling, cyber-crime and money laundering). For instance, even if the UK used the block opt-out to denounce its EU obligations as regards corruption (i.e. bribery), it would still be bound by other treaties in this field which it has ratified, drawn up within the framework of each of these other international organisations. So as far as these EU instruments are concerned, in purely practical terms withdrawal would cost us nothing, but it would also be pointless and ineffective.

32. That said, there is also what might be called the “ideological dimension”. For those who resent the very fact that the UK’s criminal justice system is obliged, however theoretically, to respect rules other than those deriving from the UK legislature and the decisions of the UK courts, the fact that the UK was “liberated” from these European instruments and from the jurisdiction of the CJEU in respect of them⁴² would be perceived as a gain. But as against this, there is another ideological dimension. The UK’s withdrawal from these instruments would seem to send a negative message as regards the UK’s attitude to law and order, and international efforts to further it. By withdrawing from them, the UK would appear to be telling the other Member States (and indeed its own citizens and the rest of the world) that it considers the forms of anti-social conduct they are aimed at – terrorism, money-laundering, people-smuggling, cybercrime and so forth – are not so grave as to require international co-operation to deal with them effectively.

⁴² On this, see §21 above.

II(B): Measures intended to influence national criminal procedure

33. This group, by contrast, comprises only three instruments that fall within the scope of the Protocol 36 opt-out. One is the 2001 Framework Decision on the standing of victims in criminal proceedings⁴³. The other is the 2008 Framework Decision which regulates the status, in national proceedings, of previous convictions imposed in other Member States in respect of earlier offences⁴⁴. The third is Article 54 of the Schengen Convention, which deals with the related but distinct issue of prosecutions for offences which have previously been the subject of criminal proceedings in another Member State.

34. At the time of writing, the EU institutions have already concluded negotiations on a new Directive on the standing of victims, which the UK has opted into. This will replace the 2001 Framework Decision and once the Directive is formally adopted (likely in autumn 2012) the earlier instrument will not feature in the list of measures to which Protocol 36 applies. Until then, however, it does fall within the “hit list” and it should therefore be considered.

35. The most obvious benefit that this instrument provides for the UK is that it helps to secure a decent standard of protection for its citizens if they are unfortunate enough to become victims of crimes in other Member States. If it ceased to apply to the UK this benefit would presumably continue to operate, insofar as other Member States have implemented it, and continue to respect it. For the UK, the advantage of denouncing it – insofar as it can be described as one – is that the UK would no longer be obliged to treat victims of crime with the consideration that the instrument requires. The obligations it imposes are not particularly burdensome and, with one possible exception, UK law currently complies with them. The possible exception concerns the obligation under Article 8(4) to ensure that vulnerable witnesses are protected “from the effects of giving evidence in open court”, which is arguably contravened by the law currently in force in England and Wales, requiring vulnerable witnesses whose evidence is contested to undergo a live cross-examination at the eventual trial; and to this extent, the UK is possibly at risk of censure by the CJEU.⁴⁵ Though it would cease to be so if section 28 of the Youth Justice and Criminal Evidence Act 1999 were implemented, because this creates a procedure under which the cross-examination of vulnerable witnesses can take place out of court ahead of trial. All in all, the freedom to persist in a failure to implement a reform that is widely perceived to be necessary⁴⁶ is hardly a convincing reason to withdraw from an EU instrument designed to improve the position of victims; particularly when the UK has opted into negotiations to supersede it with a new instrument that seeks to take the protection of victims even further.

⁴³2001 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

⁴⁴2008 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

⁴⁵ See the judgment of the ECJ in the Pupino case: Case C-105/03, [2006] QB 83; noted [2005] Cambridge Law Journal 569.

⁴⁶ On this, see (ed Spencer and Lamb) *Children and Cross-examination: Time to Change the Rules* (Hart Publishing, 2012),

36. The second instrument in this group, which is the Framework Decision on previous convictions, is usually referred to as a “mutual recognition” instrument. However, this instrument requires certain steps to be taken by Member States in the course of their own national prosecutions – unlike, for example, the European Arrest Warrant, which requires the courts of Member State A to take separate proceedings to enforce an order made by the courts of Member State B. So this section appears to be the appropriate place to deal with it.

37. This instrument requires all Member States to give the same weight and effect to previous convictions imposed by the courts of other Member States as they give to previous convictions imposed by their own national courts. So, for example, where the fact of a previous conviction exposes a defendant to the possibility of a higher penalty, this will apply to previous convictions in all other parts of the EU.

38. The Framework Decision is aimed at repeat offenders who move around, reoffending in one Member State after another; and the general idea is to make sure that they are recognised as recidivists and do not receive the lenient treatment reserved for first offenders when they commit their next crime after crossing a national border. The UK derives a tangible benefit from it, to the extent that it means the imposition of an appropriately lengthy sentence on such an offender in another Member State will sometimes stop him moving on to the UK for the next one. And it derives an intangible benefit to the extent that it ensures that criminal convictions imposed by the UK courts are not treated lightly elsewhere in the EU. On the negative side, the instrument does not impose any obvious burden on the UK, and as the UK has enacted legislation that seems to implement it,⁴⁷ it carries no realistic risk of the UK’s being subjected to enforcement proceedings. If it ceased to bind the UK, the UK would then be at liberty, should it so wish, to repeal the implementing legislation, so enabling those previously convicted before the courts of other Member States to be treated, in contradiction of the true position, as if they had clean records; but seems unlikely that it would wish to take a course so foolish. This measure is linked to the EU measures on the exchange of information on criminal records (see §§57 onwards, below), without which this legislation would be ineffective in practice.

39. Article 54 of the Schengen Convention is as follows:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

40. This provision has generated case-law that is generous to defendants, resulting in a rule which might bar the institution of fresh criminal proceedings in the UK in some situations in which the national rules might otherwise permit them.⁴⁸ Despite

⁴⁷ The UK implemented the Framework Decision for England and Wales and Northern Ireland by s.144 and Schedule 17 of the Coroners and Justice Act 2009 and for Scotland by section 71 and Schedule 4 of the Criminal Justice and Licensing (Scotland) Act 2010.

⁴⁸ For an analysis of these provisions and the Luxembourg case-law interpreting them, see Mitsilegas, *European Criminal Law* (2009) 143 onwards, and Klip, *European Criminal Law* (2nd ed 2012) 251

this, a collision between this rule and the equivalent national rules on double jeopardy appears unlikely. When UK legislation was enacted allowing acquittals to be quashed and retrials ordered following the discovery of fresh evidence of guilt, it was expressly provided that the retrials should not be ordered where to do so would conflict with the UK's obligations under this provision⁴⁹. And outside this particular context, the UK courts have a general power at common law to halt any prosecution which, if it proceeded, would put the UK in breach of its international obligations.⁵⁰

41. Article 54 of the Schengen Convention is advantageous to the UK, to the extent that it protects UK citizens and residents from being harassed by further criminal proceedings once the UK criminal justice system has finished with them, whether by means of acquittal or by means of a sentence which has been served. If the provision ceased to apply to the UK, this advantage would be lost. On the other hand, it is burdensome to the UK, to the extent that it seems capable, in some cases, of blocking criminal proceedings in certain cases where the UK authorities might wish to bring them; and if the provision no longer applied to the UK this would no longer be the case. So taken on its own, the advantages and disadvantages of withdrawing from this particular measure seem to balance one another out. However, to take this provision on its own is probably not realistic. It forms part of a "package" of other Schengen measures, with which it must stand or fall. If following a general opt-out using Protocol 36 the UK sought to opt back into the other articles of the Schengen Convention with which it wished to re-engage, such as the provisions on the exchange of police information, it would probably have to take Article 54 as part of the deal – just as it did in 2000 when the UK initially obtained the approval of the other Member States (acting unanimously) to participate in part of the Schengen rules.

onwards; and see also Sharpston and Martin, 10 *Cambridge Yearbook of European Legal Studies*, ch. 15.

⁴⁹ Criminal Justice Act 2003, s.76(4)(c); Double Jeopardy (Scotland) Act s.10(3).

⁵⁰ *Asfaw* [2008] UKHL 31, [2008] 1 AC 1061.

II(C): Police Co-operation Measures

42. A significant part of the measures adopted under the pre-Lisbon Third Pillar concerned police co-operation; in the majority of cases, this co-operation amounts to an exchange of information, either by asking national authorities directly or through the creation of centralized databases.⁵¹ The remaining measures concern cross-border operations, e.g. through the creation of joint investigation teams.

(a) Measures concerning the exchange of information

- The Schengen Information System (SIS)

43. This is a central database used by different law enforcement authorities (national immigration, border control, police and customs authorities) in order to share very specific data on persons and objects of interest. The system can be used for policing purposes (e.g. when an alert concerning a wanted or missing person is issued) or for border control purposes (alerts are issued for third country nationals who are to be refused entry by all Schengen states).

44. The current SIS is a product of the Schengen Convention,⁵² and has been the object of several implementing measures.⁵³

45. Broadly speaking, the system works as follows: national authorities provide entries or “alerts” on certain persons or objects. An alert will come up when the authorities of a different Member State enter data concerning that person or object into the database (access to the database is on a “hit/no hit” basis). There can be six different types of SIS alerts:

- 1) When a person is “wanted for arrest for extradition purposes” (now including the EAW).⁵⁴
- 2) When a person is listed to be refused entry from all the Schengen states.⁵⁵
- 3) When a person has disappeared, or needs to be placed in a secure location to protect his or her safety.⁵⁶
- 4) When a judicial authority in one Member State wants to know a person’s whereabouts in another Member State during a prosecution.⁵⁷
- 5) When the authorities of a Member State want to subject person or vehicle to discrete surveillance or checks, due to clear evidence of planning or commission of a serious crime, or likelihood thereof, or the security services believe that the person is a serious threat.⁵⁸

⁵¹ See on these measures, generally, S Peers, *Justice and Home Affairs Law* (OUP, Oxford 2011) pp. 906-924.

⁵² [2000] OJ L 239

⁵³ Numerous implementing measures were adopted by the Schengen Executive Committee; for an exhaustive list, see S Peers p. 907.

⁵⁴ Art 95

⁵⁵ Art 96

⁵⁶ Art 97.

⁵⁷ Art 98.

⁵⁸ Art 99.

- 6) When objects are sought for the purposes of seizure or for evidence in criminal proceedings.⁵⁹

46. If the authorities from a Member State get a hit result when querying the database, and they want to obtain further information pursuant to this alert, they can contact the authorities from a different Member State that issued the alert. This request for further information takes place under the “Sirene” system.⁶⁰ Sirene Bureaux, established in all Schengen states, have as their main function the exchange of additional information on SIS alerts and the coordination of further action pursuant to these alerts.

The UK and SIS II

47. The UK does not participate in Schengen fully: it takes part in almost all of the police and judicial co-operation elements of Schengen,⁶¹ but not in those concerning border control. This means that, when it comes to the Schengen Information System, the UK can have access to some alerts but not others.

48. It has been explained above that SIS alerts may be issued not only for policing purposes (when there is a missing person, for example, or when an arrest warrant is in place) but also for immigration purposes, as alerts are issued for third country nationals who are not to be admitted into any Schengen state (see (4) above). UK authorities will not have access to the latter type of alert, as they will only be able to use SIS for law enforcement purposes.

49. We say “will” because the UK does not use the current SIS, but it will use the next technical version of the system, or SIS II, which is supposed to start working in 2013. This new technical version of SIS was considered necessary in order to make it possible for further Member States to connect to the system (among them the UK) and in order to be able to include biometric data in the system (fingerprints and photos). In practice it proved possible to add new Member States to SIS I; the UK, however, decided to wait until SIS II was in operation.

50. The UK has been preparing for a number of years in order to be able to connect to SIS II. The investment has been considerable, both as a contribution to EU costs and as investment into necessary domestic infrastructure: on the one hand, the UK was allocated responsibility for paying 18% of the total cost of SIS II charged to the EU budget between 2007 and 2012.⁶² On the other, the Home Office estimated in

⁵⁹ Art 100.

⁶⁰ Parts of the SIRENE Manual were published in [2003] OJ C 38/1. The manual was amended by Commission Decisions 2006/757/EC ([2006] OJ L 317/1) and 2006/758/EC ([2006] OJ L 317/41).

⁶¹ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis. ([2000] OJ L 131/43). The Schengen provisions in which the UK participates were put into effect for this country in 2004: Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland ([2004] OJ L 395/70).

⁶² House of Lords, EU Committee “Schengen Information System II (SIS II)” HL Paper 49, 9th Report of Session 2006-07, p. 15.

2007 that the costs for the UK of implementing SIS II domestically would be £39 million.⁶³

51. The consequences of opting out of SIS II at this point are obvious: first, the UK would lose its very considerable investment. Second, it would also be unable to make use of a system that has proved a valuable law enforcement tool,⁶⁴ since the UK could not be granted access to this database on an *ad hoc* or informal basis.⁶⁵ Without access to SIS II, the UK would not have access to alerts issued by other Member States in order to, for example, locate and apprehend criminals who escape into the UK from one of the Schengen countries. Neither could the UK issue a SIS alert in order to, for instance, locate a suspect who has left the country, or a car that has been stolen in the UK and driven abroad. While the UK authorities could still request assistance on an *ad hoc* basis from other Member States' authorities, this would be slower and more cumbersome than the automated and immediate exchange through SIS II.

- The Prüm System of Exchange of Information

52. This is based on a 2008 Council Decision,⁶⁶ which incorporated provisions from the Prüm Convention.⁶⁷ This Decision allows the authorities of one Member State to have automatic access to another Member State's databases containing fingerprint, DNA and vehicle registration data. As regards fingerprint and DNA data, Member States have to create special anonymous files that can be searched automatically by other Member States. If there is a hit, further information will be supplied.

53. If it decided to opt out of this measure, the UK would be relieved of any duty to provide automated access to its databases to law enforcement authorities from other Member States. At the same time, UK law enforcement authorities would not be able to have direct and automatic access to other Member States' databases. This would

⁶³ *ibid.*

⁶⁴ In its 2007 report, the House of Lords' EU Select Committee concludes that "[T]he Schengen Information System, and its development into a second generation system, are matters of the highest relevance to this country. [...] We believe this is well understood by the police, the prosecuting authorities, and all those involved in the combating of serious cross-border crime. They appreciate the benefits to be derived from this country's participation in the information system—benefits not just for this country, but for all the States with which we can share our information." House of Lords, EU Committee "Schengen Information System II (SIS II)" HL Paper 49, 9th Report of Session 2006-07, p. 43.

⁶⁵ Council Decision 2007/533/JHA (which regulates the criminal law and policing aspects of SIS II), Art 54: "Transfer of personal data to third parties: Data processed in SIS II pursuant to this Decision shall not be transferred or made available to third countries or to international organisations". See also para 18 of the Preamble: "Data processed in SIS II in application of this Decision should not be transferred or made available to third countries or to international organisations. However, it is appropriate to strengthen co-operation between the European Union and Interpol by promoting an efficient exchange of passport data. Where personal data is transferred from SIS II to Interpol, these personal data should be subject to an adequate level of protection, guaranteed by an agreement, providing strict safeguards and conditions."

⁶⁶ Known as the "Prüm Decision": [2008] OJ L 210/1.

⁶⁷ Convention signed on 27 May 2005 between Belgium, Germany, Spain, France, Luxembourg, Netherlands and Austria on the stepping up of cross-border co-operation, particularly in combating terrorism, cross-border crime and illegal migration.

come after a significant investment on the part of the UK in order to get the system up and running: in a letter from 2007 addressed to the House of Lords EU Select Committee, the government estimated the start-up cost to be in the region of £31 million. At the time, the government did not consider this cost unreasonable, “considering the benefits that the [Prüm] Council Decision [would] bring.”⁶⁸ The consequences of opting out of this measure would be that the UK would no longer be able to have automatic access to law enforcement databases in other Member States, since it seems unlikely that the UK could be granted access on an informal basis. Nor would other Member States have automatic access to UK databases; this could hinder investigations or prosecutions of British citizens who have allegedly committed crimes abroad, or the supply of information that could help to exonerate a British citizen suspected of a crime in another Member State. Again, whilst an *ad hoc* request for assistance might still be possible, this would be a much less expeditious procedure.

- Other Databases

54. UK law enforcement officials also currently have access to the Customs Information System, as well as indirect access to the Visa Information System.

55. The Customs Information System (CIS) is a centralized database that enables customs authorities to exchange and disseminate information with a view to preventing, investigating and prosecuting breaches of customs and agricultural legislation.⁶⁹ There is a First Pillar regulation that creates a very similar system for areas outside police and judicial co-operation and criminal matters;⁷⁰ the Commission is reportedly planning to propose to merge both instruments before the 2014 deadline. If the UK opted into the new instrument, the CIS would not be covered by the block opt-out.

56. The Visa Information System was created as a First-Pillar instrument; there is, however, a Third-Pillar Council Decision that enables national law enforcement services to access the database when the case concerns one of the 32 serious criminal offences listed in the EAW Framework Decision.⁷¹ Although the UK was not allowed to take part in this Council decision (despite the UK’s unsuccessful challenge before the CJEU),⁷² the UK can obtain information from the Visa Information System indirectly by asking one of the Member States which has access to it for information on an *ad hoc* basis (under the 2006 Framework Decision or “Swedish Framework Decision” adopted for this purpose, discussed below). Were the UK to opt out of the Swedish Framework Decision on exchange of data between law enforcement agencies, it would lose even indirect access to the Visa Information System. The UK’s legal challenge to the decision that kept it from having direct access to this

⁶⁸ House of Lords, EU Select Committee “Prüm: an effective weapon against terrorism and crime?” 18th Report of Session 2006-07, HL Paper 90, pg 24.

⁶⁹ [1995] OJ C 316/33. The system was initially established pursuant to a Convention and its Protocols, which were later replaced by a Decision: [2009] L 323/20. See generally S Peers, pp. 910-912.

⁷⁰ Council Regulation (EC) No 515/97 of 13 March 1997, [1997] OJ L 082/1.

⁷¹ [2008] OJ L 218/129. The Visa Information System became operational in Oct. 2011. It is being gradually rolled out worldwide, and currently applies to Schengen visa applications to consulates in North African and Near Eastern states.

⁷² C-482/08, *UK v Council* [2010] ECR I-10413.

database proves that such access, even on a limited basis, is valuable to UK law enforcement agencies.

- Ad-hoc Exchange of Information

57. Apart from the automated systems discussed thus far, several Third Pillar measures set out rules that apply when the law enforcement authorities from one Member State ask the authorities from a different Member States for specific information on an *ad hoc* basis.

58. The general rule derives from a 2006 Framework Decision,⁷³ often called the “Swedish Framework Decision”. This measure implements the “principle of availability”, according to which conditions for exchange of information cannot be stricter at cross-border than at national level. The Framework Decision also contains an exhaustive list of grounds for refusal, and it establishes different time limits within which a request has to be answered, depending on whether the request is labelled “urgent” and whether it concerns one of the 32 serious criminal offences listed in the EAW Framework Decision.

59. There are more specific measures aimed at making the *ad hoc* exchange of information more efficient in particular areas. This is the case for criminal records.⁷⁴ Third Pillar measures have created a standard format for requests (ECRIS),⁷⁵ and a duty of spontaneous and immediate transmission to other Member States of information on convictions of nationals from those Member States, and also where the person concerned is of dual nationality of the convicting Member State. There are further specific measures aimed at facilitating the exchange of information, spontaneous and otherwise, regarding customs,⁷⁶ terrorism,⁷⁷ security at sporting events and summits,⁷⁸ drugs,⁷⁹ etc.

60. The consequences of opting out of these measures are broadly similar; we will consider the more general measure, the Swedish Framework Decision, first.

61. Were the UK to opt out of the Swedish Framework Decision, it would seemingly not be able, in principle, to request information (or receive information spontaneously) through a procedure that is fast and very advantageous for the requesting authorities: it should be remembered that the Swedish Framework Decision requires that conditions for the exchange of information are not stricter at cross-border than at national level (principle of availability), and it also imposes time limits within

⁷³ [2006] OJ L 386/89.

⁷⁴ [2005] OJ L 322/33 and [2009] OJ L 93/23 and 33. For more details, see S Peers, pp. 717-19. Were the UK to opt out of this, the fallback option would be the Council of Europe’s Convention on Mutual Assistance in Criminal Matters (ETS 30).

⁷⁵ European Criminal Records Information System (ECRIS): the 2009 implementing Decision (supra) sets out the standard format through which criminal records will be supplied, using common codes for the type of offence and penalty. ECRIS is applicable since April 2012.

⁷⁶ Naples II Convention, [1998] OJ C 24/1.

⁷⁷ Decision [2005] OJ L 252/23.

⁷⁸ Among other instruments, [2002] OJ L 121/1; [2004] OJ C 116/08.

⁷⁹ [1996] OJ L 322/5; [2001] OJ L 150/1.

which requests must be answered. Thus, under certain conditions, EU law makes it obligatory to provide the requested information, and facilitates the process. If the UK opted out of this measure, it might not be able to enjoy these advantages, as Member States would no longer be under an EU obligation to extend them to the UK (this would depend on their implementation and interpretation of the EU rules, as we shall see below). It follows that exchange of information with law enforcement officials in other Member States would most likely depend on the latter's domestic legislation and willingness, and could require the following of a more cumbersome procedure.

62. When it comes to the UK providing information to other Member States, it should be noted that the UK did not transpose the Framework Decision into national law, as UK procedures were already, reportedly, in line with this instrument.⁸⁰ In the absence of a national reform (for which there is otherwise no reason) it can be expected that, in the event of an opt-out, requests coming from other Member States would be answered in the same way as before, as under the Swedish Framework Decision. On the other hand, how would other Member States respond to UK requests? First, whether there is still an EU duty to provide information almost automatically would depend on the way in which the Swedish Framework Decision has been implemented in that particular Member State, i.e. whether the principle of availability and other advantages such as time limits are extended to the Member States that are party to the Framework Decision, to Member States that offer reciprocity, or to Member States of the EU in general. In light of the deadlines set out in the Framework Decision, it is likely that at least in some cases, other Member States would give priority to answering requests for information from the law enforcement authorities of Member States other than the UK.

63. In the event that Member States did not extend the benefits of the Swedish Framework Decision to the UK following an opt-out, then the UK would still be able to request information on an *ad hoc* basis from other Member States' law enforcement services,⁸¹ but how expeditious this process would be would depend on their national law, and it is likely to be a much less streamlined process, and one that relies on good will. This would entail either contacting law enforcement services on an informal basis or through Interpol.⁸²

64. The same considerations would apply to a potential opt-out from the more specific measures on exchange of police data in particular areas such as terrorism, sporting events, etc: these measures, just like the more general Swedish Framework

⁸⁰ SEC(2011) 593 FINAL, pg 5.

⁸¹ The exchange would have to be conducted in accordance with Art 8 ECHR, Art 8 of the EU Charter of Fundamental Rights, and national legislation. Were the UK to exercise its block opt-out, the proposed "Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data" would also apply to the rest of Member States, if not the UK (see para. 75 of the Preamble): COM(2012) 10 final. The proposed Directive allows for the exchange of police data with third countries on an informal basis (i.e. in the absence of a legally binding instrument) if "the controller or processor has assessed all the circumstances surrounding the transfer of personal data and concludes that appropriate safeguards exist with respect to the protection of personal data" (Art 35.1.b).

⁸² Created as the International Criminal Police Commission in 1923. It counts 190 member states (among them the UK and all other EU Member States). Co-operation within Interpol is more limited and formal than within Europol.

Decision, aim at facilitating the exchange of information through the creation of more streamlined procedures in specific areas. If these procedures stopped being available to UK authorities in the event of a UK opt-out, then UK authorities might have to rely on a non-automatic and less expeditious exchange of information with law enforcement authorities in other Member States, either on an informal basis or through Interpol.

65. When it comes to the exchange of information concerning criminal records, in the event of a UK opt-out there would be a fallback international law measure, the Council of Europe's Convention on Mutual Assistance in Criminal Matters (ETS 30), but this instrument (which dates back to 1959) is more restricted in scope than the current Third Pillar measure.⁸³

(b) Cross-Border Operations

66. These include rules on hot pursuit (which do not apply to the UK)⁸⁴ as well as on surveillance, covert operations, special intervention units and joint investigation teams. General rules have their origins in the Schengen Convention,⁸⁵ whereas rules concerning customs operations are set out in the Naples II Convention.⁸⁶

67. It is, arguably, the issue of joint investigation teams that is most significant in this area: these are teams that are set up by two or more Member States, for a specific purpose and for a limited period of time.⁸⁷ Since each team member has access to his or her own national law enforcement network and powers, cross-border investigations can proceed more efficiently than otherwise. A good example would be Operation Golf, a UK and Romanian Joint Investigation that tackled Romanian organised crime and child trafficking between 2007 and 2009: the team, consisting of members of the Metropolitan Police and Romanian police, was formed because the exploitation was occurring in London, while planning and profit realisation took place in Romania. This was considered a highly successful operation.⁸⁸

68. Opting out of these joint investigation teams would put an end to this type of (voluntary) collaboration, at least on a formal basis. Whether this sort of joint initiative could take place informally would depend on the national legislation of other Member States, which might not allow UK police officers to carry out police operations on their territory without a legal basis for it – a point of principle that is further discussed at §§85-87 below.

⁸³ For more details, see S Peers, pp. 717-19.

⁸⁴ The UK has opted out of Art 20 (hot pursuit) of the Naples II Convention; it has not opted into Art 41 of the Schengen Convention (also relating to hot pursuit): [2000] OJ L 131/43.

⁸⁵ [2000] OJ L 239.

⁸⁶ [1998] OJ C 24/1.

⁸⁷ EU Convention on Criminal Assistance, [2000] OJ C 197/1; Framework Decision on Joint Investigation Teams [2002] OJ L 162/1.

⁸⁸ "The UK investigation has led to the arrest of 87 persons for trafficking, money laundering, child neglect and perverting the course of justice. 272 victims trafficked by the gangs were recovered." Source: <http://ec.europa.eu/anti-trafficking/entity.action?id=5c9c60a9-6b50-478d-808c-6a1b5ff58444>

(c) Measures Creating Third Pillar Bodies or Agencies Designed to Further Co-operation

69. There is a distinct group of police and judicial co-operation in criminal matters measures that were adopted in order to set up and regulate the functioning of EU bodies or agencies for the promotion or facilitation of co-operation in this area. The most significant examples are those of Europol and Eurojust. A less well-known (Third Pillar) body is CEPOL, or the European Police College. In all three cases, as noted above, the Commission is planning to propose new legislation that would replace the old Third Pillar measures before 2014; if the UK opted into these new measures, UK participation in these organizations would not be covered by the block opt-out.

70. Europol is a law enforcement agency created to improve the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating international crime.⁸⁹ The agency has among its main functions to process, analyze and exchange information and intelligence; to aid or support national investigations; and to ask national authorities to begin or coordinate their investigations.⁹⁰ Europol staff can take part in joint investigation teams. There is an indication that Europol may gain more operative powers in the future, although not coercive powers, which “shall be the exclusive responsibility of the competent national authorities”.⁹¹

71. Member States set up national units for relations with Europol, and they send liaison officers to the Europol headquarters: in the UK, the Serious Organized Crime Agency (SOCA) hosts the UK Europol National Unit within its International Crime Department, and it also manages the UK Liaison Bureau at Europol, which is the largest of any country represented there.⁹²

72. The Commission plans to propose to replace the Europol Decision with new legislation in 2013;⁹³ if this happens, and the UK opts into the amended measure, the UK’s part in Europol would not be covered by the block opt-out.

73. The same goes for Eurojust, a body created, also under the Third Pillar, to foster the co-ordination of investigations and prosecutions between national judicial authorities.⁹⁴ It also has a role in resolving conflicts of jurisdiction. It is made up of one prosecution official seconded by each Member State, together with his or her

⁸⁹ According to Art 88 TFEU, “Europol’s mission shall be to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy”. The original legal acts governing Europol were the Convention on the establishment of a European Police Office (Europol Convention) [1995] OJ C 316/2, with further Protocols. They were later replaced by a Third Pillar Council Decision: Europol Decision, [2009] OJ L 121/27, with further implementing measures.

⁹⁰ See S Peers, pp. 930 et seq.

⁹¹ Art 88(3) TFEU.

⁹² Source: <https://www.europol.europa.eu/content/memberpage/united-kingdom-817>

⁹³ COM (2010) 171, 20 April 2010.

⁹⁴ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1. This Decision has been amended and not yet consolidated: [2003] OJ L 245/44; [2009] OJ L 138/44.

supporting team. The number of cases that Eurojust has dealt with has increased steadily over the years, from 202 cases in 2002 to 1,441 cases in 2011.⁹⁵ In a report in 2004, the House of Lords' EU Select Committee referred to Eurojust as meeting a "real and increasing need for assistance in facilitating the investigation and prosecution of complex cross-border criminal cases", as well as "a model of how to make progress in an area where the differences between national jurisdictions are so great that it would be unrealistic to aim for harmonisation. It is also an example of the sort of effective practical co-operation that an EU agency can provide, which is sometimes lost sight of in more ideological debates [...]"⁹⁶

74. Again, the Commission is expected to propose a new measure before the deadline for the UK opt-out;⁹⁷ if this happens, and the UK opts into the new measure, then the UK's part in Eurojust would also be excluded from the block opt-out.

75. Finally, the European Police College was established in 2000 as a network of national training institutes for senior police officers.⁹⁸ In 2004, the College was given legal personality and a permanent seat in Bramshill, UK.⁹⁹ The Commission has also committed itself to proposing a new instrument on CEPOL before 2014; if this new instrument materialises, and the UK opts into it, the UK's participation in the College would not be affected by the block opt-out.

⁹⁵ Eurojust, Annual Report 2011:
<http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf>;

Eurojust, Annual Report 2002:
www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202002/Annual-Report-2002-EN.pdf.

⁹⁶ House of Lords, EU Committee "Judicial Co-operation in the EU: The Role of Eurojust" HL Paper 138, 23rd Report of Session 2003-04, p. 39.

⁹⁷ [2010] OJ C 115 and COM (2010) 171, 20 April 2010.

⁹⁸ [2000] OJ L 336/1; [2004] OJ L 251/19 and 20; [2005] J L 256/63.

⁹⁹ [2004] OJ L 251/19 and 20.

II(D): Mutual recognition measures

76. Mutual recognition is the principle whereby the decisions and rulings of the courts and other competent authorities of one Member State are accepted by the courts and competent authorities of the other Member States and enforced on the same terms as their own. In the context of the civil law it has been a feature of the European scene since 1968¹⁰⁰ and some thirty years later – with the enthusiastic backing of the UK – it was also officially accepted as the “corner stone of judicial co-operation” in criminal matters at the Tampere Council in 1999.¹⁰¹ In a *passive* sense, the mutual recognition principle means that the decision or ruling of a criminal court in one Member State must be given the same effect by the legal system of another Member State as that State would give to an equivalent decision or ruling of its own. An instrument to this effect is the Framework Decision on the status of previous convictions, which was mentioned earlier.¹⁰² In an *active* sense it means that the courts of each Member State must not only accept the validity of such decisions, but also where necessary take positive steps to enforce them. Here the obvious example is the European Arrest Warrant, which is discussed below.

77. Within the scope of the Protocol 36 opt-out there are eleven instruments that were adopted with the aim of promoting mutual recognition: three in the passive sense and eight in the active sense. Beyond the reach of Protocol 36 there is a yet another instrument: the proposed new European Investigation Order, now under negotiation, which the UK has elected to opt into, and which would therefore continue to bind the UK even if the Protocol 36 opt-out were invoked.

78. At the time they were adopted some of these Maastricht instruments were completely new but others superseded earlier legal instruments that attempted to do the same job. In the case of the European Arrest Warrant there was previously a system of extradition, an institution which in its modern form dated back to the 1840s¹⁰³. For some of the other instruments there was a precursor in the form of the European Convention on Mutual Assistance in Criminal matters of 1959¹⁰⁴ – updated and improved by the EU Mutual Legal Assistance Treaty of 2000, a document which itself currently falls within the Protocol 36 “hit list” (although a large part of this treaty would be replaced by the European Investigation Order, which the UK has opted into, if and when that measure is adopted¹⁰⁵). Between these precursor instruments and the mutual recognition instruments there is an important difference of spirit. The earlier instruments follow a “request model”, according to which the requested State has a wide discretion as to whether to execute the incoming request, and if so, in what way. The mutual recognition instruments, by contrast, follow a

¹⁰⁰ Starting with the Brussels Convention of 1968.

¹⁰¹ Paragraph 35 of the Tampere Conclusions included the following passage: “... The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply to both judgments and to other decisions of judicial authorities ...”

¹⁰² See §§36-38 above.

¹⁰³ To the Extradition Treaty with the USA in 1842 and the Extradition Treaty with France in 1843; see chapter 3 of the Scott Baker Report: Scott Baker, Perry and Doobay, *Review of the United Kingdom's Extradition Arrangements* (2011).

¹⁰⁴ And which the UK ratified in 1991 (a mere 32 years later!) after the Criminal Justice (International Co-operation) Act 1990 had been enacted.

¹⁰⁵ And if this happened, the Protocol 36 opt-out would no longer apply to it: see §10 above.

“command model” in which the “executing State” (as it is now called) is obliged to do what is asked of it, unless one of a number of reasons listed in the instrument are present.¹⁰⁶ If the Protocol 36 opt-out were implemented and the mutual recognition instruments ceased to apply to the UK, some of the precursor instruments might then re-emerge from the legal shade into which the mutual recognition instruments have cast them and once again become important – as we explain below.

79. The three “passive” mutual recognition instruments to which the Protocol 36 opt-out potentially applies are the Framework Decision on the status of previous convictions, Article 54 of the Schengen Treaty, and the 1998 Convention providing for the mutual recognition of disqualifications from driving.¹⁰⁷ The first two of these have already been discussed in another context (§§30-35 above) and the third is briefly mentioned in the Appendix.

80. The eight “active” instruments fall into two broad groups. First, there are four which are mainly intended to ensure the cross-border enforcement of orders made pre-trial. These are the Framework Decisions on the European Arrest Warrant¹⁰⁸ and on the European Evidence Warrant,¹⁰⁹ the Framework Decision on the mutual recognition of freezing orders¹¹⁰ and the Framework Decision on the mutual recognition of supervision orders “as an alternative to provisional detention”.¹¹¹ Then there are five further instruments relating to the cross-border of sentences imposed after trial and on conviction. These are the Framework Decision on the mutual recognition of fines,¹¹² the Framework Decision on the mutual recognition of confiscation orders,¹¹³ the Framework Decision on the mutual recognition of probation orders and other non-custodial penalties,¹¹⁴ and the Framework decision on the mutual recognition of prison sentences.¹¹⁵ It is these “active” instruments that will be examined here. However, these groups are not watertight: the European Arrest Warrant, for example, is used for retrieving persons who have been sentenced as well

¹⁰⁶ Klip, A., *European Criminal Law: an Integrative Approach*, Intersentia, Antwerp, Oxford, Portland, (2nd ed 2011) ch.7.

¹⁰⁷ Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications.

¹⁰⁸ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹⁰⁹ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

¹¹⁰ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

¹¹¹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention.

¹¹² Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

¹¹³ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders.

¹¹⁴ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

¹¹⁵ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.

as persons who are wanted for trial. So this temporal division will not be strictly adhered to in the discussion that follows.

The effect of denouncing these instruments: two general points.

81. It should be noted at the outset that, in the event of a UK opt-out, the Council has the power to issue a decision setting out transitional measures in this area. It seems obvious that this purely transitional power cannot extend to a power to require other Member States to recognize UK decisions issued *after* 1 December 2014, or vice versa. The most it could do would be to preserve the validity of decisions issued *before* that date.

82. Notwithstanding possible transitional arrangements to the contrary, the natural consequence of an opt-out from these measures would be that the UK would not be under an EU obligation to enforce or execute orders or decisions from the courts of other Member States. It would also mean that the UK might not be able to have orders or decisions emanating from its own courts enforced in other Member States—at least in the same conditions as they are now—depending on the latter’s national rules. We will deal with these two consequences in turn.

(a) Consequences for the enforcement of decisions from other Member States in the UK

83. If the UK were to opt out of these measures, the EU obligation to give automatic recognition to orders or decisions coming from other Member States in the circumstances set out in the Framework Decisions would cease to exist. Nevertheless, to the extent that these obligations have been implemented into UK national law—which varies depending on the instrument, as we will see later—there would still be an obligation as a matter of UK national law. In that case, there would only be two differences: the first one would be that the obligation imposed on UK authorities towards other Member States could be changed at any point, as Parliament could chose to amend the national legislation from which the obligation emanate—and, as regards the European Arrest Warrant, as the Minister could choose to change the way in which the legislation is applied to all or some Member States.¹¹⁶

84. The second difference would be that the Court of Justice of the EU would not be competent to interpret and thus define the contours of the obligation imposed on UK authorities.

(b) Consequences for the enforcement of decisions from the UK in other Member States

85. This is where the UK stands to lose the most, as the natural consequence of opting out of these mutual recognition instruments would be that other Member States would no longer be under an EU obligation to automatically enforce decisions or orders stemming from UK courts. The practical consequences of this are examined in the paragraphs that follow.

¹¹⁶ i.e. the Minister could choose to categorize all or some EU Member States as “Part II territories” instead of “Part I territories”; on the structure of the UK implementing legislation see §115 below.

b.1 *Could the UK go on using the channels created by these EU instruments?*

86. The practical consequences of a UK opt-out, however, would probably vary from one Member State to another, depending on the way in which each Framework Decision has been implemented in that particular jurisdiction. The question would be whether a Member State had implemented, for example, the European Arrest Warrant Framework Decision in a way that creates an obligation for the national authorities to execute warrants issued by (i) other Member States that have implemented the Framework Decision in question, (ii) other Member States that somehow offer reciprocity, or (iii) all Member States of the EU. These implementations would affect the UK differently, as, in the event of an opt-out, it would no longer be considered a Member State that has implemented the Framework Decision, but it might still offer reciprocity (if national legislation or the way in which it applies to other Member States has not been changed), or perhaps its warrants would still be executed just because of its EU membership. As a result of all this, while the UK might go on issuing arrest warrants, these might or might not be executed in different Member States. Moreover, as discussed above, the UK would not have the possibility to transmit its arrest warrants via means of the SIS II database, which is a more effective method of ensuring that other Member States' law enforcement authorities become aware of fugitives from the UK.

87. There is of course a degree of uncertainty as to what the position vis-à-vis UK arrest warrants would be in each Member State in the event of an opt-out; the Italian and German implementing laws, for example, could possibly be interpreted in a way that would allow the execution of UK warrants even after an opt-out;¹¹⁷ such a result would not seem possible when interpreting the Spanish, French or Swedish measures.¹¹⁸

88. Against this background, it seems obvious that, in the event of a UK opt-out, and in the absence of clear transitional measures issued by the Council concerning the treatment to be given to UK arrest warrants across the remaining Member States, a very uncertain and fragmented picture would emerge. This would certainly result in judicial challenges before the courts of other Member States. These, in turn, would be likely to lead to preliminary rulings from the CJEU. While the UK could ignore these rulings as a matter of national law, they would still bind the courts and authorities of all other Member States. Indeed, even if there were a clear Council decision concerning transitional arrangements in this area, this might itself be challenged before the CJEU.

¹¹⁷ See, especially, Art 1 of law 22 April 2005 n. 69 (Italian law implementing the EAW); paras 78 and ff of the German Law on International Legal Assistance in Criminal Matters. The situation is also uncertain in the Netherlands: Act of 29 April 2004 implementing the Framework Decision (2002/584/JHA) of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union (Surrender Act).

¹¹⁸ Respectively: Ley 3/2003 sobre la Orden Europea de Arresto y Entrega (esp. Disposición Transitoria Segunda, 3); Loi constitutionnelle n° 2003-267 du 25 mars 2003 relative au mandat d'arrêt européen; Lag om överlämnande från Sverige enligt en europeisk arresteringsorder SFS 2003:1156.

b.2 *Could we use a fall-back instrument?*

89. In the absence of alternative transitional arrangements, mutual recognition of orders or decisions between the UK and other Member States could take place, to a limited degree, on the basis of earlier international instruments.

90. The European Arrest Warrant Framework Decision replaced (as between EU Member States) a Council of Europe Convention on extradition, which dated back to 1957;¹¹⁹ if the UK were to opt out of the EAW regime, and Council were to make no special arrangements,¹²⁰ it would revert to the previous instrument. Extraditions between the UK and other EU Member States could then take place, again, on the basis of the Convention and its Protocols, if applicable.¹²¹ Nevertheless, the procedure for extradition under the Convention is far more cumbersome than the automatic mechanism set out in the European Arrest Warrant Framework Decision. This will be discussed in detail below; for now, it should be noted that a fallback regime would exist in this area, even if it were not as efficient as the current one.

91. The same could be said of the Council of Europe Convention on Mutual Assistance,¹²² which dates back to 1959, and its Protocols (replaced in part by several EU measures), as well as the Council of Europe Conventions on Transfer of Sentenced Persons and its Protocol (replaced by the EU's Framework Decision on the mutual recognition of orders related to sentenced persons)¹²³ and on Proceeds of Crime.¹²⁴ Two points should be made: first, it bears repeating that the regime established in these older instruments differs from the current one, and can generally be described as less efficient. And secondly, these measures would only cover some of the ground that is currently covered by mutual recognition measures: in the case of a UK opt-out there would, for example, be no fallback measure on mutual recognition of pre-trial measures (since there is no Council of Europe instrument) or of financial penalties (since there is an instrument, but the UK and some other Member States are not signatories).¹²⁵ In the case of a block opt-out, and in the absence of any other arrangements, it would be possible for the UK and other Member States to, at least, sign the existing instruments of public international law in the area to which they are not yet signatories.

¹¹⁹ ETS 24 Extradition Convention (1957); in addition, ETS 98 Second Protocol, Extradition Convention (1978) has been ratified by the UK and by all Member States of the EU except France, Greece, Ireland and Luxembourg.

¹²⁰ In fact, it seems doubtful that the Council would have the power to adopt such special arrangements, besides purely transitional rules concerning European Arrest Warrants issued beforehand.

¹²¹ So far, the UK has only ratified the Second Protocol to the Extradition Convention (ETS 98, 1978), all EU Member States have ratified it, apart from France, Greece, Ireland and Luxembourg. There are two further Protocols to the Convention that the UK has not ratified: the First Protocol (ETS 86, 1975) has been ratified by all EU Member States except Austria, Finland, France, Germany, Greece, Ireland, Italy and UK. Equally, the Third Protocol (ETS 209, 2010) has been signed, although not yet ratified, by 12 Member States (not including the UK). A Fourth Protocol to the Extradition Convention will be opened for signature in September 2012.

¹²² ETS 30 Convention on mutual assistance (1959).

¹²³ ETS 112 Convention on the transfer of sentenced persons (1983).

¹²⁴ ETS 141 Convention on the proceeds of crime, et al (1990)

¹²⁵ ETS 70 Convention on the international validity of criminal judgments (1970), ratified by 12 Member States of the EU (not the UK): Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Latvia, Lithuania, Netherlands, Romania, Spain and Sweden.

92. Finally, the question has been raised whether, even after a potential block opt-out, it would be possible for the UK to continue to be bound by Third Pillar *Conventions* (as against other types of instrument) under public international law. If this were so, it would “save” the EU Convention on Mutual Assistance (2000),¹²⁶ and give the UK a fallback legal basis in this particular area,¹²⁷ without the need to resort to a previous Council of Europe instrument. In theory, it could be possible for such a transitional arrangement to be adopted by Council; it would also be redolent of the solution adopted as regards Denmark and Schengen (see §159 below). It seems very doubtful, however, that the UK could negotiate such an arrangement in practice. Moreover, it is doubtful that such an approach would be legally valid (and any criminal suspects affected by it would be likely to challenge its validity), since the rules in Protocol 36 refer to all measures adopted prior to the Treaty of Lisbon without exception, and the case law of the Court of Justice equates Conventions with other Third Pillar instruments.¹²⁸

The mutual recognition instruments considered individually

(i) – The Framework Decision on the European Arrest Warrant

93. This instrument¹²⁹ was designed to replace, as between the EU Member States, the existing system of extradition with a hugely simplified system – which the instrument called “surrender” (and the French version “*remise*”) to make it clear that it was something new and different. The main innovations were the following: Firstly, whereas the old system was discretionary the new system is obligatory; previously, the final decision on surrender belonged to the executive, which had an open-ended discretion to refuse, but now the decision is a matter for the courts alone, which are obliged to order the surrender if the conditions set out in the instrument are met and none of the grounds for refusal listed in the instrument apply. Secondly, the “dual criminality” requirement is relaxed; where the offence for which the person is wanted appears among the 32 offences listed in Article 2, and is punishable with at least three years’ imprisonment in the issuing State, the person must be surrendered even if his conduct would not have been a crime if committed in the State now requested to surrender him.¹³⁰ And thirdly, the new system, unlike the old one, sets out a scheme of time-limits within which the “executing state” (as it is now called) is required to take action.

94. In public debate it seems to be widely assumed that the European Arrest Warrant (EAW) brought in two further innovations: first, that it abolished the obligation of the requested State to show a prima facie case, and secondly, that it required the UK for the first time to extradite its nationals. As far as the UK was concerned, however, both of these features of the new scheme were already present in

¹²⁶ Convention on Mutual Assistance in Criminal Matters, [2000] OJ C 197/01.

¹²⁷ A fallback measure would only be necessary in those subareas of mutual assistance that have not been covered by the proposed European Investigation Order (since, in the event of the adoption of the new, post-Lisbon measure, the areas covered in that instrument would be taken outside the scope of the block opt-out).

¹²⁸ Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633 [24]-[43].

¹²⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹³⁰ For offences not mentioned on the “Framework Decision list” the dual criminality requirement remains.

the old one. For extradition requests coming from Europe the prima facie case requirement had been suppressed in 1990;¹³¹ and as regards surrendering British citizens the UK – unlike many other countries – had never treated nationality as a bar to extradition. (The Framework Decision does indeed require all Member States to surrender nationals, but here the major change related not to the UK, but to the rest of the EU. Previously a number of them, including such populous and important countries as France, Germany and Poland, refused to extradite their nationals. If one of their citizens committed a crime in the UK and then fled to his home State, the home State would then in principle be prepared – and in some cases obliged – to try him there: but in practice this was difficult to organise, and in consequence such crimes often went unpunished.)

95. Member States were required to implement the instrument by the end of 2003 and the UK purported to do so in Part I of the Extradition Act 2003, which came into force on 1 January 2004. This legislation is strangely drafted. The text studiously avoids mentioning the Framework Decision, the European Arrest Warrant and even Europe. It continues to call the new process “extradition” rather than “surrender”. And more importantly, if read literally, it fails to meet the requirements of the European instrument in a number of significant respects. The UK courts, however, have construed the provisions with the Framework Decision in mind and the outcome of the case-law is that the UK has complied with its obligation.¹³²

96. The EAW was introduced for reasons of practical necessity: the existing system of extradition had become unacceptably cumbersome, expensive and uncertain for modern conditions. In the course of public discussion leading up to the reform astonishing instances were given of how costly the current procedure was, and how slow. In one case, for example, in 1995 France sought the extradition from the UK of a person suspected of large-scale drug trafficking. Although he was arrested in the UK in 1995, it was not until September 2001 that he was finally extradited; meanwhile, his detention alone had cost the taxpayer over £120,000.¹³³ Similarly, in 1995, France sought the return of Rachid Ramda on charges of complicity in a series of terrorist bombings. It was ten years later, in December 2005, after a long series of court proceedings, that he was finally handed over; even by 2001 the case was already said to have cost the British taxpayer over £450,000.¹³⁴ When introducing the Extradition Bill the Home Office Minister explained that it was currently taking up to a year for wanted persons to be extradited back to the UK, and that it could take “anything up to six years to extradite someone back to an EU Member State”. The average cost of a contested extradition case, he said, was in the order of £125,000.¹³⁵ All this might have been acceptable in the days when the need for extradition arose only rarely,¹³⁶ but

¹³¹ By a combination of the Extradition Act 1989 ss. 9(4) and (8), and the European Convention on Extradition order 1990, SI 1990 no. 1507.

¹³² The earlier case-law is summarised in “Implementing the European Arrest Warrant: a tale of how not to do it”, (2009) 30(3) Statute Law Review, 184-202. The latest instalment is *Assange v Swedish Prosecution Authority*, [2012] UKSC 22; [2012] 2 WLR 1275.

¹³³ An example given to Parliament by the Minister, Mr John Denham, on the Second Reading of the Extradition Bill in the Commons: HC 396 col. 396, 9 December 2002.

¹³⁴ HC Deb 20 November 2001 vol. 375 cc195-7

¹³⁵ Quoted by Sally Broadbridge in *The Extradition Bill*, House of Commons Research Paper 02/79, 6 December 2002.

¹³⁶ In 1973, the year in which the UK joined the EEC (as it then was) the total number of extradition requests received from all over the world was only 19, with a mere 13 requests sent the other way.

with increasing ease and frequency of travel this was no longer true. “Extradition requests to the UK have trebled since the 1970s”, the Minister explained. “Doing nothing is not an option”, he added, “our creaking extradition laws are in need of radical overhaul.”

97. Under the EAW this situation has changed this beyond recognition where the other State involved belongs to the EU. This is instantly obvious from the statistics. In 2003, the last year of the old system, 114 extradition requests were received by the UK from all over the world and 55 people were surrendered; and the UK issued, again to all the other countries of the world combined, a total of only 87 extradition requests. In 2007, under the new EAW regime, the UK surrendered 332 persons to other EU Member States; to the other EU Member States it issued 198 EAWs, with 99 people surrendered from them. By 2010, these figures had increased enormously. In that year the UK surrendered no less than 1,068 persons to other EU Member States; meanwhile it issued 256 EAWs to other Member States, with 116 persons surrendered from them.¹³⁷ Taking the EU as a whole, it now takes on average around 17 days to hand over a wanted person who consents to his surrender, and around 48 days where he does not: as against around a year, the average time it used to take under the old system.¹³⁸ At a conference in 2012 a senior police officer with extensive experience in these matters said, “There can be little doubt that the EAW system is much quicker, simpler and cheaper. We now experience fewer problems getting suspects or convicted persons extradited. There are far fewer false starts and the exercise of justice has become more certain and effective.”

98. Recent examples of the way the EAW enables cases to be dealt speedily and effectively include the following:

Paulius Aniuolis, wanted by Lithuania for grievous bodily harm, in respect of an allegedly unprovoked attack on a lone male who suffered serious injuries. The EAW was received on 11 December 2011. On 12 December he was located in London, arrested and remanded in custody. He was surrendered to Lithuania on 6 January 2012.

Arunas Cervinskas, wanted by the Republic of Ireland for rape. The warrant related to a stranger rape on a female under 18. The EAW was received on 23 November 2011. A suspect was located living in Plaistow. Further identification material was requested and this was received on 26 November. On 28 November the wanted person was located, arrested and remanded in custody. He was surrendered to Ireland on 14 December.

Jason McKay, from Hammersmith. On 3 February 2012 he killed his girlfriend in London. On 12 February he walked into a police station in Warsaw and confessed, whereupon he was arrested. At this stage the homicide was not known to the UK police. The police attended the address and found the body. An EAW was promptly issued by the UK authorities to Poland and he was returned to the UK on 23 February. In June 2012 he was jailed for manslaughter.

¹³⁷ Figures from the Scott Baker review, note 103 above.

¹³⁸ Figures from a report by the Commission to the European Parliament and Council, SEC (2011) 430 final.

99. An earlier and higher-profile example was the case of Hussein Osman, one of the July 21st bombers. After the unsuccessful attempt to blow up the London Underground in the summer of 2005 he fled by Eurostar to France and from there moved on to Italy. Under the EAW procedure he was returned to the UK in a matter of weeks – whereas under the previous system his extradition would have taken at least a year, and might have taken very much longer.

100. Not surprisingly, the police and other law enforcement agencies are pleased with the EAW, which they see as an indispensable tool for coping with cross-border crime. In 2009 a spokesman for the Crown Prosecution Service told the House of Commons Justice Committee that it was the “most effective mutual recognition tool introduced” and that its impact was “greatly simplifying and speeding up extradition within the EU since its introduction”.¹³⁹ Reacting to the prospect of its disappearance as a result of a Protocol 36 opt-out, a spokesman for ACPO said “If [the warrant] were removed we would be working with a multiplicity of systems on a bilateral basis, it would take a lot longer, be a lot less certain and it would definitely be more expensive” and another senior police officer said that losing the EAW would be “awful”.¹⁴⁰ The Attorney-General in the previous government also defended it, saying “The European arrest warrant system provides a very effective and efficient means by which extradition can be conducted between Member States of the European Union”.¹⁴¹ More recently, the Scott Baker review (as it is usually called)¹⁴² concluded “that the European Arrest Warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily.”

101. Organisations supporting suspects and defendants are less enthusiastic and point to its defects. Fair Trials International, in particular, has repeatedly criticised the EAW for causing injustices in particular cases. But in so doing, it accepts the basic need for it, and presses for its improvement, not its abolition. “FTI recognises that the EAW is an important tool in combating serious cross-border crime and wants to see it working to deliver justice. The EU must now work to remedy the flaws in the EAW system. This will avoid further cases of injustice and an increased erosion of trust in the EAW and in mutual recognition as a whole.”¹⁴³ FTI fears that a general Protocol 36 opt-out could make the situation worse – because the end result might be that the UK opted back into the EAW, but not the various “flanking measures”, like the Framework Decision on supervision orders (discussed below), which would reduce some of the problems caused by the EAW if they were implemented.¹⁴⁴

102. By contrast, some critics of the EAW object to it so strongly that they see its consequential disappearance as one of the reasons why the Protocol 36 opt-out should

¹³⁹ House of Commons Justice Committee, *Justice Issues in Europe*, Seventh Report of Session 2009-10, HC 162-I.

¹⁴⁰ “Police defend EU arrest warrants”, *Financial Times*, 6 February 2012.

¹⁴¹ Baroness Scotland, in the fifth day the Committee stage of the Policing and Crime Bill; Hansard, HL, vol. 713, col. 613 (20 October 2009).

¹⁴² *A Review of the United Kingdom’s Extradition Arrangements*, note 103 above, §1.9.

¹⁴³ The European Arrest Warrant eight years on – time to amend the Framework Decision? 1 February 2012.

¹⁴⁴ *The UK’s right to opt out of the EU crime and policing laws from December 2014 – Frequently Asked Questions* (July 2012), p.8.

be used.¹⁴⁵ In the light of this, it is necessary to look further at the criticisms that have been made of it, and to consider whether, insofar as they are valid, they could be met without abandoning the EAW altogether.

103. Some of the criticisms are, with due respect to those who make them, so far-fetched that it is impossible to take them seriously. Among these is the suggestion that the EAW is objectionable because it delivers defendants into the hands of the Continental criminal justice systems, which are inherently flawed because, unlike ours, they are “inquisitorial” and therefore, unlike ours, do not respect (for example) the presumption of innocence or the right of silence,¹⁴⁶ or because they permit suspects to be locked up without giving them the legal means of challenging their imprisonment¹⁴⁷. This criticism is founded on serious errors about the nature of modern criminal procedure in Continental Europe,¹⁴⁸ and to some extent on misunderstandings about criminal procedure in the UK as well.¹⁴⁹

104. A related criticism is that the EAW is inherently objectionable because it causes British citizens to be tried by Continental criminal justice. This too must be summarily dismissed. As previously explained, the “nationality exception” has never been applied by UK law, though at one time a number of the Continental systems used to apply it against the UK (and all other foreign legal systems): with the consequence, in practice, of impunity in many cases for those who committed crimes abroad and then returned to their home States. If the UK wishes to be able to try EU citizens who are suspected of committing crimes here, the trial of British citizens in the courts of other EU countries must be accepted as the *quid pro quo*. Furthermore, moving to a situation in which British citizens had to be tried in the UK for offences allegedly committed in other EU Member States would pose the same practical problems as would arise if EU nationals were tried in their home States for offences committed here: or perhaps worse ones, given that the criminal courts of all parts of the UK usually insist on oral testimony in contested cases.

105. Of the criticisms that must be considered seriously, some are objections of principle and some are directed to the way the EAW currently works in practice.

106. The first objection of principle relates to the suppression of the “dual criminality requirement” – i.e. the rule that a person can only be extradited where the behaviour in question is an offence under UK law as well as under the law of the requesting State – in respect of the 32 offences contained in the “Framework Decision

¹⁴⁵ See, for instance, the letter to the *Daily Telegraph* – set out at note 2 above – urging the government to exercise the opt-out, which specifically mentioned the authors’ “deep concerns about the operation of the European Arrest Warrant for our citizens”.

¹⁴⁶ Points made by some of those opposing the enactment of Part I of the Extradition Act, by which the EAW was implemented. See *inter alia*, HC 396 col. 396, col. 57 (9 December 2002).

¹⁴⁷ See the article “Britons could all too soon become the slaves of Europe” by Simon Heffer, *Daily Telegraph*, 29 September 2006.

¹⁴⁸ If only because the Continental systems all subscribe to the European Convention on Human Rights.

¹⁴⁹ For example, it overlooks the fact that UK criminal procedure has been amended over the years to introduce a number of “inquisitorial” elements; for example, that the police in the UK now have the right to detain suspects for questioning – and that the Director of the Serious Fraud Office, and the Director of SOCA, have the right to put questions to suspects that they are legally obliged to answer, and that defendants facing trial on indictment are legally obliged to disclose the nature of their defence in advance of trial.

List”. This would clearly be a grave interference with national sovereignty if it meant that the UK were required to surrender for trial abroad a person accused of doing something that is not an offence in the UK where the conduct in question took place here – but it does not. The Framework Decision does not require this,¹⁵⁰ and Part I of the Extradition Act is drafted so as to exclude the possibility¹⁵¹.

107. The “Framework Decision List” does create the possibility (at least in theory) of the UK being required to surrender someone for conduct abroad that is not punishable under UK law, though it was contrary to the law of the State where it took place. Against this, there is a respectable argument that the UK should not, on principle, apply any of the coercive powers of the State against conduct which it is not itself prepared to punish. On the other hand, it could also be argued that we expect those who visit the UK to respect our laws, and also expect neighbouring states to cooperate by helping us to punish them when they do not, whether or not the behaviour is punishable in that country – in the light of which it is reasonable to expect the UK to return the favour. In truth, however, this issue seems to be more important in theory than in practice. We are not aware of the UK ordering the surrender of a person wanted for something that was not criminal in the UK during the eight years in which the EAW has been in operation,¹⁵² and given the extended reach of UK criminal law compared with that of other countries,¹⁵³ it is unlikely to be a common occurrence. (And it might also be added that this possibility exists, and has always existed, as between the different parts of the UK, between which the surrender of wanted persons has always operated automatically – without, it seems, its ever causing any difficulty.¹⁵⁴)

108. The second objection of principle is the complaint that, under the EAW, the UK is required to surrender wanted persons without the requesting State having to produce any solid evidence of the existence of a “prima facie case”. As previously mentioned, this was not an innovation that the EAW introduced, the prima facie case requirement having already been abolished within Europe by the Council of Europe Convention on Extradition of 1957, which the UK ratified (having adjusted its law to take account of it) in 1990. It follows that the UK’s withdrawal from the EAW would not enable this requirement to be reintroduced: to reintroduce the prima facie case requirement the UK would have to put the clock back even further and extract itself

¹⁵⁰ It is one of the optional grounds for refusal under Article 4.

¹⁵¹ It is present, albeit deeply buried, in the densely drafted provisions of ss. 64 and 65 of the Extradition Act 2003.

¹⁵² In an article entitled “We have European opt-outs, so why not use them?” (*Daily Telegraph*, 6 February 2012) the journalist Philip Johnston wrongly claimed that this was the position in the Assange case. In fact, the Divisional Court was at pains to point out that all the behaviour of which Assange was accused would have amounted to criminal offences under English criminal law: see *Assange v Swedish Prosecution Authority*, [2011] EWHC 2849.

¹⁵³ One example out of many is the scope of its legislation against terrorism: see above, note 37. Equally striking is the breadth of its sexual offences, on which see *Simester and Sullivan’s Criminal Law*, 4th ed., 477 et seq, and “The Sexual Offences Act 2003: Child and Family Offences”, [2004] *Criminal Law Review* 347.

¹⁵⁴ The most striking example is abortion – where the law is much stricter in Northern Ireland than in the rest of the UK. The same is true of sexual offences against minors, the age of sexual majority being 17 in Northern Ireland, as against 16 in Scotland and in England and Wales.

from the obligations imposed by the 1957 Convention.¹⁵⁵ And aside from the legal difficulties involved in re-introducing it, it could be said that, whilst making extradition considerably more complicated, the prima facie case requirement did not really act as much of a protection to the innocent. The obligation that it formerly imposed on the requesting State was only to produce evidence which, if believed, would justify a conviction: not to produce evidence which convinced the court of the requested State of the guilt of the accused.¹⁵⁶ Thus contrary to what appears to be believed, it would seemingly not have been an impediment to surrender in the *Symeou* case, for example.¹⁵⁷ And assuming a requirement as to the adduction of evidence could be re-imposed, it could hardly be more exacting than a requirement to produce a prima facie case – or every extradition hearing would then become a trial of the requested person.

109. The practical objections to the way the EAW works (or sometimes works) at present are more serious, and essentially come down to two. One is its scope, which enables it to be used in some cases that are trivial, or stale, or both. This problem is graphically illustrated by the much-publicised flood of EAWs emanating from Poland¹⁵⁸ – which worries the UK law enforcement authorities as well as those who speak for the interests of suspects and defendants. The other is the fact that it sometimes returns suspects to countries where they then spend excessive periods in prison before trial: as notoriously happened in the *Symeou* case, for example.¹⁵⁹ Both of these concerns are important and clearly need to be addressed; but the question is whether it is necessary to withdraw from the EAW to do so.

110. The problem of the EAW being used in trivial or stale cases stems in part from the threshold conditions set out in the Framework Decision, which do not include a general requirement of proportionality – and in consequence of which there is no such requirement in the UK implementing legislation either. (That said, however, the Framework Decision does permit and the UK legislation does incorporate a general “human rights” requirement¹⁶⁰ which, according to a recent Supreme Court decision, may be invoked to block the execution of an EAW in a stale or trivial case where this would inflict disproportionate damage on a family with children that is settled here.¹⁶¹) This problem could, in principle, be solved at EU level by amending the

¹⁵⁵ Under Article 26 of the 1957 Convention, a State could on signature or ratification enter reservations, and some did make reservations preserving their right to insist on the production of evidence: but the UK did not. See the Scott Baker Report, p.58.

¹⁵⁶ *Atkinson v United States* [1971] AC 197.

¹⁵⁷ *Symeou v Greece* [2009] EWHC 897 (Admin); [2009] 1 WLR 2384; noted [2010] CLJ 225. The Greek authorities sought Symeou’s surrender on the basis statements witnesses had made to the police accusing him of manslaughter – and which the witnesses, his friends, later claimed the Greek police had obtained from them by violence.

¹⁵⁸ According to figures published by EU council in May 2011, during 2010 Poland issued 3753 EAWs – considerably more than Germany, the runner-up, which issued 2096. According to the Scott Baker report (note 103 above), the between 2004 and March 2011 the UK surrendered 1,659 persons to Poland – more than four times as many as to its closest competitor, the Netherlands (355).

¹⁵⁹ Symeou was surrendered to Greece in July 2009. It was March 2011 before his trial eventually began and it was not until June 2012 that the proceedings finally terminated in his acquittal. For the entire period between his surrender and his acquittal he was required to remain in Greece, spending the first ten months in pre-trial detention.

¹⁶⁰ Extradition Act 2003 s.21.

¹⁶¹ *H (H) v Deputy Prosecutor of Italian Republic, Genoa* (and related cases), [2012] UKSC 25; [2012] 3 WLR 90.

Framework Decision – as has already been done in relation to defendants whose cases have been dealt with in absentia.¹⁶² However, the problem also stems in part from the fact that there is, as yet, no operational system by which justice can be done across borders in less serious cases. This means that a State confronted with (say) a minor theft committed by a person who has removed himself to the UK has a choice between issuing an EAW – an instrument designed with grave crimes and organised criminality in mind – and letting the guilty person get away with it. This problem could be solved by creating a parallel system for dealing with what might be called “disorganised crime”, similar to what happens within the UK where (for example) a minor theft is committed in Scotland by someone who then goes to England (or vice versa). In this case the person would be summoned, not arrested, the summons would be served across the Border, and if the defendant failed to appear the court would deal with him in his absence, with the possibility of enforcing the penalty in the place where the defendant lives. At EU level the germ of such a system is already present in various other mutual recognition instruments, as yet little used, like the Framework Decision on cross-border enforcement of fines, discussed below. As with the introduction of a proportionality requirement, this is a matter for action at EU level; and a recent Report from the Commission suggests that action in this area is possible.¹⁶³

111. The problem of the EAW causing people to be removed to Member States where they then spend an unacceptably long in prison awaiting trial is partly the result of the way the Framework Decision is drafted, because it does not permit the requested State to postpone the execution of the warrant until the issuing State is ready to proceed with the trial. Again, this could be solved at EU level by getting the instrument amended, and the UK could press for this. More fundamentally, the problem arises from the fact that the criminal justice systems of some Member States are (by UK standards) deplorably slow in bringing cases to trial and unreasonably reluctant to grant bail, particularly to foreigners, who are thought likely to “jump” it if they get it.

112. In the short term, the Framework Decision on the mutual recognition of pre-trial supervision orders, which is discussed below, should in principle alleviate this problem, once the Member States have implemented it, as they are required to do by 1 December 2012.

113. In the longer term, the solution is for the EU to force those Member States whose criminal justice systems are deficient in these respects to improve the way they treat defendants. In the early 2000s there were moves in this direction until the UK – astonishingly – intervened to block progress towards a proposed EU instrument protecting defendants’ rights.¹⁶⁴ In 2009, following a change of heart by the UK, the EU adopted a “Roadmap” of proposed measures intended to improve the position of

¹⁶² This instrument aims to limit the obligation to enforce such judgments. In an article in the *Daily Telegraph* 14 September 2008 entitled “EU Extradition on Demand Undermines Justice” the journalist Alasdair Palmer misrepresented the instrument as designed to do the opposite.

¹⁶³ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (SEC (2011) 430 final).

¹⁶⁴ See *Breaking the Deadlock: What Future for EU Procedural Rights?* House of Lords European Union Committee, 2nd Report of 2006-7, HL Paper 20.

defendants in criminal cases, and this is now going ahead, with the rather tentative support of the UK – which has opted into two post-Lisbon Directives forming part of this programme,¹⁶⁵ whilst (at least for the moment) opting out of a third, a proposed Directive on the right to legal advice, currently under negotiation. Once again, instead of invoking the Protocol 36 opt-out in order to rid itself of the EAW the UK could press for further action on this front.

114. What exactly would be the legal effect of the UK's withdrawing from the EAW Framework Decision in consequence of a Protocol 36 opt-out?

115. Looking no further than Part I of the Extradition Act 2003, by which the EAW is implemented, the reader's first impression is that nothing much would change. Under UK law the provisions of that Act would remain in force and the UK could therefore continue to deal with "Part I territories", as the Act requires the EU Member States to be called,¹⁶⁶ on the same basis as before: but with the difference that, freed of the need to comply with the Framework Decision, it could now amend the legislation as it wanted. However, for the reasons explained above, the position is not so simple. In a number of Member States the legislation implementing the Framework Decision, unlike our Part I of the Extradition Act, explicitly refers to it, with the likely result that those States would no longer be able to send EAWs to the UK, or execute EAWs coming from this side of the Channel.

116. The solution to the legal problem in those Member States would probably be that after a Protocol 36 opt-out they then used in dealings with the UK that part of their national legislation used for extradition with those countries which are parties to the 1957 European Convention on Extradition but are not EU Member States, or countries associated with the Schengen rules (Norway, Iceland, Switzerland and Liechtenstein). On their side, this would mean that extradition with the UK then functioned in the same way as it did before the days of the EAW. A certain consequence would be increased delay and greater expense, and a probable consequence would be that some of them no longer extradited to the UK their nationals. On our side there would be a legal impasse in our dealings with these Member States as long as they were still designated as "Part I territories", because the terms of the Extradition Act would make it impossible for the UK to deal with them on any other basis. In consequence, the government would be obliged to re-designate those States as "Part II territories", and thereafter treat them for extradition purposes under Part II of the Extradition Act, which regulates extradition between the UK and the rest of the world. This would not put the clock back to exactly where it stood before the EAW was introduced, because Part II of the Extradition Act creates a scheme of extradition that is rather simpler than the one that previously existed. However, it is still considerably more complicated than the EAW – in particular, because it retains the principle that extradition is in the last resort an act of the executive.

¹⁶⁵ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU on the right to information in criminal proceedings.

¹⁶⁶ By s.1(1) of the Extradition Act, Part I of the Act applies to those States designated as "Part I territories" by the Secretary of State. Unsurprisingly, he has so designated the other Member States of the EU.

117. A further point to make in this connection is that, in light of the statistics quoted above (§97) on the greater speed of the EAW system as compared to the extradition system which it replaced, withdrawing from the EAW would be likely to significantly *lengthen* the periods of fugitives' detention before extradition, not only for foreign prisoners in UK jails but also for British prisoners in foreign jails. Even those who consent to their extradition would wait longer in jail before extradition, because the UK would also be opting out of the rules in the Schengen Convention on consented extradition, and it has not signed the Third Protocol to the Council of Europe Convention on extradition, which also provides for rules on this issue. In any event, only two Member States have ratified that Protocol at time of writing.

118. In practical terms, one consequence might be to reduce the incidence of British citizens being surrendered to face criminal proceedings, or the enforcement of a prison sentence, in Europe. However, it would also make it much harder, and in some cases impossible, for the UK to get its hands on persons (whether British or aliens) who had committed crimes in this country and then fled across the Channel or the Irish Sea. And it would also make it much harder for the other EU Member States to extract from the UK those persons (including their own nationals) who have committed crimes on their territory and then sought refuge here. This last point is significant, because although media attention is focused on the surrender of British citizens, the overwhelming majority¹⁶⁷ of those whom the UK surrenders under the EAW are foreigners who, if they have come here after committing crimes abroad, the UK would usually have no desire to keep. In the worst case scenario, the result could be that the UK became – in the graphic expression of a seminar participant – “the Brazil of the EU”.

(ii) - The Framework Decision on the Mutual Recognition of Freezing Orders

119. This instrument¹⁶⁸ sought to create a mechanism for the quasi-automatic enforcement of orders from the courts of other Member States freezing property or evidence in the context of criminal proceedings. In 2003 the UK enacted a number of provisions of the Crime (International Co-operation) Act 2003 which provide for the mutual recognition of orders freezing evidence (but not property). These sections were eventually brought into force in 2009 – four years after the official date for implementation. Other sections of this Act, not yet in force, provide for the enforcement of freezing orders on terrorist property. Section 96 of the Serious Organised Crime and Police Act 2005 supplements all these provisions by creating a rule-making power enabling any obligation derived from the Framework Decision to be implemented by secondary legislation, but so far none has been made.

120. If this Framework Decision ceased to apply to the UK, in formal terms the result would be that the UK was relieved of its obligation to implement it, insofar as it has not yet done so, and free if it so wished to repeal the legislation that has given partial effect to it. Conversely, if UK legislation provided for the issue of freezing

¹⁶⁷ According to figures published in the *Daily Telegraph* (“Britons increasingly targeted under European arrest scheme”) on 1 December, the UK surrendered 1,173 persons during 2010-2011, of whom 48 were British citizens.

¹⁶⁸ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

orders under the Framework Decision, some Member States might then refuse to recognise them.

121. In practical terms, however, the impact would be negligible because, if our understanding is correct, in sharp contrast to the European Arrest Warrant the procedure created by this Framework Decision is not at present used. The UK legal authorities do freeze property at the instance of other Member States and vice versa, but this is still done using national legislation that predates the Framework Decision and operates on the basis of mutual legal assistance rather than mutual recognition. So instead of issuing an order, which is transmitted to the authorities of the other Member State, where it has direct effect, the authorities issue a “letter of request” to the authorities of the other Member State, asking if it would freeze the property in question by applying the relevant provisions of the law of the requested State: and if they agree to the request, they do so.

122. If and when the proposed Directive for a European Investigation Order is adopted, it will replace those parts of this Framework Decision which deal with the freezing of evidence (as against property). The UK has opted into this proposed Directive, and will therefore be bound by the replacement provisions in this respect; and as this means the earlier instrument will have been amended by a post-Lisbon measure by which the UK is bound, the Framework Decision will presumably fall outside the scope of a Protocol 36 opt-out.

(iii) - The Framework Decision on the Mutual Recognition of Confiscation Orders

123. This instrument¹⁶⁹ requires Member States to ensure that their legal systems provide for the quasi-automatic enforcement of confiscation orders issued by the courts in other Member States. At the time it was adopted the Proceeds of Crime Act 2002 (and secondary legislation made under it) already provided for the enforcement in the UK of foreign confiscation orders and the government took the view that UK law was therefore compliant and needed no amendment to implement the Framework Decision; though in fact the UK legislation does not wholly match the Framework Decision, in particular because it contains a “dual criminality” requirement – largely abolished under the Framework Decision – and because the enforcement of foreign confiscation orders is principle discretionary, rather than being mandatory except where one of a list of explicitly stated bars to execution applies.¹⁷⁰

124. If the Framework Decision ceased to apply to the UK, the UK would be relieved of its obligation to implement it (insofar as its current legislation fails to do so). In theory, it would also mean that, if in future the UK authorities tried to secure the enforcement in another Member State of a confiscation making explicit use of the procedures created by the Framework Decision, in certain Member States it might not be recognised. (For further details, see the general discussion at §§83-85 above.)

¹⁶⁹ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders.

¹⁷⁰ The discrepancies are more fully examined in (Vernimmen-Van Tiggelen, Surano and Weyembergh, *The Future of Mutual Recognition in Criminal Matters in the European Union* (Brussels, 2009) pp. 537-539.

125. In practice, however, we believe that as things stand the loss of this particular instrument would make little or no difference. At present, trans-border confiscation proceedings do indeed take place: but the business is done the basis of the UK legislation, which dates from 2005¹⁷¹ and operates on the “request model” rather than the “command model” envisaged by Framework Decision. The situation, in other words, is rather similar to the position with trans-border freezing orders, discussed in §121 above.

(iv) - The European Evidence Warrant

126. The aim of the European Evidence Warrant Framework Decision¹⁷² was to move from the “request” model of the previous instruments on mutual assistance to the “command” model of mutual recognition for certain types of evidence:¹⁷³ Thus under the new regime, Member States are under an obligation to provide specific pieces of evidence that another Member State requires, as long as the evidence is necessary and proportionate, and as long as that kind of evidence could also be obtained, in similar cases, in the Member State that issues the warrant. The measure provides grounds for non-execution of a warrant and, as is the general rule with these instruments, it abolishes the requirement of double criminality in relation to the 32 grave offences that are listed in the EAW Framework Decision.

127. The measure was supposed to have been implemented by January 2011; but it has not been implemented in the UK due to the introduction, in 2010, of a proposal for a Directive creating a European Investigation Order,¹⁷⁴ a broader measure which would entirely replace the European Evidence Warrant. The Council adopted a general approach on the European Investigation Order draft in December 2011.¹⁷⁵

128. The UK has opted into the negotiations for the European Investigation Order Directive, and so if it is indeed adopted the European Evidence Warrant would be repealed and it would no longer fall within the scope of the block opt-out. Conversely, if the negotiations on a European Investigation Order do not come to fruition, the European Evidence Warrant would still be within the scope of a UK block opt-out. In that case, the consequences of opting out of this instrument would be that the UK would no longer be under an obligation to, first, implement the Framework Decision, and secondly, execute other Member States’ evidence warrants. When it came to the execution of UK evidence warrants abroad, this would again depend on the way in which these Member States had implemented this Framework Decision, but the most likely scenario is that the UK would have to return to the “request” model; in this case, the fallback legal basis would be the 1959 Council of Europe Convention on

¹⁷¹ An Order, made under powers created by the Proceeds of Crime Act 2002.

¹⁷² Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

¹⁷³ It excludes, inter alia, evidence that could only be obtained by the holding of hearings, bodily examination, gathering real-time information, or analysis of existing documents or data. On the scope of the measure and further background: S Peers, pg 714.

¹⁷⁴ [2010] OJ C 165/22.

¹⁷⁵ Council of the European Union 18498/11 PRESSE 491, PR CO 79 (13-14 December 2011) p.20.

Mutual Assistance and the First Protocol to it.¹⁷⁶ A Second Protocol, mostly concerned with financial crime, was also agreed in 2001; but a number of Member States have chosen not to ratify it.¹⁷⁷

(v) – Pre-trial Supervision Orders

129. The Framework Decision on Supervision Orders¹⁷⁸ requires Member States to create a mechanism by which their criminal justice system can supervise each other's suspects who have been released on bail awaiting trial. This would assuage the concern that citizens from other Member States who are suspected of having committed a crime are perceived to be a flight risk, and are often not released on bail in circumstances where nationals would be.¹⁷⁹ (It should be noted that the Framework Decision does not harmonise national law as regards bail; the question whether a person should be granted bail and under which conditions is still left to the national legislator.)

130. This measure was supposed to be implemented by 1 December 2012. At the time of writing, the UK had not yet implemented it.

131. Opting out of this measure would mean that, first, the UK would no longer be under an obligation to create (if it has not yet done so by then) and operate a mechanism that would allow UK citizens who are suspected of having committed a crime elsewhere in the EU to be released on bail and go back to the UK, where UK courts would supervise compliance with their bail conditions. As a result, UK citizens in this situation would be most likely kept in detention while awaiting trial in a different Member State. Conversely, opting out would also mean that the UK would not be able to release citizens from other Member States on bail and send them to their home country while they await trial, with the likely consequence that, at least in some cases, they would remain in British prisons at the UK taxpayers' expense. There is no fallback international instrument in this area.

(vi) – Financial Penalties

132. The principle of mutual recognition has also been extended to financial penalties;¹⁸⁰ as a result, national authorities are expected to recognise and enforce financial penalties imposed by criminal courts in other Member States. The Framework Decision abolishes double criminality for the usual 32 grave offences,

¹⁷⁶ ETS 30 Council of Europe Convention on Mutual Assistance; this instrument has been ratified by all EU Member States, as has the first Protocol to it (ETS 99).

¹⁷⁷ ETS 182. The Second Protocol to the Convention on Mutual Assistance (2001) has been ratified by 16 Member States, including the UK: Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Ireland, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia and UK.

¹⁷⁸ 2009 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention.

¹⁷⁹ See S Peers, 721; Annex 3 to the Commission Green Paper on pre-trial supervision orders (SEC (2004) 1046, 17 August 2004).

¹⁸⁰ 2005 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

plus another seven, and it makes execution compulsory except where specified grounds for non-execution exist. Implementation required primary legislation in both England and Scotland to give effect to it, and this legislation is now in force.¹⁸¹ To date it has been used, on a rather modest scale, for the transfer of fine enforcement between the Netherlands and the UK – though there is obvious growth potential for the future.

133. The likely consequence of an opt-out, in this case, is that financial penalties imposed by UK courts in criminal proceedings could not be enforced by other Member States' authorities as a matter of EU law. Again, the (unlikely) possibility exists that other Member States would continue to enforce UK decisions in this area, depending on how they have implemented the Framework Decision, and how their courts interpret these national rules.

134. Conversely, the UK would still be under an obligation to enforce financial penalties imposed by other Member States' criminal courts, at least as long as the UK's national legislation remained in place and was not amended or repealed.

135. No fallback international instrument would be available, unless the UK and other Member States that have not done so decided to ratify the Council of Europe Convention on custodial and non-custodial sentences (1970).¹⁸²

(vii) – Probation Orders

136. The Framework Decision adopted in this area in 2008 requires Member States to set up a mechanism to give effect to probation or parole measures, or alternative sanctions, imposed by the courts of other Member States.¹⁸³ This means that the offender can be transferred to his or her country of lawful and ordinary residence, and the latter is responsible for enforcing the foreign court's decisions and rehabilitating the offender.

137. This instrument works in a similar way to other mutual recognition measures: it abolishes the dual criminality requirement for the usual 32 offences (as long as they carry in the issuing State a maximum penalty of at least three years), and it sets out an exhaustive list of grounds for non-execution. It follows the “command” model, in that the executing State has an obligation to accept the transfer of its consenting resident. The offender can ask to be transferred to a different Member State, i.e. one of which he or she is not a lawful and ordinary resident, but in that case the Framework Decision does not place the executing Member State under a duty to accept.

¹⁸¹ The relevant Scottish legislation is the Criminal Proceedings etc (Reform) Scotland) Act 2007 (asp 6), s.56; the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Act 2009 adds a number of sections (to be inserted after s223 of the Criminal Procedure (Scotland) Act 1995) dealing with the mutual recognition of criminal financial penalties. Provisions to implement the Framework Decision in England and Wales and Northern Ireland were enacted in the Criminal Justice and Immigration Act 2008 and have been in force since 2009.

¹⁸² ETS 70 Convention on the international validity of criminal judgments (1970), ratified by 12 Member States of the EU (not the UK): Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Latvia, Lithuania, Netherlands, Romania, Spain and Sweden.

¹⁸³ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

138. The measure was supposed to be implemented by December 2011; while Scotland has in fact implemented it,¹⁸⁴ England has not yet done so at the time of writing.

139. In the event of a block opt-out, the immediate consequence would be that England would not be under an obligation to implement the Framework Decision, if it had not already done so. It would also mean that there would be no EU obligation for the UK to accept the transfer of its own citizens and supervise the measures or alternative sanctions imposed on them by the courts of other Member States. More worrying than the lack of an EU obligation would be the lack of any possibility for the UK to arrange the transfer, and supervision at home, of its own citizens (or its residents, strictly speaking), something that is obviously to their benefit. On the other hand, it would also mean that the UK might not be able to send offenders from other Member States back home, with the guarantee that the receiving state would enforce and supervise the measures or sanctions imposed on the offender. Again, the precise consequences would depend on how each Member State has implemented the Framework Decision.

140. There would be no fallback international measure, unless the UK and those Member States who have not done so decided to ratify a 1964 Council of Europe Convention on supervision of conditionally released and early released offenders.¹⁸⁵ Even if this happened, this old instrument differs substantially from the current Framework Decision, since it is not based on the principle of mutual recognition and follows the “request” model rather than the “command one”. Furthermore, it does not abolish the dual criminality requirement.

(viii) – Custodial Sentences

141. The 2008 Framework Decision on the transfer of custodial sentences extends the principle of mutual recognition to this area,¹⁸⁶ facilitating the repatriation of a sentenced person who is currently in prison in another Member State. The measure had to be implemented by December 2011; UK legislation has been in line with it since 2008.¹⁸⁷

142. Again, the instrument abolishes the dual criminality requirement in the usual cases, and sets out grounds for non-execution. This instrument goes further than the previous international instruments in that it applies the “command” model—as the executing State is under a duty to take over enforcement of the judgment—and that the sentenced person’s consent is not necessary in a majority of cases; most notably,

¹⁸⁴ Criminal Justice and Licensing (Scotland) Act 2010, section 27.

¹⁸⁵ ETS 51. This Convention has been ratified by 12 EU Member States (the UK is not one of them): Austria, Belgium, Czech Republic, Estonia, France, Italy, Luxembourg, Netherlands, Portugal, Slovakia, Slovenia and Sweden.

¹⁸⁶ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.

¹⁸⁷ The UK complies with the Framework Decision thanks to amendments that were made to the Repatriation of Prisoners Act 1984 by the Criminal Justice and Immigration Act 2008.

when the person is a national of the of the Member State to which he or she is to be transferred, and also resident there.¹⁸⁸

143. The consequences of an opt-out from this measure would be that, first, the UK might not be able to transfer foreign prisoners to their home Member State, and secondly that it might not be able to repatriate its own citizens; again, whether the UK could continue to use the EU channel would depend on the way in which each Member State has implemented the Framework Decision. Most probably, the UK would have to revert back to the Council of Europe Convention on this matter when asking Member States to accept the transfer.¹⁸⁹ As mentioned above, the Convention does not go as far as the EU Third Pillar measure: it requires dual criminality and the consent of both Member States (“request” model), as well as of the sentenced person. There is a Protocol to this Convention that does away with the need for the prisoner’s consent in certain cases (if the prisoner has fled, or if there is a deportation or expulsion order), but it has not been ratified by all Member States.¹⁹⁰

144. It should be remembered that the transfer of prisoners to their home Member State is normally in the interest of the sentenced person (and thus of the executing State), and also of the issuing State, as there is often political pressure to reduce the number of foreign nationals within the national penitentiary system. The UK’s expectation when opting into this Framework Decision was that it would become a net exporter of prisoners: In 2012, there were 3,700 EU citizens in UK prisons, against 800 UK nationals in the prisons of other Member States, mostly Spain.¹⁹¹

Mutual recognition instruments: overall conclusion

145. Some of this group of instruments are of little practical importance and if they ceased to apply to the UK the impact would be minimal. The opposite is true, however, of the European Arrest Warrant, the loss of which would have serious consequences. For this reason, it seems likely that, if the Protocol 36 opt-out were invoked, this is one of the instruments which the UK would then seek to opt back into. And if this were to happen, some of the other mutual recognition instruments would also be required – notably the Framework Decision on pre-trial supervision, which, if properly implemented and applied, has the potential to mitigate its harsher consequences.

¹⁸⁸ For an overview see S Peers, pp. 724-729; G Vermeulen et al, “Cross-border execution of judgments involving deprivation of liberty in the EU” [2011] IRCP Series, vol. 40. Available here: http://ec.europa.eu/justice/news/consulting_public/0012/JLS-DC-FinalReport_en.pdf

¹⁸⁹ ETS 112. The 1983 Convention on the transfer of sentenced persons has been ratified by all EU Member States.

¹⁹⁰ ETS 167, Protocol to the Convention on the transfer of sentenced persons (1997). Ratified by all EU Member States except Italy, Portugal, Spain, Slovenia and Slovakia.

¹⁹¹ Source: Home Office Representative Mr. Graham Wilkinson, speaking at IALS Seminar “Serving Time in a Foreign Land: The Framework Decisions on the Mutual Recognition of Custodial Sentences and European Supervision Orders, with a look at progress on raising standards in pre-trial detention in the EU” (IALS, 22 March 2012).

Part III

What is to be done?

146. At the outset, this paper pointed out that there were two main arguments being made in favour of the exercise of the Protocol 36 opt-out from criminal law and policing matters: (a) national sovereignty; and (b) the limited negative impact of exercising the opt-out. As demonstrated in Parts I and II, both these arguments are mistaken.

147. As regards national sovereignty, of course decisions on the key elements of criminal and police procedure and law should be made in and by the UK, by the national parliaments and courts – just as they are in other countries. But the EU’s measures on policing and criminal law do not violate that principle. First of all, these laws each had to be agreed unanimously by all Member States, including the UK, and so none of them were forced on this country against its will. Secondly, most of the EU rules concern subjects which are cross-border by nature, and which therefore need to be the subject of agreement between a number of States, since no individual State can address them in isolation: mutual recognition measures (such as the movement of evidence, fugitives or prisoners between States), the exchange of information between law enforcement bodies and the creation of international agencies to assist these forms of co-operation. While rules on substantive criminal law can of course be adopted on a purely national level, the EU’s involvement in this area has been largely limited to harmonisation of the law as regards crimes which have an obvious cross-border dimension – like terrorism, drug trafficking and smuggling of people – to ensure that there are no safe havens within the EU for people who wish to commit such acts.

148. More particularly, as explained in Part I, the “block opt-out” would not apply to EU criminal law measures which have already been adopted since the Treaty of Lisbon, to those proposed since the Treaty of Lisbon which the UK has already opted into during negotiations (such as the proposal on the European Investigation Order), or to those which the UK is likely to opt into after they are proposed in future. So even after the use of the block opt-out, EU law would still have a significant impact on UK law in this field. Furthermore, if the UK decided against the use of the block opt-out, it would still retain the power it already has¹⁹² to opt out of any new EU policing or criminal law proposals in future – for instance, any proposal which might be made regarding a European Public Prosecutor.

149. As for the practical consequences of exercising the opt-out, as explained in Part II, UK law is already in compliance with EU measures concerning substantive criminal law (as it largely was when these measures were first adopted), and so there is no real loss of sovereignty either by continuing to be bound by these measures or by accepting that the Court of Justice could assess whether the UK has implemented them correctly. Even if the UK exercised the block opt-out, it would continue as regards most EU measures in this area to be bound by other international commitments; and even if those commitments did not exist, or the UK denounced them, it is rather improbable that any UK government would wish to exercise its “sovereignty” to decriminalise (for instance) terrorism or online child pornography or

¹⁹² Under Protocol 21; see §14 above.

drug trafficking. Also, the UK's non-participation in such measures would send a signal that it is not really concerned about the gravity of the crimes involved.

150. In the area of the exchange of information, the UK would lose access to EU-wide databases (such as the Schengen Information System) and would likely be excluded both from EU systems for access to other Member States' databases and from measures which expedite the exchange of information in individual cases. The UK might, as a fall back, try to negotiate bilateral arrangements on the latter forms of access with individual Member States, but this would be a complex process which might not be successful in every case.

151. As regards its participation in EU agencies, it should be noted that the UK has a significant influence in this area, as the host State of the European Police College; moreover the current Director of Europol and two previous Presidents of Eurojust were British. If the UK opted out, it would have to pay the costs of moving the Police College to another Member State, and could only have a limited involvement in the agencies in question, by means (for instance) of posting liaison officers like non-EU States.

152. Finally, in the areas of mutual recognition and procedural law, the UK could no longer participate in the large majority of measures in this field, most notably the European Arrest Warrant and rules on the transfer of prisoners – although it would (bizarrely) still participate in EU measures on the transmission of criminal evidence in future, due to its opt-in (after the entry into force of the Treaty of Lisbon) to the proposed legislation on the European Investigation Order. It would probably prove difficult in practice for the UK to maintain the EAW and other regimes informally with other Member States, if it wished to do that. As a fall-back, the UK's relations with other Member States would be governed by Council of Europe instruments on criminal law, but in some areas (such as pre-trial release) there are no instruments; in other areas (such as the validity of criminal judgments and the recognition of probation and parole orders), the UK (and some other Member States) have not ratified the instrument concerned, and in still other areas (such as the Second Protocol to the mutual assistance convention) the UK has ratified the treaty concerned but some other Member States have not. In any event, none of the Council of Europe measures establish a system which is as effective as the EU's rules, as the EU measures were specifically designed to improve the Council of Europe rules by setting out deadlines, providing for standard forms, limiting the exceptions to the rules and so on.

153. Some legal clarity on the impact of the block opt-out might be brought on these issues by the adoption by the EU Council of a measure which set out the transitional rules relating to the UK block opt-out. But since the Council only has the power, when adopting this decision, to address the impact of the opt-out, it would clearly be illegal for its decision to maintain the UK's participation in EU measures, unless the UK had indicated its intention to opt back in to some of them (on which, see below).

154. While this analysis has focussed upon rebutting the arguments for exercising the block opt-out, there are also positive arguments for continuing the UK's participation in this system. As the evidence referred to in Part II indicates, the EU

measures are on the whole supported strongly by law enforcement professionals, who can point to a number of examples of the usefulness of the EU measures in practice. It can be reasonably concluded that the use of the block opt-out would, for instance, make it harder for British police to investigate crimes with a cross-border element, harder to get hold of fugitives who flee the UK to another Member State and harder to move foreign convicted criminals from British prisons to the prisons of other Member States. There is a risk that some serious crimes would be committed in Britain by nationals of other Member States – or by British citizens returning from abroad – which would have been prevented if the block opt-out had not been exercised (for instance, because less information is exchanged between Member States). Also, there is a similar risk that some crimes would go unpunished as a result of exercising the block opt-out (for instance, because other Member States would no longer extradite their nationals to the UK). Is this a price worth paying for a purely nominal increase in British sovereignty?

155. Legitimate concerns to ensure that British citizens receive a fair trial in other Member States, and fair treatment in other Member States' criminal justice systems generally – and indeed, to ensure that the citizens of *any* country receive a fair trial and fair treatment in the criminal justice system of *any* Member State, including the UK – can best be addressed by trying to reform the system, not by leaving it. As noted already, the EAW Framework Decision has already been amended to improve the rules as regards *in absentia* trials. Moreover, the EU measures on criminal suspects' rights adopted or proposed since the Treaty of Lisbon (concerning interpretation and translation rights, the right to information about criminal proceedings and access to a lawyer) all apply to EAW proceedings. Further proposals on legal aid and the protection of vulnerable suspects are planned. By December 2012, Member States must implement a Framework Decision on mutual recognition of pre-trial supervision orders, which should in some cases reduce the time spent in pre-trial detention by British suspects in the jails of other Member States. The European Commission has issued consultancy papers on the presumption of innocence and the issue of detention, which could lead to further proposals to ensure suspects' rights in these areas too.

156. In fact, the UK could directly make a positive contribution in this area by tabling, in conjunction with some other Member States,¹⁹³ proposals to amend the EAW legislation (and other EU criminal law measures, if it wished) to address its particular concerns, on issues like pre-trial detention and proportionality in relation to the EAW. On the other hand, if the UK exercises its block opt-out without opting back into any measures, its influence in these areas will be precisely zero.

157. It follows from the analysis in this paper, particularly the evidence of practitioners about the usefulness of the relevant EU measures for the operation of UK law enforcement and criminal justice, that the best option by far is for the UK to retain its full participation in EU criminal law and policing measures adopted before the entry into force of the Treaty of Lisbon.

158. However, since there are a number of other options, their desirability will also be assessed below.

¹⁹³ Article 76 TFEU provides for legislation in this area to be proposed either by the Commission, or by at least one-quarter of the Member States (i.e., seven Member States at present).

159. First of all, the second-best option would be to announce that the UK will in principle remain a full participant in such measures – but subject to certain conditions. There is still enough time before the UK has to make a decision on the block opt-out (1 June 2014) to allow for a reasonable period to assess whether those conditions have been satisfied. The conditions would be the adoption of amendments to the pre-Lisbon policing and criminal law measures to address the particular concerns of the UK about those measures – for instance, the concerns about the EAW referred to in §153, although there might be other concerns the UK could raise as well. The announcement to this effect should be accompanied by a precise list of the concerns the UK has and the amendments which it wishes to see. This could even entail tabling proposals to this effect (with a group of other Member States – see §153) or inviting the Commission to do so. Most EU legislation in this area can be amended by means of a qualified majority vote of the Member States’ representatives in the Council, jointly with the European Parliament.

160. Another option would be to negotiate an amendment to the EU Treaties relating to the UK’s position as regards EU policing and criminal law. In theory, there is no limit on the changes to the UK position that could be made by way of Treaty amendment. However, in practice, other Member States might be reluctant to negotiate such a Treaty amendment at all, and if they were willing to negotiate one, they might be reluctant to accept the amendments which the UK wished to see. Or they might make their support for such amendments conditional upon UK support for other Treaty amendments which it finds unpalatable (i.e. the amendments relating to economic and monetary union considered in December 2011), at least without further Treaty amendments which the UK desires but which other Member States have been unwilling to accept (i.e. the government’s suggested amendments relating to the finance industry). Since a Treaty amendment needs to be agreed unanimously by Member States, negotiations could be difficult.¹⁹⁴ Furthermore, since a Treaty amendment needs to be ratified by every national parliament, there could be delays and difficulties at this stage also. All in all, while it is technically possible that such a Treaty amendment could be negotiated and ratified by 1 December 2014 (the end of the transitional period relating to pre-Lisbon criminal law measures) it seems improbable that this could happen in practice. Having said that, there might still be some point to negotiating a Treaty amendment that would enter into force in 2015 or 2016; the UK could simply exercise the block opt-out (or not) in the meantime.

161. If the option of Treaty amendment is considered feasible, one possible amendment would be the so-called “Danish solution”.¹⁹⁵ A Protocol to the EU Treaties relating to Denmark¹⁹⁶ provides that that country participates in Schengen-related measures and pre-Lisbon EU criminal law and policing measures on the basis of international law, with (implicitly) no jurisdiction for the Court of Justice. The UK could request that this precedent be extended to itself, as regards pre-Lisbon EU criminal law and policing measures. An alternative approach, which would have much the same effect, is to provide simply that the Court of Justice’s jurisdiction

¹⁹⁴ Also, the EU would have to hold a special “Convention” of national and EU representatives before negotiating such Treaty amendments, unless a majority of Member States (and the European Parliament) agree not to hold one.

¹⁹⁵ For further details of this suggestion, see the Open Europe paper, note 1 above.

¹⁹⁶ Protocol 22.

remains excluded for the UK as regards pre-Lisbon EU criminal law and policing measures; this would simply entail maintaining (for the UK) the status quo as it existed before the Treaty of Lisbon (and will exist up until 1 December 2014).¹⁹⁷ In the event that the Treaty amendment (if negotiated) is not ratified by 1 June 2014, the UK could make it clear that it will exercise its block opt-out. In theory, another option could be to amend the Treaties to allow the UK to opt in and out of any pre-Lisbon legislation in this area as it chooses,¹⁹⁸ but there is no precedent for such an approach in EU law (except as regards aspects of defence policy); and apart from this the practical problems outlined in §160 must be borne in mind.

162. A third approach is to exercise the block opt-out, but then to exercise the right to opt back in as regards a number (perhaps a very large number) of the measures which the UK has opted out of. This could be announced at the same time as the decision to exercise the block opt-out, in order to ensure that there is little or no gap between the date of the block opt-out and the date of the UK's continuing participation in the measure concerned. Alternatively, since there is no deadline on deciding to opt back in, the government could take its time, at least as regards some measures, to assess in practice whether there are more arguments for continuing to apply the measure than ceasing to apply it. There might be a good case for this, for instance, as regards measures which have not yet been widely implemented in practice (the Framework Decision on the transfer of prisoners, for instance), or which Member States do not yet have to implement (the Framework Decision on pre-trial detention orders, for instance). The UK could also announce that, at least for some measures, its willingness to opt back in is subject to certain conditions, i.e. amendment of the measures concerned to address their defects (see §156 above).

163. Whilst it must be kept in mind that any decision to opt back in is subject to the consent of the EU institutions, their approval is conditioned by the obligation in Protocol 36 to ensure the "widest possible measure of participation" of the UK, "without seriously affecting the practical operability" of the measures concerned, and "respecting their coherence". Taken together, these rules impose an obligation upon the Commission to permit the UK to join any non-Schengen-related pre-Lisbon policing and criminal law measures it wishes to participate in, unless there is an inextricable link with another measure which the UK does not wish to participate in. For example, it would not be practically feasible to participate in the initial decision establishing Eurojust without participating in the decisions amending that decision, or in the decision establishing Europol without participating in the measures implementing it. A sufficiently strong link also exists between the EU's Framework Decision on data protection in policing and criminal law matters (if that measure has not been replaced by 1 December 2014) and any pre-Lisbon measures which apply that Framework Decision as regards a particular EU database or set of rules for information exchange. If the UK sought to opt back in to the pre-Lisbon policing and

¹⁹⁷ A Treaty amendment to this end could simply repeal all of Art. 10(4) and (5) of Protocol 36, except for the first and third sentences of the first sub-paragraph of Art. 10(4). Art. 10(4) would then read: "At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. This paragraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2."

¹⁹⁸ Open Europe paper, note 1 above.

criminal law measures connected to the Schengen acquis, the discretion to admit the UK to participate in these rules which the Council (acting unanimously) would otherwise enjoy would be qualified by the wording of Protocol 36 (the institutions “*shall* seek to re-establish”), and the conditions which apply to the Commission would also apply to the Council’s decision-making.

164. There would be a strong case for opting back into those measures which have proven to be particularly relevant to law enforcement practice, notably the measures on information exchange, the EAW and the measures establishing the EU agencies. Of course, if on this basis, the UK opted back into a significant proportion of the pre-Lisbon measures, this would prove the pointlessness of exercising the block opt-out in the first place.

165. Finally, there is the option of exercising the block opt-out and never, on principle, opting back in to any EU measure in this area whatsoever. This approach would prioritise antipathy towards the European Union above any benefit for British law enforcement authorities or the British criminal justice system that results from any of the EU measures. Can the advocates of this view really demonstrate that *every single EU measure* in this area, taken individually, impinges upon UK sovereignty to an unacceptable degree? Even when, as regards substantive criminal law, the UK has similar obligations under many international treaties, and as regards mutual recognition, has comparable (although less extensive) obligations under many Council of Europe Conventions?

166. If the UK were to exercise the opt-out, whether or not it then opted back into some of the measures, careful attention would have to be paid to the relevant transitional rules, in order to guarantee legal certainty for the persons concerned and for the effect of the opt-out on the criminal justice systems of the UK and other Member States.

167. In this area of law, the UK faces an important choice about its relations with the European Union. It is essential that the decision which this country has to take should be made with full knowledge and due consideration of all of the facts about our co-operation with the EU in this field and the consequences of exercising the various options which the UK has, and not on the basis of false assumptions and misunderstandings. We hope this paper will help to ensure that this is so.

APPENDIX

The instruments within the scope of the Protocol 36 opt-out, in chronological order

1. Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests

This Convention binds the contracting parties to ensure that a range of frauds against the Community budget are rendered criminal. There was a delay before it came into force because it took a long time to acquire the necessary ratifications. The UK is a party and UK law complies with the obligations imposed by it. If the instrument ceased to apply to the UK, the UK would be free to de-criminalise the frauds at which it is directed.

In July 2012 the Commission proposed a Directive which would supersede this instrument. The legal basis for this proposed new instrument is Article 325 TFEU, which does not fall within the scope of Protocol 21. So if the Convention is superseded by a new Directive, the UK will necessarily be bound by the new instrument.

2. Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the European Union

A brief instrument, the purpose of which is evident from the title.

If it ceased to apply to the UK, and the UK wished to continue to exchange liaison magistrates with EU countries, it would have to do so by making bilateral arrangements – as it has already done with the USA.

3. Joint Action 96/610/JHA concerning the creation and maintenance of a Directory of specialized counter-terrorist competences, skills and expertise to facilitate counter-terrorist co-operation between the Member States of the European Union

Member States have developed skills in response to particular threats, and they decided to create a directory of such skills and expertise in order to effectively prevent and combat terrorism. This is not a vehicle for sharing intelligence.

All Member States have an obligation to contribute to the directory. Should the UK exercise the block opt-out, it would no longer be under such an obligation, and it would not have access to the entries made by other Member States.

4. Joint Action 96/698/JHA on co-operation between customs authorities and business organizations in combating drug trafficking

Legitimate business organisations were being utilised by drug traffickers to smuggle drugs; this measure envisages a high degree of co-operation between customs authorities and business organizations in order to tackle this problem. National

customs authorities and businesses were to develop a memorandum of understanding to this effect. The effect of opting out of this measure would not be significant, as it does not concern international co-operation.

5. Joint Action 96/699/JHA concerning the exchange of information on the chemical profiling of drugs to facilitate improved co-operation between Member States in combating illicit drug trafficking

On measures of this type, see §§57-65 above.

6. Joint Action 96/747/JHA concerning the creation and maintenance of a directory of specialized competencies, skills and expertise in the fight against international organized crime, in order to facilitate law enforcement co-operation between the Member States of the European Union

This measure envisages the creation of a directory of specialised skills, to be made available to Member States as needed, in order address certain forms of international organized crime. The directory would be located with the Europol Drugs Unit. The effect of an opt-out would be that the UK would not be under an obligation to contribute to the directory; conversely, it would not have access to it or to the skills listed by other Member States.

7. Joint Action 96/750/JHA concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking

Without imposing any detailed obligations, this instrument requires Member States to co-operate fully in the fight against drug addiction and endeavour to approximate their laws to make them mutually compatible to the extent necessary to prevent and combat illegal drug trafficking in the Union; to make the practices of their police, customs services and judicial authorities more compatible with each other, thus making for closer European co-operation to prevent and combat illegal drug trafficking in the Union; to legislate to fill voids on synthetic drugs, and, finally, to ensure that penalties for drug trafficking are amongst the harshest available for comparable crimes.

The provisions of the instrument are said to be without prejudice to the general principle that a Member State may maintain or step up its national policy in the fight against drugs in its territory. If this measure ceased to apply to the UK, it would be free of the general obligations it imposes; but the freedom is not one that it would presumably wish to take advantage of.

8. Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests

Building on the first Convention, this protocol binds the contracting parties to criminalise the bribery and corruption of national officials when carrying out duties in relation to the Community. The UK has ratified it and UK criminal law is compliant, bribery being comprehensively covered by the Bribery Act 2010. If the instrument ceased to apply to the UK, the UK would then be free, should it so wish, to remove

the criminal liability of such persons. There is a proposal to replace this instrument: see item 1 above.

9. Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

Covers ground similar to that covered by the previous instrument. It is binding on the UK, the UK having ratified it in 1999. If the instrument ceased to apply to the UK, the UK would be free, should it so wish, to amend the Bribery Act so as to legalise the corruption of officials of the categories mentioned in the instrument.

10. Joint Action 97/339/JHA of 26 May 1997 with regard to co-operation on law and order and security

This measure aims at strengthening police co-operation in situations where detailed arrangements need to be made with regard to events such as meetings attended by large numbers of people from more than one Member State. The measure requires national authorities to provide their counterparts in other Member States with information, upon request or unsolicited, if sizeable groups which may pose a threat to law and order and security are travelling to another Member State to participate in an event. In addition, liaison officers may be temporarily posted to other Member States.

On these types of measures and the effect of a potential opt-out, see §§57-65 above.

11. Joint Action 97/372/JHA of 9 June 1997 for the refining of targeting criteria, selection methods, etc. and collection of customs and police information

Pursuant to this measure, national customs authorities are to optimise the use of targeting criteria and structured selection methods, as well as collection of customs and police information regarding the combating of drugs trafficking. They shall also strengthen the mutual exchange of intelligence for the purposes of risk analysis. For more information concerning this type of measures and the effect of a potential opt-out, see §§54-65 above.

12. Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests

By this instrument the contracting parties agree to criminalise money-laundering, and take various other measures against it. The UK has ratified it and UK law is compliant. If the instrument ceased to apply to the UK, the UK would be free – as far as this instrument is concerned – to decriminalise money-laundering; but it would still be bound by various other international obligations, including a series of EU money-laundering Directives which fall outside the scope of the Protocol 36 out-out. There is a proposal to replace this instrument: see item 1 above.

13. Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime

This instrument creates a mechanism for peer evaluation of the application and implementation at national level of Union and other international acts and instruments in relation to the fight against organized crime. If the measure ceased to apply to the UK, the UK would no longer take part in, or be subject to this process of peer evaluation – and thus free to be as lax in complying with these international instruments as it wished.

14. Council Act of 18 December 1997 drawing up the Convention on mutual assistance and co-operation between customs administrations (Naples II)

See main text, §59 and §§66-68 above.

15. Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications

An instrument whereby the contracting parties agree to recognise and enforce each others driving disqualifications. It has not so far entered into force because it has attracted insufficient ratifications. However, the UK enacted implementing provisions in Part 3 of the Crime (International Co-operation) Act in 2003. By SI 2008 No.3009 (C.130), which were to come into force after the UK and Ireland made declarations under Article 15(4) of the Convention on driving disqualifications. Since these declarations have been made, the Convention applies between Ireland and the UK. Invoking the block opt-out would therefore disapply this Convention, and Irish driving disqualifications could not be recognised in the UK, until and unless the two States agreed on a replacement bilateral arrangement.

If the instrument ceased to apply to the UK, then insofar as it actually obliges the UK to make it a criminal offence to drive in the UK when subject to a foreign ban, the UK would be free from its obligation to do so (and therefore at liberty to allow banned drivers from the Continent to retain the freedom of the British roads).

16. Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters

Despite earlier measures passed in this area, it was felt necessary to make further practical improvements regarding mutual legal assistance between the Member States, particularly for the purpose of combating serious crime. With this in mind, each MS was required to deposit a statement of good practice in these matters, from which an official copy was made and circulated round all Member States.

This is a largely advisory measure; it tells Member States what they should be doing regarding having statements of good practice, and what they should contain, but deals only slightly with practical implications. If the instrument ceased to apply to the UK the UK would be free from the obligation it imposes – but the obligation is minimal.

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

Imposes an obligation on Member States, expressed in general terms, to ensure that their legislation on confiscation etc can be used at the behest of litigants in other Member States. UK legislation currently complies with this. If the instrument ceased to apply to the UK, it would be free to amend its legislation so that this was no longer possible, although this might also entail denouncing the Council of Europe Convention on the proceeds of crime.

In 2012 the Commission put forward a proposal for a new Directive that would (inter alia) repeal this instrument. So far, the UK has not opted into it. Should it eventually do so, the Joint Action would no longer be among those covered by Protocol 36, and the UK would be bound by the new Directive.

18. Joint Action 98/700/JHA of 3 December 1998 concerning the setting up of a European Image Archiving System (FADO)

This measure sets up a computerised image archiving system providing access to national document checkers, and providing them with information on new genuine documents that are in circulation and on new forgery methods that are detected. Member States are thus able to exchange information through this computerised system within very short periods of time. It improves on the previous European Fraud Bulletin and Handbook of Genuine Documents. In the event of an opt-out, the UK authorities would no longer have access to this system.

19. Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees

This instrument does what its title suggests. In the event of a block opt-out, the UK would opt out of Europol altogether. However, the Commission plans to propose new legislation on Europol, which would presumably amend this measure also, and which would put Europol outside the scope of the block opt-out (provided the UK opted into the new measure). See main text, §§69-72 above.

20. Council Decision 1999/615/JHA of 13 September 1999 defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties

4-MTA is a designer drug that was found to have grave side effects. In the light of this, the Council decided to require all Member States to ban it. In the UK it is currently banned a Class A drug. If this instrument ceased to bind the UK, the UK would be at liberty to legalise it.

21. Council Decision of 2 December 1999 amending the Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, with regard to the establishment of remuneration, pensions and other financial entitlements in euro

Another self-explanatory Europol-related measure. See main text, §§69-72 above.

22. Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents

On measures of this type, see main text, §§60-68 above.

23. Council Decision 2000/375/JHA to combat child pornography on the internet

This instrument requires Member States to criminalise the production, processing, distribution and possession of child pornography material through the Internet.

UK law is compliant, because its laws criminalise child pornography on the internet. If the instrument ceased to apply to the UK, the UK would be free, should paedophiles ever come into public favour, to decriminalise this sort of behaviour, or even actively encourage it.

24. Council Framework Decision 2000/383/JHA of European Commission 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

This requires all Member States to ensure that their criminal law penalises the counterfeiting of money, and if the currency in question is Euros, the maximum penalty is at least eight years' imprisonment.

The counterfeiting of any currency is potentially punishable with 10 years' imprisonment under UK law. If the instrument ceased to apply to the UK, the UK would be free to reduce the penalty for counterfeiting euros (and any other currency) or to decriminalise it altogether, although this would also entail denouncing the relevant international treaty (the Geneva Convention on counterfeiting currency). See generally §§26-31 above.

Replacement proposals are expected in 2012. If a new Directive is adopted and the UK opts into such proposals, this Framework Decision will eventually fall outside the scope of the Protocol 36 opt-out.

25. Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union

This Convention extends and improves the facilities for mutual legal assistance created by the earlier (non-EU) Convention of 1959. The UK has ratified it, enacting the Crime (International Co-operation) Act 2003 in order to comply.

This instrument is to be amended by the proposed Directive on the European Investigation Order (EIO), a proposal which the UK has opted into. If the Directive is

adopted before the Protocol 36 opt-out is exercised, the 2000 Convention would then fall outside it.

If this has not yet happened by 1 December 2014, the Protocol opt-out would mean that the 2000 Convention ceased to apply to the UK. In that case, mutual legal assistance between the UK and EU Member States would have to take place within the framework of the 1959 Convention – the inadequacies of which led to the 2000 Convention. It should be noted that the Council has already reached a “general approach” on the proposed Directive.

26. Council Decision 2000/641/JHA of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)

This measure concerns the appointment of a secretariat to oversee the bodies established by other measures, to ensure that data protection responsibilities are fulfilled regarding certain databases and sources of information.

Were the UK to opt-out, the loss of this particular measure would not be significant, as it would have already lost the use of the bodies and databases to which it indirectly applies.

27. Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements between financial intelligence units of the Member States in respect of exchanging information

All Member States set up financial intelligence units (FIUs) to collect and analyse information (received under Directive 91/308/EEC) in order to establish links between suspicious financial transactions and underlying criminal activity with a view to combating money laundering.

This measure requires Member States to ensure that their FIUs cooperate to assemble, analyse and investigate relevant information that may be an indication of money laundering. FIUs shall also exchange this information, spontaneously or on request.

An eventual opt-out of this measure would preclude the sharing of information between the UK FIUs and other Member States’ units on this legal basis. On the sharing of ad-hoc information in general in the event of an opt-out, see §§57-65 above.

28. Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings

There is a proposal under negotiation for a new Directive establishing minimum standards on the rights, support and protection of victims of crime. The UK has opted into this, so if it goes ahead, the Framework Decision would disappear and no longer be covered by the opt-out. If the new Directive has not been adopted by then this

instrument would fall within the scope of the opt-out. The consequences are discussed in §35 above.

It should be noted that an agreement between the EP and the Council on the Directive was announced in June 2012. This agreement has been approved by the Member States in Coreper, and by the two relevant EP committees in July 2012, by a large majority. The EP plenary is due to vote on the agreed text of the Directive in September 2012. It can therefore be expected that this Framework Decision will no longer be on the list by autumn 2012.

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

For this type of instrument, see the main text, at §§26-32 above.

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

In order to improve the efficiency of prosecuting drug traffickers, this instrument creates a standard system at European Union level for the legal transmission of samples of drugs. Transmission is to be based on agreement between the sending and receiving Member States, and should take place in a manner that is secure and guarantees that the transported samples cannot be abused. Each Member State must also designate a national contact point for the purposes of implementing this Decision. If this measure ceased to apply to the UK, it would then be free to disregard the obligations created by it – should it wish at some point to make the prosecution of drug traffickers more difficult.

31. Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (repealing Articles 1, 3, 5(1) and 8(2) of Joint Action 98/699/JHA)

This instrument requires Member States to have, in their national legal systems, procedures to identify, trace, freeze and confiscate the proceeds of crime. With the Proceeds of Crime Act 2002 the UK has a very comprehensive system of this sort. If this instrument ceased to bind the UK, the UK would be at liberty to demolish it, leaving criminals free to enjoy the proceeds of their crimes.

In 2012 the Commission put forward a proposal for a new Directive that would (inter alia) amend this instrument. So far, the UK has not opted into it. Should it eventually do so, the 2001 instrument would no longer be among those covered by Protocol 36, and the UK would be bound by the new Directive.

32. Council Act of 16 October 2001 establishing the Protocol to the Convention on mutual assistance in criminal matters between the Member states of the European Union.

This instrument extends the mutual legal assistance regime established by the earlier Convention to enable one Member State to obtain information about bank accounts

located in another. See comments on the 2000 Mutual Legal Assistance Convention, above.

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

This supplements other EU legislation against counterfeiting Euro coins and banknotes by requiring Member States to use a suitable level of expertise when analysing alleged fakes, and requiring them to share information on forged euros with various agencies, including Europol and the precursor body which shortly afterwards became Eurojust.

If the instrument ceased to bind the UK, the UK would be free, as regards constraints imposed by this instrument, to use incompetent experts and to refuse to share information. It would, however, remain bound by other EU legislation protecting the euro to which Protocol 36 does not apply, and also other international instruments in connection with counterfeiting, including the Geneva Convention of 1929.

34. Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

This measure seeks to increase penalties for counterfeiting, by requiring Member States to take account of previous convictions related to currency counterfeiting when sentencing; as would happen under UK law anyway.

See the main text at §§26-32 above, and comments on 2000/383/JHA, above.

Replacement proposals are expected in 2012. If these were adopted before the Protocol 36 opt-out were exercised, and the UK had opted in, this instrument would disappear and no longer be covered by the Protocol 36 opt-out.

35. Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

See main text at §73 above.

36. Council Decision 2002/188/JHA of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA

PMMA is a synthetic drug, sometimes sold as Ecstasy. When research suggested that it could cause death, the Council adopted this instrument requiring it to be banned in all Member States. In the UK it is currently a Class B drug. If this instrument ceased to apply to the UK, the UK could be free to legalise it.

37. Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension

On measures of this type, see main text, §§57-65 above.

38. Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams

See main text, at §§66-68 above.

39. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism

For instruments of this type, see main text at §26-32 above.

40. Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes

On measures of this type, see main text, §§57-65 above.

41. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

Discussed in detail in the main text at §§93 onwards.

42. Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

The UK has domestic legislation which fulfils this criterion. If the Framework Decision ceased to apply to the UK, it would be able to make it legal to assist illegal immigration. However, the UK would continue to be bound by the closely-linked Directive 2002/90, which addresses the immigration law aspects of facilitation of illegal migration, and which is not covered by the opt-out.

For instruments of this type, see main text, at §§26-32 above.

43. Council Decision 2002/956/JHA of 22 November 2002 setting up a European Network for the Protection of Public Figures

This instrument requires Member States to set up a network linking the national police services and other services responsible for the protection of the public figures, with each Member State designating a single contact point. The reason was increased travel by public figures, making them more vulnerable to attacks. If this instrument ceased to apply to the UK, the UK might no longer be able to receive or transmit information through the network, making arranging appropriate security more difficult. However, it is likely that any threat might be communicated through other EU channels. These channels might also be cut off, however, if the UK opted out of other organisations (e.g. Europol). In that case, exchange of information would have to take place through Interpol or on an *ad hoc* basis (see §§57-65 in the main text).

44. Council Decision 2002/996/JHA of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism

Post 9/11 it was felt that every legal system needed to have clear policies relating to terrorism offences and their implementation. As every Member State was responsible for its own implementation and system, there needed to be a way to objectively evaluate their effectiveness on a basis of equality and mutual confidence. If this instrument ceased to apply to the UK, the UK would presumably no longer take part in the evaluations, nor would it be involved in the evaluations of other Member States.

45. Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States

This measure concerns the posting of liaison officers to third countries and international organizations, the sharing of the information obtained by those officers, and the role of Europol. It was later amended by a 2006 Council Decision (2006/560/JHA of 24 July 2006), discussed below.

On the potential block opt-out and Europol (and related measures), see §§66-69 in the main text. On how the sharing of any information would take place on an ad hoc basis, see §§57-65.

46. Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

For instruments of this type, see generally §§26-32 above.

47. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

See §§119-122 above.

48. Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

In the 1997 Convention on Corruption provision was made in the Convention on Corruption regarding its application to Gibraltar. It was felt desirable that the legislation be extended to Gibraltar and this decision did so. As the UK is responsible for the international relations of Gibraltar, presumably the effect of a Protocol 36 opt-out would be that the legislation ceased to apply to Gibraltar.

49. Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2

On evidence that they had no medicinal uses, were potentially dangerous and were being trafficked, the Council decided to require all Member States to ban these drugs.

The UK has done so. If this instrument ceased to bind the UK, the UK would be at liberty to legalise them.

50. Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes

This instrument requires the competent authorities of the Member States to ensure that, where they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law. It also requires the relevant national law enforcement and immigration authorities to co-operate with one another in order to ensure the efficient investigation and prosecution of genocide a national level.

If this instrument ceased to apply to the UK, it would be free of the obligations so imposed; and hence free to turn a blind eye to the arrival of persons suspected of genocide and to refuse to co-operate over such matters with other Member States. In return, it might receive a lower level of co-operation from its neighbours.

51. Council Decision 2003/659/JHA amending the Eurojust Decision

See item 35 above.

52. Council Decision 2004/731/EC of 26 July 2004 concerning the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on security procedures for the exchange of classified information

Since this measure was adopted on the basis of Articles 24 and 38 TEU, as they then were, it also covers CFSP issues, and therefore the block opt-out would only take effect as regards criminal law and policing issues; the treaty would still apply to the UK as regards CFSP matters, which are the principal subject-matter of this treaty in any event.

53. 2004 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking.

For instruments of this type, see generally §§26-32 above.

A proposal for a Directive which will replace this instrument is expected. If adopted before the Protocol 36 opt-out is exercised, and the UK has opted in, the Framework Decision would no longer fall within the scope of the instrument.

54. Council Decision of 2004/843/CFSP 26 July 2004 concerning the conclusion of the Agreement between the European Union and the Kingdom of Norway on security procedures for the exchange of classified information

Since this measure was adopted on the basis of Articles 24 and 38 TEU, as they then were, it also covers CFSP issues, and therefore the block opt-out would only take

effect as regards criminal law and policing issues; the treaty would still apply to the UK as regards CFSP matters, which are the principal subject-matter of this treaty in any event.

55. Council Decision 2004/919/EC of 22 December 2004 on tackling vehicle crime with cross-border implications

Cross-border theft of motor vehicles being a major problem, this instrument encourages Member States to co-operate in dealing with it. The measures required include the identification of “national contact points”, and the exchange of information (other than personal data). If this instrument ceased to apply to the UK, the UK would be relieved of the obligations to co-operate which it creates. In return, it could expect to receive less information and co-operation from other Member States.

56. Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol

This measure concerns the exchange of information between Member States’ law enforcement authorities competent in criminal matters and Interpol. In the event of an opt-out, the UK would no longer be under an EU obligation to exchange these data with Interpol, but this would not affect its membership of this organization or its obligations under international law.

57. Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property

This instrument requires Member States to put in place effective procedures to confiscate from criminals the proceeds of their crimes. The UK has such legislation. If this instrument ceased to apply to the UK, the UK would be free to repeal it, leaving criminals in undisturbed possession of their gains; though if it did so, it would probably infringe various other international obligations.

See also item 17 above, on the 2012 proposal which would amend this instrument.

58. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

See main text at §§132-135 above.

59. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems

For instruments of this type, see §§26-32 above.

There is a proposal for a new Directive to replace this instrument, which the UK has opted into. The Council has already reached a “general approach” on this proposal. If this is adopted before the date the Protocol 36 opt-out was exercised, the Framework Decision would no longer fall within the scope of it.

60. Council Decision 2005/296/CFSP, JHA of 24 January 2005 concerning the conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia on the security procedures for the exchange of classified information (Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information (Council Decision 2005/296/CFSP/JHA of 24 January 2005))

See item 54 above.

61. Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances

This instrument requires Member States to co-operate in the sharing of information about new (non-medicinal) drugs. If the instrument ceased to apply to the UK, it would be relieved of the obligation to co-operate thereby imposed. In return, it might lose a possibly valuable source of information. However, there exists outside the EU a European Information Network on Drugs and Drug Addiction (the Reitox network) and indeed the Framework Decision explicitly states that ‘Nothing in this Decision should prevent Member States from exchanging information, within the ...Reitox Network). If the 2005 Council Decision ceased to apply to the UK, the UK would presumably still belong to the Reitox network, and exchange information by this route.

In December 2011 the Council invited the Commission to put forward, during 2012, a proposal for a new Directive to replace this instrument. If this is done, and the UK decides to opt in, the 2005 Framework Decision would eventually fall off the list of instruments covered by the Protocol 36 opt-out.

62. Council Decision 2005/481/CFSP of 13 June 2005 concerning the conclusion of the Agreement between the European Union and Ukraine on the security procedures for the exchange of classified information

See item 54 above.

63. Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro-counterfeiting

The Geneva Convention on the Suppression of Counterfeiting requires contracting parties to nominate a central office for dealing with counterfeit money. This Council Decision requires all Member States to nominate Europol as their central office, insofar as the counterfeiting involves the euro. If it ceased to apply to the UK, the UK would be free to nominate some other body, less appropriate for the purpose.

64. Council Decision 2006/560/JHA of 24 July 2006 amending Decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States

This Decision amends the previous legislation on the common use of liaison officers posted abroad, which was discussed above. It brings the legislation in line with current practice, whereby one Member State assumes responsibility for coordinating EU co-operation in a particular country or region. This Member State or “lead nation” also convenes liaison officers’ meetings.

In the event of a block opt-out, the UK would not participate in the common use of liaison officers posted abroad.

65. Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and co-operation concerning terrorist offences

On measures of this type, see main text, §§57-65 above.

66. Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA

See main text, §§69-75 above.

67. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders

See §§ 123-125 of the main text, above.

68. Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union

See §§ 57-65 above.

69. Council Decision 2006/317/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the European Union and the Republic of Croatia on security procedures for the exchange of classified information

See item 54 above.

70. Council Decision 2006/467/CFSP of 21 November 2005 concerning the conclusion of the Agreement between the European Union and the Republic of Iceland on security procedures for the exchange of classified information

See item 54 above.

71. Council Decision 2007/412/JHA of 12 June 2007 amending Decision 2002/348/JHA concerning security in connection with football matches with an international dimension

On measures of this type, see main text, §§57-65 above.

72. Council Decision 2007/845/JHA of 6 December 2007 concerning co-operation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or property related to, crime

This instrument requires all Member States to set up specialised agencies responsible for confiscating the proceeds of crime. It also creates, at EU level, a legal basis for the exchange of information between them. In the UK such an agency has long existed: originally a separate body called the Assets Recovery Agency, it was later merged with SOCA – a body which is itself on the way to being replaced by a new body called the National Crime Agency.

If this instrument ceased to apply to the UK, it would be free, if it so wished, to dispense with a specialised agency of this sort, thereby making it easier for criminals to retain the profits of their crimes, but such a course appears unlikely. It would also mean that the instrument no longer provided a legal basis, under EU law, for the exchange of information between the UK body and its counterparts. Provided these other agencies were prepared to exchange information informally, this would not be a problem. But it is possible that, in some Member States, the absence of a formal legal basis would present a problem.

73. Agreement between the European Union and the United States of America on the processing of Passenger Name Records (PNR) data by air carriers to the United States Department of Homeland Security

On the basis of the assurances in DHS's letter explaining its safeguarding of PNR (the DHS letter), the European Union will ensure that air carriers operating passenger flights in foreign air transportation to or from the United States of America will make available PNR data contained in their reservation systems as required by DHS.

By the Council Decision of 26 April 2012 the EU agreed a new instrument which supersedes the 2007 agreement. (See OJ 2012/472/Eu). To this, the UK has opted in; although the new instrument contains a clause under which it shall only apply to the UK on notice to this effect being given by the Council. It therefore looks as if the earlier instrument will shortly cease to feature on the Protocol 36 opt-out list.

74. Council Decision 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information

See item 54 above. In any case, the EU is currently negotiating a new treaty with the USA on data protection as regards policing and criminal law.

75. Decision establishing “criminal justice” programme (OJ 2007 L 58/13)

See item 76 below

76. Decision establishing “Crime prevention/fight against crime” programme (OJ 2007 L 58/7)

Both of the previous items will expire in 2013, but replacement proposals have been tabled. The UK opted in to the proposed replacement as regards policing, but opted out of the proposed justice programme.

77. Council Decision 2008/206/JHA of 3 March 2008 defining 1-benzylpiperazine (BZP) as a new psychoactive substance which is to be made subject to control measures and criminal provisions

BZP is a synthetic stimulant. Acting on information that it has no medicinal purposes and that its use might involve health risks, the Council required all Member States to ban it. In the UK it is a Class C drug. If this instrument ceased to apply to the UK, the UK would be at liberty to legalise it.

78. 2008 Council Decision 2008/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime

See main text, §§69-75 above. A replacement proposal is planned for 2012.

79. Council Decision 2008/568/CFSP of 24 June 2005 concerning the conclusion of the Agreement between the European Union and the Swiss Confederation on security procedures for the exchange of classified information

See item 54 above.

80. Council Decision 2008/615/JHA of 23 June 2008 on stepping up of cross-border co-operation, particularly in combating terrorism and cross-border crime

(Transposing the Prüm Treaty into the legal framework of the EU – “The Prüm Decision”)

See §§52-53 in the main text above.

81. Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA on stepping up of cross-border co-operation, particularly in combating terrorism and cross-border crime

(Implementing the Prüm Treaty’s legal framework)

The aim of this Decision is to lay down the necessary administrative and technical provisions for the implementation of Decision 2008/615/JHA, in particular as regards the automated exchange of DNA data, dactyloscopic data and vehicle registration data, as set out in Chapter 2 of that Decision, and other forms of co-operation, as set out in Chapter 5 of the same measure. See §§52-53 above.

82. Council Decision 2008/617/JHA of 23 June 2008 on the improvement of co-operation between the special intervention units of the Member States of the European Union in crisis situations

This measure concerns crisis situations requiring special intervention. It does not cover mass gatherings, natural disasters or serious accidents (within the meaning of Article 18 of the Prüm Decision, Council Decision 2008/615/JHA, discussed above) but envisages forms of police assistance between Member States through special intervention units in man-made crisis situations presenting a serious direct physical threat to persons, property, infrastructure or institutions, in particular hostage taking, hijacking and similar events.

The Decision lays down general rules under which special intervention units from one Member State can provide assistance in the territory of another Member State, if the latter requests such assistance.

In the event of an opt-out, the UK would no longer be under an obligation to provide assistance to other Member States, but neither would it be able to use this resource, should it need it.

83. Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

See main text at §§36-38 above.

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

Requires Member States to punish misbehaviour of the type long punished in the UK as the crime of conspiracy. See main text at §26-32 above.

85. 2008 Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption

As the title suggests, this instrument sets up a network of national contact-points through which to disseminate information about corruption and to help share experience and good practice. If the instrument ceased to apply to the UK, presumably the UK would no longer be part of the network. If this were the case, the result could be a loss of useful information.

86. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union

See main text at §§141-144 above.

87. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

See main text at §§26-32, and in particular, §28.

88. 2008 Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism

See main text at §§26-32.

89. Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions

See main text at §§136-140 above.

90. Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network

The European Judicial Network (EJN) is a network of public prosecutors who, as “national contact points”, are available to advise one another, and who meet all together at least once a year, usually in the Member State that currently holds the presidency. To some extent the EJN duplicates the role of Eurojust – but despite this, it continues in existence and this instrument provides it with a formal constitution.

If this instrument ceased to apply to the UK, the UK would no longer be a part of the network. Unless some special arrangement could be made under which it was given some kind of “associate status”, it would lose one of the tools by which it handles the problems of trans-border crime. It is difficult to envisage any compensating gain.

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

This obliges all Member States to impose limits on the dissemination of personal data transmitted between one Member State and another, or between a Member State and EU agencies such as Europol. The UK has taken view that most of the obligations imposed by this Framework Decision are already imposed by the UK’s national legislation on data protection, and that any additional ones can be met by fostering “good practice” in the various criminal justice agencies. (See Ministry of Justice Circular 2011/01.)

If this Framework Decision ceased to apply to the UK, it would liberate the UK from the obligations it imposes. However, the UK would still be bound by other EU legislation on data protection which falls outside the scope of Protocol 36 – in particular the EU Data Protection Directive (Directive 95/46/EC).

There is a recent proposal for a new Directive which, if it is adopted, would repeal this instrument and replace the Framework Decision. This measure is based on Article 16 TFEU, so the UK opt-out does not apply. If it is adopted, the earlier instrument will fall outside the scope of the Protocol 36 opt-out.

92. Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

See main text at §§126-128 above.

93. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial

This instrument amends five earlier Framework Decisions, all of which would cease to bind the UK if the UK exercised the Protocol 36 opt-out.

94. Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States

See main text at §56 above.

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

See main text at §59 above.

96. Council Decision 2009/371/JHA establishing the European Police Office (Europol)

See main text at §§69-72 above. A proposal for a replacement instrument is planned for 2012. If this is adopted before a decision to exercise the Protocol 36 opt-out, and the UK has opted in, the earlier instrument would not fall within the scope of the opt-out.

97. Council Decision 2009/796/JHA of 4 June 2009 amending Decision 2002/956/JHA setting up a European Network for the Protection of Public Figures

Earlier legislation (Decision 2002/956/JHA, discussed above) required Member States to set up a network linking the national police services and other services responsible for the protection of the public figures, with each Member State designating a single contact point. This 2009 Council Decision extends the scope of the previous legislation so that it applies also to persons in a non-official position who are deemed to be under threat because of their contribution to public debate.

If this instrument ceased to apply to the UK, the UK might no longer be able to receive or transmit information through the network, making arranging appropriate security more difficult. However, it is likely that any threat might be communicated through other EU channels. These channels might also be cut off, however, if the UK opted out of other organisations (e.g. Europol). In that case, exchange of information would have to take place through Interpol or on an ad hoc basis (see §§57-65 in the main text).

98. Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions of supervision measures as an alternative to provisional detention

See main text at §§129-131 above.

99. Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA

Earlier legislation had set up a European Crime Prevention Network (EUCPN) and was later replaced by this 2009 Council Decision, which aims at strengthening the network by making certain changes to its structure, appointment of personnel and funding. In the event of an opt-out, the UK would no longer be part of this network, and would not be able to profit from any assistance that other Member States may be able to offer through it.

The Commission is planning to make a proposal on this issue in 2013.

100. Council Framework Decision 2009/905/JHA of 30 November 2009 on accreditation of forensic service providers carrying out laboratory activities

Criminal proceedings for offences with a trans-border element sometimes involve forensic evidence obtained by the authorities of one Member State being adduced in evidence in another. With the aim of ensuring that such evidence is of good quality, this instrument requires all Member States to “ensure that their forensic service providers carrying out laboratory activities are accredited by a national accreditation body as complying with EN ISO/IEC 17025.” This standard emanates from the International Organization for Standardization, an international body that is completely separate from the EU. By article 5, the Framework Decision “does not affect national rules on the judicial assessment of evidence”. If the Framework Decision ceased to apply to the UK, the UK would no longer be required to ensure that its forensic science agencies comply with the international standard, though it would be still be at liberty to do so – and presumably would, if it wished to ensure that forensic evidence coming from the UK was taken serious in the courts of other countries.

101. Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes (CIS)

See main text at §§54-56 above. Simplifying and clarifying proposals are expected in 2012.

102. Agreement on mutual legal assistance between the European Union and the United States of America

This agreement contains provisions on mutual assistance which supplement the bilateral treaties (where they exist) between each Member State and the US on this issue. If the UK denounced it, we would have to resort to older instruments which would probably be less suitable for current conditions.

103. Agreement on extradition between the European Union and the United States of America

This agreement contains provisions on extradition which supplement the bilateral treaties (where they exist) between each Member State and the US on this issue. If the UK denounced it, we would have to resort to older instruments which would probably be less suitable for current conditions.

104. Council Decision 2009/933/CFSP of 30 November 2009 on the extension, on behalf of the European Union, of the territorial scope of the Agreement on extradition between the European Union and the United States of America

The Netherlands had informed the Presidency that it wished to extend the territorial scope of the Agreement on extradition, in accordance with Article 20(1)(b) thereof, to the Netherlands Antilles and Aruba. Such extension has taken place by way of exchange of diplomatic note from the General Secretariat of the Council with the Mission of the United States of America to the European Union on 9 June 2009, acknowledged in the diplomatic note of the United States Mission to the European Union of 16 June 2009.

As the UK would already have opted-out of the main agreement on extradition between the EU and the USA, the addition of this instrument to the list of those no longer applying to the UK would be of little practical importance.

105. Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol's relations with partners, including the exchange of personal data and classified information

An instrument the purpose of which is evident from the title. It regulates the relationship between Europol and third parties. Were the UK to exercise the block opt-out, it would no longer be a member of Europol, although it should be borne in mind that the Commission intends to propose new legislation on Europol in 2013; if a new instrument were adopted and the UK had opted into it, membership of Europol would no longer be within the scope of the block opt-out; see §§69-72 in the main text.

Presumably, if the UK were no longer a member of Europol, it would then become a “third party”, in the terms of this Council Decision (see comment on next item).

106. Council Decision 2009/935/JHA of 30 November 2009 determining the list of third countries with which Europol shall conclude agreements

Another self-explanatory measure relating to Europol (see discussion concerning Council Decision 2009/934/JHA immediately above). If the UK were no longer a member of Europol, this list could plausibly be amended to include the UK as a “third country” that is able to conclude an agreement with the agency.

107. Council Decision 2009/936/JHA of 30 November 2009 adopting the implementing rules for Europol analysis work files

Self-explanatory; if the legislation creating Europol no longer applied to the UK, this subsidiary instrument would have no further relevance to the UK.

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

This requires Member States to make enquiries of other Member States if they have reason to believe that parallel criminal proceedings are taking place there, to respond to such enquiries from other Member States, to negotiate with the authorities of other Member States when parallel proceedings are taking place in order to iron out problems of overlap. It also requires them to ask Eurojust for help if they cannot solve their differences.

If it denounced this measure, the UK would be free of its obligation to consult, to respond to enquiries, and to refer difficult points to Eurojust; and if it wished to take advantage of this freedom, thereby to diminish the efficiency with which trans-border cases are handled (and at the same time increasing the risk of suspects and defendants being harassed by multiple proceedings.)

109. Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information

Rules governing Europol and its handling of information.

Were the UK to exercise the block opt-out, it would no longer be a member of Europol, although it should be borne in mind that the Commission intends to propose new legislation on Europol in 2012; if a new instrument were adopted and the UK had opted into it, membership of Europol would no longer be within the scope of the block opt-out; see §§69-75 in the main text.

110. Council Decision 2010/348/EC of 17 November 2009 concerning the conclusion of the Agreement between the Government of the Russian Federation and the European Union on the protection of classified information

See item 54 above.

111. 1985 Convention implementing the Schengen Agreement of 1985
Article 27(2) and (3)
Article 39 (to the extent that that this provision has not been replaced by Council Framework Decision 2006/960/JHA).
Article 40
Article 42 and 43 (to the extent that they relate to article 40)
Article 44
Article 46
Article 47 (except (2)(c) and (4))
Article 48
Article 49(b) – (f)
Article 51
Article 54
Article 55
Article 56
Article 57
Article 58
Article 71
Article 72
Article 126
Article 127
Article 128
Article 129
Article 130
Final Act - Declaration N° 3 (concerning article 71(2))

112. Accession Protocols: (amended in conformity with article 1 (b) of CD 2000/365/EC and CD 2004/926/EC article 1)

Italy: Articles 2, 4 + common declaration on articles 2 and 3 to the extent it relates to article 2,

Spain: Articles 2, 4 and Final Act, Part III, declaration 2

Portugal: Articles 2, 4, 5 and 6

Greece: Articles 2, 3, 4, 5 and Final Act, Part III, declaration 2

Denmark: Articles 2, 4 and 6 and Final Act Part III joint declaration 3

Finland: Articles 2, 4 and 5 and Final Act, Part II joint declaration 3

Sweden: Articles 2, 4 and 5 + Final Act, Part II joint declaration 3

113. SCH/Com-ex (93) 14 on improving practical judicial co-operation for combating drug trafficking

114. SCH/Com-ex (96) decl 6 rev 2 (declaration on extradition)

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

116. SCH/Com-ex (98)52 on the Handbook on cross-border police co-operation

117. SCH/Com-ex (99)6 on the Schengen acquis relating to telecommunications

118. SCH/Com-ex (99)7 rev 2 on liaison officers

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

120. 1999 SCH/Com-ex (99) 11 rev 2 (agreement on co-operation in proceedings for road traffic offences)

General note to items 111-120: These provisions of the Schengen acquis set out rules governing practical aspects of police co-operation, aspects of mutual assistance in criminal matters, the *ne bis in idem* rule (ie double jeopardy) and related data protection rules. See main text at §§43-46 above.

121. Council Decision 2000/586/JHA of 28 September 2000 establishing a procedure for amending Articles 40(4) and (5), 41(7) and 65((2) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

See main text at §§43-51 above.

122. Council Decision 2003/725/JHA of 2 October 2003 amending the provisions of Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders

See main text at §§43-51 above.

123. Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen Acquis

This agreement extends the Schengen acquis to Switzerland. See points 111 to 120 above. Note that the UK would continue to be bound by the Protocol to this agreement which extends the Schengen acquis to Liechtenstein, since the decision concluding this protocol on behalf of the EU was adopted after the entry into force of the Treaty of Lisbon, and the UK opted in to this decision.

124. Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism

See main text at §§43-51 above.

125. Council Decision 2006/228/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism

See main text at §§43-51 above.

126. Council Decision 2006/229/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism

See main text at §§43-51 above.

127. Council Decision 2006/631/JHA of 9 March 2006 fixing the date of application of certain provisions of Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including the fight against terrorism

See main text at §§43-51 above.

128. Commission Decision 2007/171/EC of 16 March 2007 laying down the network requirements for the Schengen Information System II (third pillar)

See main text at §§43-51 above.

129. Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

See main text at §§43-51 above.

130. Council Decision 2008/173/EC of 18 February 2008 on the tests of the second generation Schengen Information System (SIS II)

See main text at §§43-51 above.

131. Commission Decision 2008/334/JHA of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II)

See main text at §§43-51 above.

132. Council Decision 2008/328/EC of 18 April 2008 amending the Decision of the Executive Committee set up by the 1990 Schengen Convention, amending the Financial Regulation on the costs of installing and operating the technical support function for the Schengen Information System (C.SIS)

See main text at §§43-51 above.

133. Council Decision 2008/149/EC of 28 January 2008 on the conclusion, on behalf of the European Union, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis

This agreement extends the Schengen acquis to Switzerland. See points 111 to 120 above. Note that the UK would continue to be bound by the Protocol to this agreement which extends the Schengen acquis to Liechtenstein, since the decision concluding this protocol on behalf of the EU was adopted after the entry into force of the Treaty of Lisbon, and the UK opted in to this decision.

134. Commission Decision 2009/724/JHA of 17 September 2009 laying down the date for the completion of migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)

See main text at §§43-51 above.

Annex

(Containing instruments within the Protocol 36 opt-out at in December 2011, and included in lists published at that date, but no longer relevant.)

Council Framework Decision 2002/629/JHA on combating trafficking in human beings

Replaced by Directive 2011/36/EU of the European Parliament, which UK opted into.

Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography

No longer relevant: replaced by Directive 2011/92/EU, which UK opted into.

Council Decision 2008/651/CFSP/JHA of 30 June 2008 on the signing, on behalf of the European Union, of an Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data Name Record (PNR) data by air carriers to the Australian Customs Service

Replaced by new agreement signed 29th September 2011

Decision on migration from SIS to SIS II (OJ 2008 L 299/43)

Amended by Regulation in 2010 and Commission proposal for amendment due in 2012, so no longer on the Protocol 36 list.